Joint Committee on the Draft Constitutional
Renewal Bill

Session 2007–08

Draft Constitutional
Renewal Bill

Volume II: Evidence

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Dr Julian Lewis MP: Response to the Government’s consultation on managing protest around Parliament.
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Minutes of Evidence
TAKEN BEFORE THE JOINT COMMITTEE ON THE
DRAFT CONSTITUTIONAL RENEWAL BILL
TUESDAY 13 MAY 2008

Michael Jabez Foster, in the Chair

Present

Armstrong of Ilminster, L
Campbell of Alloway, L
Gibson of Market Rasen, B
Hart of Chilton, L
Maclennan of Rogart, L
Norton of Louth, L
Tyler, L
Williamson of Horton, L

Mr Christopher Chope
Martin Linton
Fiona Mactaggart
Emily Thornberry
Sir George Young

Memorandum by Democratic Audit (Ev 04)

INTRODUCTION

1. The government’s green paper, The Governance of Britain (Cm 7170) in July 2007 proclaimed the ambitious goal of “reinvigorating our democracy” through a variety of constitutional and political reforms that set out to achieve a “new constitutional settlement—a settlement that entrusts Parliament and the people with more power”. The green paper set out proposals that were presented as being intended to answer “two fundamental questions: how should we hold power accountable, and how should we uphold and enhance the rights and responsibilities of the citizen?”

2. The most tangible product of this process is the Draft Constitutional Renewal Bill under examination by your committee and the accompanying Constitutional Renewal white paper. The draft Bill represents the government’s answer to the first of fundamental questions that it posed. Answers to the second question remain at a formative stage.

3. In the following paper we have pulled together, rather hastily, a briefing on and response to the Ministry of Justice white paper The Governance of Britain—Constitutional Renewal (Cm 7342-I) and the Draft Constitutional Renewal Bill (Cm 7342-III), both published in March 2008. In order to provide an overview of the draft Bill’s place in the effort to re-balance power between the executive and Parliament and improve the government’s accountability to Parliament, we have drawn on matters beyond the contents of the Bill, as well as examining them closely. We have assumed that one of the values of pre-legislative scrutiny is that it need not be confined by the rules of the traditional legislative process.

4. We recognise the significance of the government’s intention to limit its powers under the Royal Prerogative. This is a major step forwards. It is however a faltering step forwards that does not measure up to the goal of balancing the flow of power from the people to government with Parliament’s power to hold government to account. We appreciate that the draft Bill is intended to be only the first stage of an ongoing process that deals with priority reforms. It is the manner in which the government’s proposals engage with these reforms that concerns us. The draft Bill creates a series of accountability procedures and shifts in responsibility from the executive to Parliament. At the same time, the government seeks to retain an undue degree of discretion within new accountability procedures; and the shifts in responsibility, as in the proposals for dissolution, are more symbolic than real.

5. The paper provides a full analysis, but we list few examples of such concerns here:

— Ministers will be able “exceptionally” to bypass the procedure for parliamentary scrutiny of treaties, subject only to the proviso that in their “opinion” they need to (clause 22).1

1 Draft Constitutional Renewal Bill, clause 22.
The draft resolution on war powers allows the government to act without approval if security or circumstances of emergency—in the opinion of the Prime Minister—require it. The Prime Minister is able to determine the timing of a vote and the information that is supplied to Parliament. The activities of the Special Forces are without the scope of the proposed Resolution.

The Attorney General, a party political figure, will take on a statutory power to end prosecutions and investigations by the Serious Fraud Office if “satisfied that it is necessary to do so for the purpose of safeguarding national security” (clause 12).

Clause 32 stipulates that civil servants must “carry out their duties for the assistance of the administration…whatever its political complexion”, but omits the long-established corollary that they must be ready to serve a government of a different party. The same clause allows for special advisers to be exempt from the core Whitehall requirements of objectivity and impartiality.

6. We also wish to drawn particular attention to clause 43 of the draft bill, “Power to make consequential provision”. We urge the committee to seek to clarify the purpose of this clause which could be read as enabling ministers to amend any Act through statutory instrument. We assume that it is intended only to apply to amending the provisions of the prospective Constitutional Renewal Act, but even so we believe that any alterations to what would be an important piece of constitutional legislation should require full parliamentary procedure.

Reforming the Royal Prerogative

7. The capacity of Parliament to scrutinise the executive and to hold it to account is a vital component of representative democracy, and ideally Parliament should be able to share in policy-making and key decision-making—or at least be consulted—in advance as well as to scrutinise both retrospectively. Democratic Audits over time have confirmed the generally agreed consensus that the Westminster Parliament is dominated by the executive and has insufficient powers to scrutinise government and to hold it to account. The powers that the Prime Minister and ministers exercise in particular under the Royal Prerogative are not subject to effective parliamentary scrutiny, let alone approval, and yet they extend to vital issues, including making war and agreeing treaties, running the civil service, and making policy in the European Union, major international agencies and in foreign and diplomatic affairs generally. It is unacceptable that political power can be wielded without any basis in Acts of Parliament or effective democratic parliamentary oversight, and sometimes without the knowledge of the legislature (and public).

8. We therefore broadly welcome the government’s commitment to re-balance power between the executive and Parliament; to give Parliament more capacity to hold government to account; and to carry out a full review of Royal Prerogative powers, making immediate progress in key areas, such as war and treaty making, the impartiality of the civil service and passports.

9. The Public Administration Select Committee (PASC) report on prerogative powers made an unanswerable case for total overhaul of the Royal Prerogative; argued for immediate action on war and treaty making powers and control of passports; and set out realistic proposals for a thorough identification of the full extent of prerogative powers and their transformation over time into a set of powers exercised under Acts of Parliament, and subject to appropriate forms of parliamentary supervision. This report provides a sound basis for the government’s review of the Prerogative and the powers it gives ministers, the “full extent” of which, as the white paper puts it, are “uncertain”.8

10. In sum, we support the government’s proposal in the draft Bill to place the civil service on a statutory base, with certain important reservations. But we regret that its proposals for immediate reform intended to render war powers and treaty making more accountable to Parliament fall short of what is required; and we are also very concerned that the review will be confined to those authorities “which are devolved from the Monarch to Her Ministers” and exclude those that remain personal to the Sovereign. Falling into the latter category

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3 Ibid, clause 32.
4 Section 7, Representative and Accountable Government, Handbook on Democracy Assessment, op cit.
5 See, for example: Chapter 14, “Heckling the Steamroller”, in Weir, S, and Beetham, D, Political Power and Democratic Control in Britain, Routledge, 1999; and Chapter 7, “Servants of the People?”, in Beetham, D, et al, Democracy under Blair, Politico’s, 2002 (second edn).
7 Taming the Prerogative, HV 422, 2003–04.
8 Cm 7342—I, p 62.
9 Cm 7342—I, p 62.
are two powers with considerable democratic ramifications—the power to dissolve Parliament and to appoint the Prime Minister.

11. The government’s acceptance of the case for strengthening the impartiality of the civil service by placing it on a statutory basis is a genuine move forward towards greater constitutional clarity in the UK. But its position on other areas that we examine here is not so admirable. The government pleads the need for “flexibility” to justify its preference for parliamentary convention over statutory status in the case of war powers. Other representative democracies make such powers available to governments under constitutional or statutory rules with no great loss of flexibility. The degree of flexibility the government seeks to retain is precisely the flexibility that has discredited politics in this country in recent years by enabling governments to strong-arm policies through the House of Commons where their majorities normally deliver parliamentary subservience rather than accountability. By relying ultimately only on the force of convention, the government seeks too much flexibility.

12. Equally, the shift from executive discretion under prerogative powers to a House of Commons vote on the dissolution of Parliament is simply sleight of hand since generally the government will still have the majority it needs to enforce its will; and leaving the power to appoint the Prime Minister after a general election to the Monarch, instead of transferring it to the House, is in the first place wrong in principle, and would in practice mean that the choice of Prime Minister in a hung House will rest with the secret deliberations of a small group of civil servants and courtiers rather than to the democratic decision of MPs and parliamentary parties.

13. We welcome the government’s intention to enable Parliament to debate and vote on the ratification of treaties. The government proposes that “present arrangements [ie, the Ponsonby Rule] for parliamentary scrutiny should be placed on a statutory footing.” The problem here is that, while a statutory rather than prerogative basis for treaty making is desirable, “present arrangements” are inadequate. As we explain more fully below, the Ponsonby Rule does not in practice lead to debates, let alone votes, being held on treaties (as the government noted in its consultation paper, Cm 7239). Here again, the government is pursuing an undue amount of flexibility to allow for an op-out from the statutory process. We are also not satisfied that Parliament’s influence over treaties should be confined to the purely retrospective act of agreeing to their ratification. We argue strongly below that Parliament should share in formulating the government’s position in treaty making and international and EU negotiations through the process known as “soft mandating”.

14. We now move to consider in detail the concrete proposals for reform of the Prerogative: two of PASC’s three priority areas—war powers and treaties—and of the civil service (where PASC and the Committee on Standards in Public Life, among others, have made a strong case for reform). We cannot discuss action on passports, PASC’s third priority, since the government has yet to provide details of its plans.

1. The Civil Service

15. Calls for a Civil Service Act to put the civil service on a statutory footing have been made for as long as the modern civil service has existed. The idea was first proposed in the Northcote-Trevelyan report of 1854, the document which came to be regarded as the foundation of Whitehall principles. But up to the present, the civil service continues to be managed under the Royal Prerogative, even though the Labour government under Tony Blair accepted the case for reform. We welcome the government proposal to place the civil service on a statutory basis, for a number of reasons. It is desirable as part of an overall abolition of the Royal Prerogative; and as a component in the complete codification of the UK constitution which we advocate. More specifically this shift is desirable because it would entrench the principles of impartiality, integrity, honesty and objectivity that are essential to the UK official machine.

16. Broadly speaking, we are supportive of the draft Bill’s provisions. Correctly it will enshrine the “historic principle of appointment on merit on a basis of fair and open competition” and put the Civil Service Commission on a statutory footing, charged primarily with upholding this principle. We regret, however, that the Commission will not be able to undertake inquiries into the functioning of the Civil Service Code on its own initiative and will only be able to do so following a complaint by a civil servant or with the agreement of the government, advised by the Head of the Civil Service (the Cabinet Secretary).

17. The role of the Commission as guardian of a non-partisan Civil Service should not be circumscribed in this way. We welcome the setting out of the core values of the civil service on the face of the bill, but we recommend that explicit parliamentary approval should be required for the Civil Service and Diplomatic Service codes that the Bill requires the government to publish and lay before Parliament. While the proposed legislation refers to the need for officials to “carry out their duties for the assistance of the administration . . .

10 The Governance of Britain: War powers and treaties: Limiting Executive powers, Cm7239 October 2007, pp82-3.
whatever its political complexion” it does not mention the need to be able to serve future ones of a different
draft constitutional renewal bill
party, a long-established corollary of the previous requirement.
2. War powers
18. The Bill confirms that the Prime Minister will possess the “power to manage the civil service”. How might
this power be exercised? We note that constant reorganisations of Whitehall departments, sometimes with
serious constitutional implications (such as the formation of the Ministry of Justice) can take place with
negligible preparation, let alone parliamentary oversight. The Bill should strengthen parliamentary
oversight in this area. Finally we are concerned that security vetting will continue to be carried out under the
Royal Prerogative. Since clearance procedures are a legitimate subject of public concern, with substantial
human rights implications, there should be an appropriate parliamentary role in their development and
operation.
19. We are concerned about the weakness of the draft Bill’s provisions on the position of special advisers. We
acknowledge that these temporary officials have an important role to play in supplying ministers with a distinct
source of advice and support; and in protecting permanent civil servants from being asked to perform
inappropriate tasks. However, we submit that a number of changes that the government does not propose
should be made, many of which follow the recommendations of the Committee on Standards in Public Life
(CSPL) and the Public Administration Select Committee over several years. In particular, the number of
special advisers in place each year and the Code of Conduct for Special Advisers should be subject to
parliamentary approval; and more fundamentally, as the CSPL recommends, special advisers should no
longer be categorised as civil servants, since such a description is clearly inappropriate. They belong in a
separate category of state servant. Possibly, pending reviews of party financing, the political parties should
meet the salary costs of special advisers in future, although it may be advantageous to subject them to the
discipline of being state officials.
20. There is a clear need for discipline in the relationship between special advisers and permanent officials.
There is a constant need to ensure that the activities of the former, who are partisan appointments, do not
undermine the ability of the latter to retain their objectivity and party political neutrality and remain able to
serve different ministers of varying parties. The purpose of special advisers is loosely described as being to
“assist” a minister, a flexible definition that suggests that any number of possible tasks may be permissible.
Presently the Code of Conduct for Special Advisers provides for special advisers to exercise what are in effect
management functions over career officials, such as communicating instructions from ministers and asking
them to take on tasks. These provisions should be removed from the Code and the purpose of special advisers
should be clarified to rule out managerial functions. This is especially important as many of the problems that
have arisen between special advisers and permanent staff have come about in part because of personality
crashes that would be rendered less significant if their role were kept more strictly to assistance to ministers.
It has been suggested that each department should devise its own concordat, agreed between the Secretary of
State, officials and civil servants and governing how they should work together.
2. War powers
21. The government committed itself in the Governance green paper to provide Parliament with a clear role
in decisions to enter into armed combat. Unfortunately it has concluded that this change should be brought
about by a Commons Resolution rather than an Act of Parliament, though it states it is “not ruling out
legislation in the future.” The white paper argues that a “resolution will define a clear role for Parliament in
this most important of decisions, while ensuring our national security is not compromised by the introduction
of a less flexible mechanism.” In other words, the government wants to retain executive discretion unbound
by statutory rules of conduct.
22. We advocate a statutory framework, on the grounds that any other arrangement will mean government
will retain flexibility, not of the sort that is beneficial to national security, but open to abuse to the detriment
of democratic principles and practice—as well as effective policy. Many other countries, including military
allies of the UK in NATO such as the US and Holland, have firm statutory and constitutional provisions for
securing the consent of their legislatures to war-making. There has been no apparent undermining of national
security for them and we see no reason that there need be for the UK were it to adopt similar arrangements.
23. Our position is that not only the conduct of armed combat but the full prerogative powers for controlling
the disposition of the armed forces, within and outside the UK, should be placed on a statutory basis and made
subject to parliamentary oversight. Parliament would have to establish new procedures in cooperation with

12 See for example, CSPL, Defining the Boundaries within the Executive, Cm 5775, 2003.
government for fulfilling its new responsibility. One way forward would be for the government to make an annual report to Parliament on its troop deployments, explaining what had taken place over the previous year and setting out its plans for the coming year for debate and, if need be, vote in the House of Commons (possibly informed by a prior debate in the Lords). Deployments in potential or actual hostile circumstances would be subject to prior (or in special circumstances swift retrospective) approval by the Commons (again informed by a Lords debate). Once entered into, the mandate for such operations would require renewal on a regular basis; and if and when the mission parameters changed.13

24. Contrary to the government’s view that there is no need “for a new committee to oversee Parliament’s decision making”, it is our view that a parliamentary committee should be established to guarantee effective and timely parliamentary oversight. The committee, possibly a joint committee of both Houses, could take evidence, where necessary in secret, and report to Parliament. Its reports would inform the annual Commons debate. When the government was contemplating potential or actual hostile action this committee could determine the timing of a parliamentary debate and vote on a basis of a report by the government, within an agreed parliamentary framework. The committee would be able to require a government report and debate in the event of any deployment taking place without the government informing Parliament; if the mission parameters were shifting; or if there was a need for full parliamentary deliberation for some other reason.

25. The government’s proposals not only rule out statutory oversight by Parliament, but also confine oversight to actual or possible armed conflict, and not the disposition of the armed forces as a whole. It does not cover the activities of the Special Forces—whose engagement is often a preliminary to larger scale combat. Retrospective approval will not be required for emergency deployments into actual or potential armed conflict, or for those which the Prime Minister judges should not revealed to Parliament in advance on security grounds. The reason offered for these omissions is that if retrospective support were not forthcoming, “there could be some serious and undesirable consequences”. It is highly unlikely that a government—which by definition has the support of the House in general—would lose such a vote. But if it did, the implication would be that an action had been carried out which could not secure the support of the ruling party or parties. To allow governments to act without this basic level of support would be “serious and undesirable” indeed.

26. Moreover, the government will not give Parliament the opportunity to review commitments and prevent possible “mission creep”, following an initial vote of approval. There are echoes of the disastrous executive drift in the US war in Vietnam following the 1964 “Tonkin Gulf” resolution in the UK’s presence in Iraq and Afghanistan (where, with the latter operation, our military deployment has escalated significantly over time, and was not even subject to substantive vote in Parliament).

27. There are four other issues germane to the power to make war or deploy troops into potential armed conflict:

1. It is clearly desirable that Parliament should have the power of recall during a recess if such action was likely. However while recognising that members as well as the executive should be able to recall Parliament, the government’s proposal for recall by MPs sets the bar too high for recall in an emergency. The proposal stipulates that over half of MPs—who would be widely dispersed during a recess—would have to make the request for recall to the Speaker, who would then have discretion on whether or not to accede. The Hansard Society Commission report on parliamentary scrutiny recommended a far less onerous process: that after representations from one or more MPs, the Speaker should consult party leaders and then make the decision.14 This low threshold may be open to abuse. We would suggest that a third of members, from more than one party, should be sufficient to secure a recall, and should have the final say. If an oversight committee, representative of appropriate select committees, were established to keep the government’s conduct of military affairs under scrutiny, it could be given an emergency power to recall Parliament where action was imminent or to take action on behalf of the plenary if a recall was not practically possible (a similar arrangement exists in Germany).

2. The white paper argues that the Prime Minister should have the ultimate decision as to what information should be provided to Parliament about proposed conflict. We have recommended that a new oversight committee should determine what information is made available to Parliament. As we have seen all too clearly in the run-up to the Iraq war, and as in the Suez crisis of 1956, a government cannot be relied upon to present full or even accurate information to Parliament in such circumstances—and catastrophe followed in both cases.

13 See Burall et al, Not in our name: Democracy and foreign policy in the UK, op cit, pp 187-88; and Blick, A, and Weir, S,
3. We disagree with the government’s view that the advice of the Attorney General should remain confidential in such circumstances. It is our view, see below, that a political Attorney General should not also be the government’s chief legal adviser; but whether the AG or a civil servant gives this advice, it should be in the public domain. We appreciate that the government’s legal advice should remain confidential in most circumstances, but when it comes to matters of war, putting people’s lives at risk and affecting the UK’s standing in the world, the full advice should be made available to Parliament and the public. Further, Parliament should be able to obtain its own legal advice (see our section on the legal system).

4. We also disagree with the government’s view that the Prime Minister should be able to determine the timing of any vote. This should be a matter for Parliament.

3. Treaty ratification

28. The government enters into more than 30 treaties a year, covering a wide range of policy areas, from trade to military cooperation, to human rights, to security. At present there are only limited constraints on the complete freedom of action of ministers and officials to enter into binding agreements. If an agreement requires a change to domestic legislation, then this alteration must be enacted according to the appropriate parliamentary legislative procedures. There exists as well a convention, the “Ponsonby Rule”, according to which a treaty must be tabled before the House of Commons for 21 sitting days before it is ratified. If there is a request for a debate during this period through the “usual channels” or by a select committee in conjunction with the Liaison Committee, there is an understanding it will be granted.

29. The government proposes that “present arrangements for parliamentary scrutiny should be placed on a statutory footing.” The problem here is that, while a statutory rather than prerogative basis for treaty making is desirable, “present arrangements” are inadequate. As the government noted in its consultation paper (Cm 7239), the Ponsonby Rule does not in practice lead to debates, let alone votes, being held on treaties.

30. There is however a positive dimension to the government proposal. It would make clear that “In the event of a vote by the House of Commons against ratification of a treaty, the Government could not proceed to ratify it”. In such circumstances the government would have to drop the agreement, or start the 21-day process again.

31. We have two reservations about the positive nature of this development. First, ministers will retain the right “exceptionally” to bypass procedures, on a basis of their own judgement. The justification for this opt-out is apparently the supposed need to retain discretion for emergencies, during recesses and so on. But as a minimum, there should be more detail provided in the draft bill as to the circumstances under which democratic procedure can be set aside, and the alternative measures that will ensure accountability. Preferably, this proposal will be deleted altogether.

32. Second, as Parliament is presently configured, this change would have no practical impact, since debates and votes do not take place under the Ponsonby Rule, meaning that the opportunity to reject a treaty that the government proposal seems to provide would not arise. Parliament will have to change its organisation and procedures if it is to turn this latent power into a reality.

33. We recommend that a sifting committee should be established, possibly comprising members of both Houses, to monitor treaties as they are tabled before Parliament. The committee could forward the documents to the relevant specialist select committee or committees, for a report and an assessment of whether a full vote in the Commons was required (we agree with the government that the Lords, particularly as currently constituted, should not have the ability to block a treaty). The sifting committee could be empowered to require a debate and vote if the relevant committee thought that one was necessary (and it could decide to extend the 21-day period if necessary). A report by the select committee and any recommendations contained within it could inform the debate. The government has suggested it is open to ideas along these lines, though stressing, “It is for the Houses themselves to decide upon such arrangements”. We trust that the government will encourage and cooperate with the reorganisations necessary to make a reality of parliamentary oversight of treaty-making; and support the allocation of increased resources in terms of staff support that will be entailed if the task is to be carried out effectively.

34. Finally the government notes that it does not support “a formal mechanism for the scrutiny of treaties prior to signature” on grounds of “the diverse circumstances and timeframes in which treaty negotiations are conducted”. Here the government may be creating a straw man. As it notes in its summary of responses to its consultation and in the white paper itself, some respondents (including Democratic Audit) proposed the introduction of “soft mandating” to give Parliament the opportunity to discuss the government’s position in negotiations over treaties, and more widely, in negotiations over EU affairs, UN and other international
negotiations, including the UK’s position in major inter-governmental bodies and alliances, in advance of decisions being taken and agreed.

35. This process in no way amounts to “scrutiny of treaties prior to signature”. Rather it means involving Parliament in the negotiations leading to the agreement. It would require ministers (and often officials) to meet with the relevant select committee in advance of their attendance in international negotiations to agree a “soft mandate”—that is, a general bargaining position and desirable outcome. The minister would then report back to the committee; and if he or she had departed from the agreed position, would explain why they had done so. The process of soft mandating and the performance of ministers within it could help the committee decide whether a debate and vote in plenary was required; and inform its report on the treaty and any recommendations within it. The understanding that ministers and officials should cooperate with committees in a process of soft mandating should in our view be written into the Ministerial Code.

4. Dissolving Parliament and Appointing the Prime Minister

36. The Governance green paper (Cm 7170) states that the government intends to modify the Prime Minister’s status as the sole person able to request a dissolution from the monarch and in practice determine the date of the next general election. It is proposed to develop a convention for requests to the monarch for dissolution of Parliament to be made subject to a prior vote in the House of Commons. In the first instance, the shift in power from a Prime Minister to Parliament is more apparent rather than real. A Prime Minister with a majority in the House would still retain the advantage over opposition parties in being able to determine the date of an election since he or she could generally count on his or her parliamentary majority to vote in agreement. We favour in principle the introduction of fixed-term parliaments to set in place a pre-determined democratic timetable for general elections. Fixed-term elections would remove the unfair advantage that incumbent Prime Ministers now possess in being able to choose the most advantageous moment to fix the date of a poll, and to tailor policies and government advertising to take full advantage. In circumstances where a government had lost the confidence of the House, this would be a matter for Parliament to resolve by establishing a new government.

37. More fundamentally however, both in principle and practice, it is wrong to leave the monarch’s personal prerogative powers untouched, as the government intends. This decision would leave the Queen and her successors, hereditary heads of state, with the power to choose the Prime Minister after an election and to act as the only formal barrier to the abuse of the right of the Prime Minister to request dissolution. It is incompatible with democratic principle that the head of government should be appointed by a figure subject to no form of accountability and lacking in democratic legitimacy.

38. It is of course argued that these powers are theoretical only: the monarch is bound by convention not actually to exercise them; and is further bound by the parties’ own choices when it comes to appointing Prime Ministers. However, as Professor Peter Hennessy has described, the monarch’s “reserve powers” are “most certainly active when it comes to dissolving Parliament and appointing Prime Ministers”. Hennessy lists five occasions from 1974 onwards when the Palace, the Cabinet Office and No. 10 “were engaged in intense contingency planning in case the reserve powers should come into play”, most recently when a hung parliament seemed a strong possibility. The fact is that in the event of a hung parliament, there is no transparent process by which the monarch can decide who to ask to form a government. Even from the point of view of the monarchy itself, this arrangement is undesirable since the ruler may very well be drawn into political controversy if there is a need to resolve a deadlock.

39. The monarch would most likely take the advice of the three “guardians” of the prerogatives—his or her own Private Secretary, the Prime Minister’s Principal Private Secretary (or presumably, now the post has been created, Permanent Secretary) and the Cabinet Secretary, on the basis of a “good chaps” consensus on responsible governance and possibly a “Precedent Book”, a loose-leaf collection of internal guidance notes, documents and precedents, which is of course confidential.

40. The viable alternative to existing arrangements is for the House of Commons to elect a Prime Minister. This is what the Scottish Parliament does for the purpose of selecting the Scottish First Minister, and it has proved effective. In cases where a single party had a Commons majority, the vote would be a formality. In other circumstances, it would be preceded by bargaining between the parties. But a Prime Minister elected in this way would have more legitimacy and probably stability than a candidate who emerged from within the “golden triangle” on grounds and principles that are unlikely to be fully divulged.

15 See further, Burall et al and the World of Difference report cited above.
16 Hennessy, P. The Hidden Wiring: Unearthing the British Constitution, Gollancz 1995, ch. 2
17 op cit. This description is a summary of Professor Hennessy’s fascinating exploration of this arcane process.
41. There is finally the monarch’s right, which may or may not be regarded as a prerogative, to be informed, to be consulted, and to warn. We are informed that the Queen is a wise and shrewd counsellor. If this is the case, then let Gordon Brown take her advice, as he might that of any other person. But no one individual should by virtue of their birth enjoy privileged access to government. Weekly audiences between Prime Minister and monarch have no place in a mature democracy.

THE ROLE OF THE ATTORNEY GENERAL

42. It is a basic democratic requirement that the legal system is separate from and not subordinate to the executive; and that governments are subject to the rule of law and act and are seen to act in compliance with legal norms. It is to satisfy these democratic principles that the office of the Attorney General (AG) urgently requires reform. The office is held at present by a party politician and minister, who attends cabinet and participates in government decision-making, while at the same time superintending the main prosecuting authorities, reviewing sentences and providing legal advice—which almost always remains secret. The House of Commons Constitutional Affairs Committee (now the Justice Committee) accurately expressed the dangers of this anomalous situation in its report of July 2007, The Constitutional Role of the Attorney General (HC 306), recognising that there are “inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office”.

43. In recent times these tensions have become matters of pressing concern and have arguably contributed to growing public and expert disillusion with governance in the UK. The confusion over Lord Goldsmith’s legal advice seeking to legitimise the invasion of Iraq in 2003, at first revealed only partially, arose suspicions that he had “been got at” and led to pressure for its publication in full. When it was published in May 2005 it transpired that the view expressed internally was more equivocal than the official justification provided for the military action. During 2006–07 the ongoing investigation into “cash-for-honours” allegations aroused concern over the problematic position of the AG in having the final say on whether prosecutions were to be conducted. Many of those involved in the investigation were his political colleagues and close friends, including the Prime Minister, who had made him a peer and who was responsible for his appointment.

44. In each case the contradictions between the impartiality required by certain parts of the role and the partisanship associated with others were clearly visible, to the detriment of confidence in the political and legal system, and possibly contributing to unlawful actions and undermining the rule of law.

45. The Governance green paper in July 2007 seemed to promise reforms to remove the “tensions” in the office so that public confidence and trust in the office of the AG could be restored. But after consultation the government has expressed its intention that the AG should remain the government’s chief legal adviser, a parliamentarian and a cabinet minister, while continuing to superintend the prosecuting authorities. Under the draft Bill, the Attorney General will retain a role in formulating criminal justice policy, in conjunction with the Home Secretary and Justice Secretary. We fear that this position will continue to undermine respect for our political and legal systems, and inevitably so.

46. There are safeguards of a sort. The government proposes that the Attorney General may not give a direction “in relation to an individual case”; and it will require the statutory establishment of a protocol between the AG and the main prosecuting authorities. The Director of Public Prosecutions, Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions will be given fixed-term appointments to enhance their independence.

47. We endorse these changes but regret that the AG will be given a role in individual cases with “implications for national security”, a power that will extend to “investigations being conducted by the Serious Fraud Office”. This is entirely improper. The prosecuting authorities should be left with the responsibility for all decisions on prosecutions, and the courts are quite capable of handling sensitive security matters through the public immunity interest process. The concept of “national security” is notoriously susceptible to distortion; and leaving any such decision in the hands of a minister is likely to provoke public suspicion of abuse for political ends.

48. The final decision on all prosecutions must rest with the Director of the SFO. Otherwise there may be more decisions that arouse suspicion and may be ruled unlawful. We note that, presently, the AG does not have an explicit power to instruct the SFO Director, so the Constitutional Renewal proposals will actual worsen the position. We support the government’s plan to reduce the number of cases in which the consent of the AG is required for prosecution under certain offences, and we recommend that legislation should go further and shift the power completely to the DPP or other appropriate Director. The effect would be to depoliticise decisions over prosecutions.
49. We see no difficulties in principle with the plan to end the power to “enter a nolle prosequi” [ie, stopping a trial on indictment]. Unlike the government, we believe the power to refer “unduly lenient” sentences to the Court of Appeal should not continue to be held by the AG, but should reside with the prosecuting authorities. There is always a danger that populist pressure rather than reasoned judgement will motivate the use of such an authority while it remains in the hands of a party politician.

50. We support the government proposal to “modernise” the oath of the Attorney General (and Solicitor General) to require respect for the rule of law (though we question whether “modernise” is the correct term). However, there is not yet a proper definition of the rule of law in statute, and we recommend that the government take the opportunity presented by this Bill to establish one.18 We add that, as noted by the then Constitutional Affairs Select Committee, upholding the rule of law should be a matter for all ministers, not just those who have taken an oath so to do.

51. We endorse the government support for “improved mechanisms whereby Parliament could hold the Attorney General to account” including a specific select committee. We urge the government to ensure that this change takes place, and not hide behind statements that this is a matter for “Parliament to decide”.

52. The government argues that it would be inappropriate for the advice of the Attorney General to be published “on a routine basis”. We respect the need for the government not to show its hand in advance of legal proceedings, but we advocate a shift in the direction of openness, especially around crucial decisions such as that of going to war. We suggest that the Information Commissioner could have a role to play in establishing ground rules for the disclosure of legal advice and ensuring they are adhered to.

Recommendation for a reformed office of Attorney General

53. We agree with the views expressed by the former Constitutional Affairs Select Committee and JUSTICE, among others, that the role of chief legal adviser to the government should be separated from that of the AG and performed by a civil servant from a legal background (who could still be attached to the department of the Attorney General and could draw on the support of experts in different legal fields, including international law). The Attorney General could continue to be responsible for formulating criminal justice policy in conjunction with the Home Secretary and Justice Secretary, and they should properly maintain oversight over the conduct of the prosecuting authorities. But they should have no power to intervene in decisions over specific prosecutions or criminal investigations.

54. The chief legal adviser, as an official, would be governed by the Whitehall values of integrity, honesty, impartiality and objectivity as set out in the Civil Service Code (and in the draft Bill). In our view holders of the office should be able to attend cabinet and provide advice to its members when required. In an arrangement analogous to the Accounting Officer principle, these legal officers would be accountable to a parliamentary committee that would focus on the nature of the advice they provided, rather than the merits of the policy to which it related. It would probably be appropriate for a new parliamentary committee to be formed, possibly a joint committee of both Houses, and could also hold the AG accountable in his or her reduced role along with the DPP and the directors of the other criminal prosecution agencies. This committee should have access to expert legal opinion of its own so that it could provide Parliament with an expert view to assist in its deliberations.

Judicial Appointments

55. We hold strongly to the principle of a judiciary independent of the executive and broadly celebrate the judiciary’s fierce attachment to its independence. It is regrettable that the executive’s formal but uncertain progress in this direction has not always involved the full consultation necessary—including the landmark decision in June 2003 to abolish the office of Lord Chancellor and establish a Supreme Court.19 There is a need for fuller public debate around the role of the judiciary that extends beyond often exasperated ministers, politicians, civil servants and legal experts and practitioners; and takes part within the framework of a broader constitutional settlement.

56. The government has consulted on the withdrawal of the executive from the appointment of judges; and whether Parliament could play a role in the process. The Lord Chancellor will be removed from the selection process for judicial appointments below the High Court and the Prime Minister will be removed entirely from

the process. This proposal does not go as far as that put forward by the Law Society for the complete removal of the executive from the appointments process and the establishment of the Judicial Appointments Commission (JAC) as a non-ministerial department, independent of the Ministry of Justice, that would make recommendations to the Crown.

57. The government’s principles for judicial appointments are set out in the Bill. They are: an independent judiciary; appointment on merit; equality; openness, transparency; and an efficient, effective system. We note that those who made submissions to the consultation on judicial appointments suggested a number of other principles including accountability; flexibility; proportionality; security of tenure; skill; diligence; understanding; impartiality and integrity. We endorse the view that “diversity” should be established as a principle in its own right, not merely as a subdivision of equality.

58. The Lord Chief Justice will no longer be required to consult the Lord Chancellor before deploying, authorising, nominating, or extending the service of judicial office holders. But the Lord Chancellor may be given additional powers to set performance targets for and to direct the JAC in certain matters. There is some cause for concern at the possibility that a political figure, the Lord Chancellor, will be granted an enhanced ability to intervene in the work of the JAC, which should be independent of the executive. Any powers the Lord Chancellor does exercise should be directed exclusively towards the more effective realisation of the rule of law that, as we have suggested, should be defined in statute; and they should also be subject to full parliamentary accountability. We are also concerned about the possibility that the Lord Chancellor may be given licence to delegate judicial appointments duties to junior ministers or senior officials, on the grounds they may be used to bestow political favours. This plan is not in the Bill. But we note that the government is considering the issue further.

59. Statutory salary protection will be introduced for certain tribunal judges, in line with judicial officers in the courts. Parliament will not be given a role in the appointment of individual judges but will hold pre-appointment hearings for future chairs of the JAC. The views of Parliament will not be binding upon the government. We consider the merits of the proposal for a number of public appointments to be preceded by parliamentary hearings below. As far as the judiciary is concerned, we agree that parliamentary scrutiny should be directed towards the prospective chair of the JAC (who can continue to give evidence as well once in post). There would be a danger of politicisation of the process if individual judges were subjected to parliamentary questioning. What is important is that Parliament has oversight of the overall parameters of policy and can act as a guardian of the rule of law and the principles required for it to be meaningful.

60. We suggest that the most appropriate parliamentary forum for pre-appointment hearings and the oversight of the judicial appointments system would be some kind of joint committee, perhaps comprising representatives of various interested specialist select committees and other significant figures. It could scrutinise, amongst other matters, the performance of the JAC against the principles of judicial appointment, within which should be included diversity. It may be the case that some form of the newly-developed Canadian model could be adopted, whereby judges are subject to post-appointment hearings.

REFORM OF THE INTELLIGENCE AND SECURITY COMMITTEE

61. The Intelligence and Security Committee (ISC), a non-parliamentary committee of cross party MPs and peers appointed by the Prime Minister, is responsible for scrutiny of the Intelligence and Security Agencies. The Prime Minister consults the opposition over appointments. The ISC is based in the Cabinet Office and meets in private. It reports to the Prime Minister and its reports are then published with sensitive material deleted.

62. The position of Democratic Audit is that the ISC should be fully reformed as a joint parliamentary committee, reporting to Parliament, with an appropriate mechanism to allow the security agencies to request deletions as appropriate (the Prime Minister would receive an unexpurgated version and where necessary decide upon contested deletions). The committee should normally meet in public, with provision for private hearings, and work from the parliamentary estate with parliamentary staff. The newly-formed committee could also take on scrutiny of the National Security Strategy, published as part of the Governance agenda. This broad-ranging document extends beyond the work of the security agencies and is designed to make debate about the anti-terrorism strategy more open.

63. The government is, as a first stage of change, proposing measures that go part-way towards integrating the committee into Parliament (seemingly following consultation only with the ISC itself). There will be an attempt to hold some meetings in public; provide the ISC with a team of expert staff; and locate it outside
Cabinet Office premises. Its reports will be debated in the Lords as well as the Commons. Parliament will be given the opportunity to nominate candidates for appointment to the ISC; but the Prime Minister and Leader of the Opposition will have the final say. In fact, this process more or less mirrors practice for the selection of members for parliamentary select committees, but it is our view that the dominion of the party whips over the composition of these committees also requires reform.

**National Audit Office and Comptroller & Auditor General**

64. Financial scrutiny is fundamental to effective democracy. Since Parliament has little direct independent influence over the budget, scrutiny of spending after the fact takes on a heightened importance. Fortunately the National Audit Office (NAO) has long proved excellent at this function, both through its own reports and the support it provides to the Public Accounts Committee, arguably the most effective of parliamentary committees. However, the government is acting upon the recommendations of the Tiner review following the controversy surrounding the previous Comptroller & Auditor General.20 The reforms will be included in the Constitutional Renewal Bill, but are not present in the draft version. We believe their absence should not prevent consideration of them by the joint committee. The NAO is to have a board with a majority of non-executives, including a non-executive chair, to set its strategic direction and support the C&AG. Future C&AGs will have fixed terms of 10 years. We have one concern. In the past, it was generally assumed that C&AG’s were in their last full-time post before retirement. Such may cease to be the case. Special attention must be paid to the conditions under which they may accept posts after their term in office has ended to ensure that confidence in the system is protected. The Commons Public Accounts Commission has said that it is essential that:

> subsequent employment could not be seen as a reward for actions taken while C&AG, and for that reason there should be a lifetime prohibition on C&AG or former C&AG accepting any post in any body which the NAO has audited or which is in the gift of the Government. Apparent conflict of interest could also arise over some other posts in the private sector, for example with defence contractors or other suppliers to the public sector.21

**Parliamentary Scrutiny of Public Appointments**

65. As part of its re-balancing between the executive and Parliament, the government plans to introduce public scrutiny of certain senior public appointments through pre-appointment hearings by relevant select committee and pre-commencement hearings for “market sensitive” posts. The government has produced a list of 20 posts that it considers suitable for consultation with the Commons Liaison Committee. Fine in principle, but once again its good intentions are undermined by its unwillingness to relinquish control. The Liaison Committee has objected to the government’s intention to control which posts are to be the subject of hearings, and to conduct the process only on a “trial basis” to ensure, as the white paper puts it, “that the right balance is struck between strengthening the role of Parliament in scrutinising public appointments and maintaining an appointment process which is proportionate and continues to attract high quality candidates.” Members of the committee have put forward 40 additions to the government’s list.22

66. The government also wishes to prescribe the direction of questions, saying that they should “focus on issues of professional competence and on the candidate’s suitability for the role”—criteria that might unhelpfully exclude the possibility of a useful discussion of policy issues; and (as the Liaison Committee has noted) personal independence.

67. It ought to be the prerogative of Parliament to determine which posts are suitable for scrutiny (though committees should consult government on their choices) and to conduct the hearings as members see fit. The government’s fear that “high quality candidates” might be put off by the process are understandable, but one quality that all those who hold high public office must possess is the ability and willingness to respond to questions about their role and performance. Such people are not likely to be frightened or alienated by effective pre-appointment scrutiny.

20 See the appendix on the NAO’s corporate governance in the Public Accounts Commission report, Review of the National Audit Office’s Corporate Governance, HC328, 2007-08


22 See: house of Commons Liaison Committee, Pre-appointment hearings by select committees, HC384, 2007-08.
In any event, given the government majorities on committees and the whips’ role in selecting members, select committees are likely to tend more towards moderation in their questioning and findings than aggressive interrogation or unreasonably hostile findings. If they were to raise serious concerns about a particular candidate, the government would be well advised to take it seriously, both in its own interests and those of parliamentary accountability. However in the final event their conclusions are not binding on ministers.

MANAGING PROTEST AROUND PARLIAMENT

68. The human rights of assembly, demonstration, protest and speech are protected under the Human Rights Act and the European Convention on Human Rights. These rights are integral to democracy; and being able to exercise them in the vicinity of Parliament is of added symbolic value. The government under Tony Blair severely restricted the exercise of these rights around Parliament in the Serious Organised Crime and Police Act 2005 (SOCAP). The government will now repeal the relevant sections of the Act. It ought to be left to the Metropolitan Police to weigh how to deal with any assemblies or protests in a proportionate manner as prescribed in law, subject finally to the jurisdiction of the courts.

69. However, the white paper states, “Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order that Members are able freely and without hindrance to discharge their roles and responsibilities” and invites the “views of Parliament on whether additional provision is needed.” We understand that continuous protests in the vicinity of Parliament can and in one case does cause considerable disturbance—as protests anywhere else can do. It would in our judgement harm both the standing of government and Parliament were “additional provision” in policy to give the convenience of Parliament priority over basic human rights of speech and protest.

Professor Stuart Weir and Dr Andrew Blick
May 2008

A BRIEF GUIDE FOR THE JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

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<th>Proposal</th>
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<tr>
<td>“To invigorate our democracy, with people proud to participate in decision-making at every level”</td>
<td>The Governance of Britain, Green Paper, Cm 7170, July 2007</td>
<td>This is a key aim if the government is to restore public confidence in our democracy, but there is no sign that the government will seek to deal with the formidable social and economic obstacles to fuller participation.</td>
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<td>“To clarify the role of government, both central and local”</td>
<td>Governance Green Paper</td>
<td>Proposals in the draft bill do clarify some issues, but the insistence on retaining ministerial discretion continues to leave wide areas of ambiguity that can be exploited by the executive.</td>
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<td>“To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account”</td>
<td>Governance Green Paper</td>
<td>A vital reform, but the Governance proposals to strengthen Parliament are more apparent than real. On almost every issue, the emphasis on discretion again vitiates a necessary and long overdue goal.</td>
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<td>“To work with the British people to achieve a stronger sense of what it means to be British, and to launch an inclusive debate on the future of the country’s constitution”</td>
<td>Governance Green Paper</td>
<td>This has so far been a top-down, confused and confusing process. A Green Paper on Rights, Responsibilities and Values is to be published in advance of a Citizens’ Summit that is to formulate the British statement of values.</td>
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<td><strong>Limiting executive powers:</strong></td>
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<td>War powers</td>
<td><em>Constitutional Renewal, Ministry of Justice, Cm 7342, March 2008 (following consultation paper)</em></td>
<td>The intention to give Parliament the final say on the use of armed force will be set out in a Commons Resolution, and not in statute; and the government will retain significant “opt-outs”. Once it has approved military action, Parliament will have no control over possible “mission creep”. Legislation is not ruled out for the future.</td>
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<td>Treaty ratification</td>
<td><em>Constitutional Renewal (following consultation paper)</em></td>
<td>Parliament to be given statutory power to veto treaty ratification. But this is a “take it or leave it” retrospective power, with no role for Parliament in the negotiating process. It is not yet clear how Parliament will be able to make effective use of the power and whether a “sifting” process will be set up.</td>
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<td>Dissolutions of Parliament</td>
<td><em>Governance Green Paper</em></td>
<td>Giving Parliament a vote prior to a Prime Minister’s request to the monarch for a dissolution is a symbolic gesture that will make hardly any difference to the balance of power between Parliament and the executive. It begs the question whether it remains appropriate for the monarch to retain the personal prerogative power to grant (or withhold) consent for a dissolution.</td>
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<td>Giving the House of Commons the ability to request a recall of Parliament</td>
<td><em>Governance Green Paper; Modernisation Committee inquiry to be held</em></td>
<td>The bar is set too high, demanding a request from a majority of MPs who will be widely dispersed during a recess; and then leaving the final decision which should rest with MPs to the discretion of the Speaker.</td>
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<td>Civil Service Bill</td>
<td><em>Constitutional Renewal</em></td>
<td>A valuable measure that will put the civil service and Civil Service Commissioners on a statutory footing and enshrine key values. However, the Civil Service Commission will not have the power to hold inquiries into compliance with the Civil Service Code on its own initiative; and tensions around the position of special advisers are unresolved.</td>
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<td>Wider review of the Royal Prerogative</td>
<td><em>Governance Green Paper; Constitutional Renewal; a consultation paper is to be published following an internal government “scoping exercise” on executive prerogative powers.</em></td>
<td>All Royal Prerogative powers should either be placed on a statutory basis or terminated. It is right (as the Public Administration Select Committee advised in its authoritative report; HC 422, 2004) to prioritise war powers, treaties and passports; but it is essential to move fast towards full public consultation on the whole process. It is a mistake to rule out reform to the personal prerogatives of the monarch, especially with regard to the choice of a Prime Minister that ought to be the prerogative of the House of Commons.</td>
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<td>Reform of the role of the Attorney General</td>
<td>Constitutional Renewal; consultation paper</td>
<td>The proposals do not fulfil the government’s original intention to remove the tensions inherent in a government minister acting as senior legal adviser and supervising the prosecuting authorities. While providing some safeguards, the Attorney General will continue to serve as the government legal adviser and is given an explicit power to halt prosecutions and investigations on undefined national security grounds. The AG will report annually to Parliament and swear to respect the rule of law.</td>
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<td>Distancing the executive from judicial appointments</td>
<td>Constitutional Renewal; consultation paper</td>
<td>It is right to exclude the Lord Chancellor and Prime Minister from the processes of appointing senior judges. However the Judicial Appointments Commission will find it very difficult in practice to broaden the composition of the judiciary and needs to be governed by wider criteria for appointments, including a commitment to diversity.</td>
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<td>Ecclesiastical appointments</td>
<td>Constitutional Renewal; Archbishops’ consultation paper and report approved by General Synod.</td>
<td>It is proper to remove the Prime Minister’s active role in making appointments; but there is a failure to address the broader issues of its privileged status over other faith communities and its proper place within a largely secular society.</td>
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<tr>
<td>Distancing ministers from the granting of honours</td>
<td>The Governance of Britain; Sir Hayden Phillips, Cabinet Office, 2004</td>
<td>Continuing commitment by Prime Minister and ministers not to alter recommendations for honours. But the whole process is too opaque and exclusive to command public confidence.</td>
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<td>Parliamentary oversight and executive accountability:</td>
<td>Governance Green Paper; Commons Liaison Committee, Pre-appointment hearings by select committees, HC384, 2007–08 (response to government list of posts)</td>
<td>The proposal for select committee pre-appointment hearings and pre-commencement hearings for “market sensitive” is potentially a valuable development. The government is seeking to control the list of posts that will come under scrutiny.</td>
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<td>A parliamentary role in key public appointments</td>
<td>Governance Green Paper; Constitutional Renewal: The National Security Strategy of the United Kingdom, Cm 7291, March 2008</td>
<td>It would be consistent with the government’s aim of strengthening Parliament if oversight of the strategy were given to a parliamentary select committee, perhaps a joint committee of both Houses, rather than left with a committee of prime-ministerial appointees, albeit chosen from within Parliament and from parliamentary nominees.</td>
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<td>Draft legislative programme in advance of the Queen’s Speech</td>
<td><em>The Government’s Draft Legislative Programme, Office of the Leader of the House of Commons, Cm 7175, July 2007; Modernisation Committee, Scrutiny of draft legislative programme, January 2008</em></td>
<td>A good proposal. The government produced a draft legislative programme in July 2007 that the Commons debated on 25 July 2007. However the timing came shortly before the ten-week summer recess and select committees did not take advantage of the opportunity to examine the proposals. If the proposal is to work effectively, committees must find ways of working in the recess.</td>
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<td>Annual debates on departmental objectives and plans</td>
<td>Governance Green Paper; Modernisation Committee inquiry underway</td>
<td>Potentially a valuable idea, especially if the debates can be linked to the work of select committees and committee and parliamentary input into Public Service Agreements (PSAs) (see also below).</td>
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<tr>
<td>Greater transparency for government expenditure</td>
<td><em>Commons Treasury Committee, Comprehensive Spending Review 2007, HC 279 2006–07; Liaison Committee, Parliament and Government Finance: Recreating Financial Scrutiny, HC 426 2007–08</em></td>
<td>Simpler reports at the three stages in the expenditure process—plans, estimates and out-turns – would assist greatly in improving Parliament’s performance in scrutiny and oversight of government expenditure. We also recommend that Parliament’s role could be further strengthened if select committees were involved in the drafting of PSAs across the spectrum of government.</td>
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<tr>
<td>Parliamentary oversight of the Office for National Statistics (now the UK Statistics Authority)</td>
<td><em>Governance Green Paper; Statistics and Registration Service Act 2007</em></td>
<td>A good ongoing reform. The independence of official statistics with parliamentary scrutiny is an important component of a modern democracy. The Treasury Committee took evidence from the nominee for chair of the new body and its report was debated in the House on 25 July 2007.</td>
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<tr>
<td>Reform of the National Audit Office and office of Comptroller &amp; Auditor General</td>
<td>Constitutional Renewal; Commons Public Accounts Commission, Corporate Governance of National Audit Office, HC 402, 2007–08</td>
<td>The broadly positive proposals of the Tiner review, most notably the creation of a board to oversee the NAO, are to be included in the Constitutional Renewal Bill. It is unfortunate that the government has been unable to include them in the draft bill.</td>
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<tr>
<td>The introduction of regional ministers and regional select committees</td>
<td>Governance Green Paper; Liaison Committee, <em>The work of committees in 2007</em>, HC 427, 2007–08</td>
<td>Regional ministers have been appointed; the proposal for regional select committees is floundering, being unpopular in the House and probably unworkable. We believe that England requires an elected tier of regional government; meanwhile there is an urgent need to improve democratic oversight of the largely unaccountable mechanisms for regional governance.</td>
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### Proposal | Significant document/s and formal procedures | Comments
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Changes to the Ministerial Code | Governance Green Paper; Ministerial Code, Cabinet Office, July 2007 | An independent adviser on ministerial interests is in post and ministers are expected to accept the business appointment rules. But the Code continues to be issued under prerogative powers and is the creature of the Prime Minister and Cabinet Secretary. They devise the rules and are ultimately responsible for their enforcement. There is no provision for parliamentary oversight.

**“Reinvigorating” democracy:**

House of Lords reform | The House of Lords: Reform, Cm 7027, 2007 | Cross-party negotiations on a wholly or substantially elected second chamber and the removal of hereditary peers are said to be making progress; a white paper is due before the summer recess. A key issue will be the representativeness of the electoral system and its relationship with the system for elections to the House of Commons.

Enhancing the role of backbench MPs | Commons Modernisation Committee, Revitalising the Chamber, HC 337, 2006–07 | The real key to enhancing the role of backbench MPs within a more effective House would be to require all backbench MPs to participate in a strengthened and expanded select committee system, which could then feed in to the work of the Chamber.

The UK Parliament and devolution | Governance Green Paper; cross-border and cross party review of the Scotland Act 1998 | The government is committed to maintaining the Union as it “represents our values and gives them expression in the world” (hence in part the “British values” exercise which is not concerned only with integration of new immigrants). The minority SNP administration in the Scottish Parliament is committed to a referendum on Scottish independence in Scotland by 2010; in response the Scottish Labour party has called for an early referendum. There is also the National Conversation in Scotland, a Scottish governments process. In Wales the All Wales Convention is supposed to be deciding when to hold a referendum on the Assembly getting equal powers with Scotland. In England, there are calls for an English Parliament which have not had much purchase.

Parliamentary elections | Review of Voting Systems: The experience of voting systems in the UJK since 1997, Cm 7304, 2007 | Reform of the disproportional system for elections to the House of Commons seems likely to remain in the long grass, though there have recently been suggestions that ministers are considering the Alternative Vote as an alternative. AV would mean that all MPs were elected on a majority of the local vote, but is more or equally disproportional in its effects.
## Proposal

### Making Parliament more representative and extending women-only shortlists for parliamentary candidates beyond 2015


A Speaker’s conference will consider weekend voting, lowering the voting age to 16, registration reforms and the representation of women and ethnic minorities in the House of Commons. There may be measures in the new Equality Bill to extend the right of political parties to have women-only short lists beyond 2015. The gross inequality between men and women in Parliament will not be overturned by purely partial and discretionary measures that do not bind political parties. Moving election days to the weekend is a long overdue reform.

### Petitioning Parliament

- **The Governance of Britain—petitions: the Government’s response to the Procedure Committee’s first report, session 2006–07, on public petitions and early day motions, Office of the Leader of the House of Commons, Cm 7193, 26 July 2007**

The current rules for petitions are designed to discourage them. The government has agreed the cautious proposals made in the Procedure Committee report (April 2008) that in no way match the arrangements for petitions that the Scottish Parliament has adopted and could form a progressive template for reform at Westminster and make a contribution to bringing Parliament and people together. The Procedure Committee has now produced a similarly cautious report on e-petitions.

### Protests around Parliament

- **Constitutional Renewal**

The government will repeal the restrictive measures that prohibit protests around Parliament in the Serious Organised Crime and Police Act 2005. But Parliament is to be given the right to make its own regulations which could risk putting the convenience of members ahead of the human rights of assembly and protest. The decisions should rest with the Metropolitan Police.

### Right of charities to campaign

- **The Governance of Britain**

It is important that charities should be allowed to campaign more effectively for the purposes for which they were established as long as they do so impartially and objectively. The Charity Commission applies very restrictive rules, based largely on a blunt prohibition on suggesting or proposing changes in the law in the UK (or elsewhere).

### Devolving powers to “local communities”

- **Strong and Prosperous Communities: The Local Government White Paper, DCLG, Cm 6939, October 2006; An Action Plan for Community Empowerment Building on Success, October 2007**

The government is preparing proposals for greater community involvement in the work of local authorities, introducing community “calls for action” rights, making use of citizens’ juries and similar mechanisms for consultation and possibly balloting on spending decisions. Researches into the efforts of local, health and other authorities to involve the public have demonstrated how difficult it is to achieve genuine and representative participation.
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<thead>
<tr>
<th>Proposal</th>
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<tr>
<td>A “Concordat” between local and central government</td>
<td>Governance of Britain</td>
<td>Concordat negotiated and published in December 2007. The Local Government Association regards it as a first, though small, step in an ongoing process of devolution of policy-making to local authorities.</td>
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<td>The state and the citizen:</td>
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<td>A “common bond” for all citizens</td>
<td>Lord Goldsmith QC, Citizenship: Our Common Bond, March 2008</td>
<td>Lord Goldsmith’s report on citizenship seems to be concerned more with exclusion than inclusion. Any common bond for citizens must be based on an inclusive definition of citizenship and should leave proper space and dignity for residents of the UK who are not citizens. The rule of law and human rights provisions should apply to every resident regardless of their citizenship status.</td>
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<td>A “British statement of values”</td>
<td>The Governance of Britain</td>
<td>No significant progress. The only discernible move has been to give government buildings the right to fly the Union flag whenever they wish.</td>
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<tr>
<td>A “British Bill of Rights and Duties”</td>
<td>The Governance of Britain; Michael Wills, “Kick-starting a national debate on a Bill of Rights and Responsibilities”, speech to Department of Political Science, University College, London, 5 March 2008</td>
<td>No significant progress. A Green Paper is expected in the next few months. JUSTICE has published a thorough examination of the possibilities.</td>
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<td>A “concordat between the executive and Parliament”</td>
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<td>No significant progress. Would be a “soft” alternative to proposal below.</td>
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<td>A “written constitution”</td>
<td>The Governance of Britain; Jack Straw, “Modernising the Magna Carta”, speech to George Washington University, Washington, DC, 13 February 2008</td>
<td>No significant progress. Would be a “hard” alternative to proposal above.</td>
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Examination of Witnesses

Witnesses: Professor Vernon Bogdanor CBE FBA, Professor of Politics and Government, Brasenose College, University of Oxford; Professor Stuart Weir, Director of Democratic Audit, Human Rights Centre, University of Essex and Mr Peter Riddell, Chief Political Commentator of The Times and Chairman of the Hansard Society, gave evidence.

Chairman: Can we thank you very much for coming along this afternoon to meet our Committee. We do apologise that we are just a few minutes behind and we will try and not keep you for longer than we need, but thank you very much indeed. Has anyone got any interests to declare among the Committee members?

Lord Norton of Louth: As Peter Riddell is appearing as Chairman of the Hansard Society I should explain that I am a member of Council of the Hansard Society.

Q1 Chairman: Are there any other declarations of interest? There is a list of interests that have been declared at the beginning which have been noted and are on the record. Perhaps we can return then to the business of the day, which is your evidence. The draft Bill and the accompanying White Paper mark, as you know, the next step in the Governance of Britain agenda and what we would really like, to kick off, is to ask your overall impression of the Government’s approach to constitutional reform and whether you consider the Bill and the White Paper are appropriate vehicles for taking forward that agenda?

Professor Bogdanor: The measures in the draft Bill may be good measures or they may be bad measures, but I think it would be an exaggeration to say that if they were passed into law this would amount to constitutional renewal. It seems to me that there is a danger in the title of the Bill of raising exaggerated expectations which perhaps are not going to be met and might perhaps lead to some popular disillusion if people really expected these proposals to lead to constitutional renewal. One part of the agenda in the White Paper, the section connected with the Lord Chancellor, seems to me an attempt to reclaim powers that have been surrendered. I am referring to the suggestion that there might be targets in judicial appointments. Again, that might be a good proposal, it might be a bad proposal, but the Constitutional Reform Act specifically said that merit would be only the criterion for selection to the judiciary so this is a major proposal which would have the effect of reclaiming a power that was given up in 2005. The central theme of the draft Bill is to strengthen parliamentary accountability and, while that is obviously a good thing, I think it is reasonably fair to say that we are dealing with a part of the Constitution that causes the most problems is not the relationship between Parliament and Government but the relationship between institutions in general and what one might call the people or the electorate. That is discussed in the Green Paper on constitutional reform in the section on localism where double devolution, redistribution of powers to local authorities, and similar matters are discussed. That seems to me the central part of the agenda of constitutional reform, to meet popular worries about the working of government. Government it is said, is too much for “them”, for those in the Government and Parliament while “us”, we, do not have enough influence over government. I do not really think this particular draft Bill, good though it may be, really meets that central.

Q2 Chairman: Professor Weir, you very kindly have offered us a paper on this and you use the expression that in your view it is simply a sleight of hand since generally the Government will still have the majority it needs. Would you like to expand a little on that?

Professor Weir: First of all, I think that what Vernon has said is the key to actually fulfilling the ambitions of the Green Paper rather more and that is to think about the rebalancing between the executive and local authorities. I do not think the concordat goes anywhere near beginning to fulfil that idea. As for sleight of hand, I also think it is very important that that Green Paper did actually recognise how damaging the persistence of Royal Prerogative powers is, and will continue to be for some time, and therefore we think it is important that the Government has taken up the Public Administration Committee’s timetable starting off with the priorities of war powers, ratifying treaties, and passports, but the real problem is they are giving power ostensibly towards Parliament and then they are taking it back with one hand or the other. They are retaining far too much “wriggle room” to be able to evade the kind of accountability that is necessary, especially on very significant things like going to war. I think I ought to add that placing the Civil Service on a statutory basis is a very important and a very genuine step forward. To some extent, my attitude towards the Bill is, yes, it is disparate but I think this is a time when we should “take what we can get” really because, from my point of view, the whole move towards constitutional reform in this country is beginning to founder generally, not just here, and so there is something in this Bill that is worth taking at the moment. I also think that Parliament needs to be more assertive. I agree with Vernon that there has been a marked
raising of the game in Parliament recently, but I think it needs to go at least one stage further and I think we need to move away from a retrospective model of accountability, to one where Parliament can share with the executive in actually making policy and being consulted properly in advance. We have advanced in several of our publications, and especially in the foreign policy area, the idea of soft mandating which would allow select committees, as in Scandinavia, to share with ministers in the kind of deliberations that can lead to improved policy, and to hold the Government much more accountable when they go off to Brussels or to the IMF or wherever and actually get a report back on the basis of what has been discussed rather than just a ministerial statement. I think that is important.

Q3 Chairman: Before I call other colleagues, Peter Riddell, would you like to add something?

Mr Riddell: I have a number of hats. I am Chairman of the Hansard Society at the present time and I am Chief Political Commentator of The Times. The Hansard Society has got views and we did comment on the original Green Paper and I have asked the head of our Parliament and Government Programme to send it to your Clerk. Naturally what I am saying today is my personal view rather than the corporate view of the Hansard Society, which does not have views. What I would like to say is it is the glass half-full half-empty phenomenon. You can say looking at the totality, this is small stuff, which was the general reaction when we had the statement from Jack Straw in March in relation to the big picture. There are a whole series of very big questions on Lords’ reform and electoral reform, as Vernon and Stuart have said, central and local government relations, how far we can go towards a codified Constitution/Bill of Rights, those are the really big tricky issues. However, if you go back a few years to look at two principal things in the Bill, firstly that was opposed by the then Prime Minister and (three years ago) the then Cabinet Secretary; that has all changed and, secondly, on war powers, and one of Lord Holme of Cheltenham’s—if I can pay tribute to him as he died ten days ago, my predecessor as Chairman of the Hansard Society and Lord Norton’s successor as Chairman of the Constitution Committee—major achievements when he chaired the Constitution Committee in the Lords was proposing the former which was largely taken up by the Government. When they produced that report in 2006 Lord Falconer, as Lord Chancellor, rubbed it, doing a parody of “non-ripe time”. That has now been accepted and thus you have two fundamental things rejected two years ago now accepted. I think there are a lot of detailed points in both those proposals which no doubt we will discuss later but you have got to recognise that. In relation to the bigger picture, my concern is—and it runs through the whole basis of the proposals—how much is the Government just saying the executive is prepared to be a bit more transparent, create a few more hurdles to go through before it can get its own way, or how much is it really handing over to Parliament? I think that on a lot of the things, something which is non-statutory but was a big feature of Gordon Brown’s statement last July for public appointments, really the power remains with the executive and there is little more both in transparency and one or two more minor hurdles have been created. Similarly, if you look through on war powers, there is a bit more but what has been given to Parliament is a bit limited. On the Civil Service the same, in a whole series of areas, the power really still lies with the executive. There was a very interesting exchange two weeks ago when Ed Miliband gave evidence to the Public Administration Committee of the Commons in parallel, I know, to your own inquiry, when he was asked should the Ministerial Code be put in this Bill and he said, “There’s a danger in that that it would make it justiciable.” and I think that is a very interesting area of how much you are talking about the executive retaining control and how much the courts and the judges will become involved.

Q4 Lord Maclennan of Rogart: On that very last point, do the witnesses have a view about the desirability of basic constitutional provision being justiciable? What objection would they take? That is a general question and perhaps as a particular question on this, the Royal Prerogative is a step but it is a very minor step compared with what was recommended by PASC, and they recommended that prerogative powers should be put on a statutory basis. Is that a view which is endorsed by the witnesses?

Mr Riddell: On your big question, I think there needs to be a very much bigger debate about the relationship between Parliament and judges to move on that road, which is why I agree with Stuart here; before we get anywhere near a codified Constitution we have got to have a much clearer view of what we think the relationship of judges is with Parliament than we have now. The controversies produced by the Human Rights Act, which are quite considerable, have shown some of the difficulties there. In relation to prerogative powers, I think more is achieved, as Lord Maclennan is implying, given where we started from. I think the proposal on war powers to establish a convention is a reasonable compromise but it needs to be tightened up considerably, particularly on legal advice. The proposal on legal advice is inadequate in the Bill and in the proposed convention on that. I think that is a reasonable one. On the other aspects—
treaty-making and so on and so forth—they are fair enough.

**Q5 Lord Macleanan of Rogart:** Why should there be a compromise on the principle enunciated by PASC?  
**Mr Riddell:** I think it is flexibility. If you could find a legal formula which was sufficiently flexible for an operational basis, you could. I think the convention combines the virtues of both but it has got to be a tighter convention than so far proposed and it has got to be much tighter on the provision of legal opinion. The key issue after Iraq was not whether Parliament votes or not, Parliament can always vote on anything and it is not beyond the wit of MPs to force a vote on anything at any stage, as you will know from your time as MP. Lord Macleanan. The fact there has not been one on Afghanistan is an interesting point to make. I think the key issue is the provision of information. The problem was in 2002-03 the nature of the information provided. You could also argue in relation to Afghanistan that John Reid, the Defence Secretary, provided inadequate information about the significance of deployment in Helmand. That should be made more explicit, that should be tightened up a lot, particularly on the legal side whether you should have full legal advice. There was a very interesting lecture which Lord Bingham did in Cambridge a couple of years ago now when he said that the normal client relationship should not apply in times of going to war; it is totally different from advising on other things. That is a point that I suggest you might take up on that. I would say on going to war that full legal advice should be available and you should tighten up that but beyond that I think the convention provides the right flexibility.

**Professor Bogdanor:** I believe one has to ask the question of what it is that judges can be expected to do. There is a great danger that we are asking judges to resolve problems which have already been resolved at a political level. For example, when those who were against the ban on hunting brought that to court, the judges rightly said this was a matter for the electoral and parliamentary arena and not for them, and that the position of the judges would be devalued if it was thought that they were to become, as it were, a third chamber of Parliament. The judges also cannot deal with matters which are really matters of personal relationships. I am strongly in favour of putting the Civil Service on a statutory basis but it would be unwise, I think, to exaggerate what can be achieved by that. If, for example, a minister does not wish to listen to the advice of a particular senior official, it could hardly be suggested that the senior official would take the minister to court; it is not really a matter for the judges to deal with, it is not a properly justiciable matter. Where judges are at their best I think is in dealing with the problems of people who cannot easily get into the electoral arena, small and very vulnerable minorities, asylum seekers for example, suspected terrorists and the like. There is a great danger of extending the judicial role beyond what it can bear. On the general question of the Prerogative, on the question of war powers, which no doubt we will come to later, I wonder if people are not there trying to resolve what is a substantive problem via constitutional reform. By that I mean that many MPs regret that they supported the Iraq War, they believe that they were misinformed and they were not told what the true situation was and possibly, if there was another vote, the result would be very different from what it was. But in practice it is extremely difficult for any Government to take this country into military action of any kind without the support not only of the governing party in Parliament but also of the official Opposition. I can think of only one military expedition in the 20th Century which was supported only by the Government and not by the Opposition and that was the Suez expedition and I think that is one of the reasons that it failed—the official Opposition was not prepared to support it. I wonder what effect a parliamentary vote would have had. A positive parliamentary vote may mean very little. Neville Chamberlain won a positive vote in 1940 after the Norwegian expedition but that did not save his premiership. I think one is in danger of trying to meet what is a substantive worry that many people have about the Iraq War—whether they were right to support it—through a constitutional reform.

**Professor Weir:** I would like to pick up on Lord Macleanan’s question. I think there is a very real role for the justiciary, in contradiction to my two colleagues here. I think that is one of the main reasons why the Royal Prerogative should be put on a statutory basis as far as possible. If you rely on convention, especially with all the kind of flexibility that is in the current proposal, we are almost replicating in fact the process that led to the approval of the Iraq War, because the Prime Minister will control the information that is made available to Parliament, he will be able to time the debate and so on and some aspects of that, like the deployment of special forces in advance, will still be able to happen. Obviously you need—and I take Peter’s point—to be able to get the judiciary and the executive actually to understand each other’s role, but I think the point about putting this on a statutory basis is that you do make it justiciable and you do therefore have some kind of control over process which we do not have at the moment, and the whole point of it being justiciable and a statutory basis is that there should be clarity in what is possible and what is not possible, how government should behave and so on, and I am afraid that the proposals in the White Paper and the Bill leave far too much wriggle room for government to evade any kind of proper accountability.
Sovereign did not play an active role. On the question politicians themselves had reached. That was also the Queen simply endorsed the decision which the agreement who was to be appointed Prime Minister. Parliament in 1974, it was as a result of political even in a hung Parliament. For example in the hung system and the test of whether a government has actually decide who the next Prime Minister is going to. Although in form it is true that the Queen appoints a caretaker position until the House of Commons has actually approved the new Queen’s Speech and then, by implication, a new government, and is that not really meeting what Professor Bogdanor is saying, that it is those sorts of issues in terms of the Royal Prerogative that are of interest to the public outside the Westminster bubble rather than whether the judges should be involved in really rather technical, erudite and esoteric issues?

Professor Weir: I quoted Professor Peter Hennessy in the paper saying that there were five or six occasions when a small elite group of officials and courtiers’ task was energetically looking at what might happen after an election on five occasions since 1974, and it seems to us that the proper way of deciding who the next Prime Minister should be should be to leave that to a vote in Parliament and to Parliament to actually decide who should be the next Prime Minister, rather than the Queen advised by whoever advises her. This is especially important in terms—and I am not saying there is going to be a hung Parliament at the next election—of sooner or later I suspect there will be a hung Parliament, and then the whole process of deciding who should form the next administration becomes even more important because it really should not be down to the Queen and her advisers to make the decision. It should be a matter of negotiation within Parliament and the parties within Parliament. I think we in this country place far too much emphasis on getting decisions through very, very quickly and I think this is one of the reasons that the idea of continuous government and governance is a danger, and I think we can well wait a bit before we actually decide who the next Prime Minister is going to be if we actually do the job better.

Professor Bogdanor: Our system is a parliamentary system and the test of whether a government has parliamentary support is the vote on the address. Although in form it is true that the Queen appoints the Prime Minister, in substance that is not the case even in a hung Parliament. For example in the hung Parliament in 1974, it was as a result of political agreement who was to be appointed Prime Minister. The Queen simply endorsed the decision which the politicians themselves had reached. That was also true in the two hung Parliaments of the 1920s, the Sovereign did not play an active role. On the question of dissolution, the question of whether Parliament should vote for dissolution is, in a sense, a political one, it would not make any difference in normal circumstances because a government with a majority could always get that majority to support a dissolution. It would matter when the Government did not have a majority, as in 1974, when Harold Wilson as Prime Minister was able to choose a time to dissolve at his own convenience in October of that year. If the majority in Parliament had to support dissolution, that would give what one might call the pivotal parties in the middle, the Liberal Democrats and Nationalists, great leverage politically because they would then say to Wilson in the circumstances of 1974, “No, you cannot dissolve, we won’t allow you to dissolve until conditions X, Y and Z are met.” Thus it would alter the political power balance in the House of Commons. That may or may not be a good thing but it would be an alteration of the way things now work.

Mr Riddell: Could I add on that to Lord Tyler, you have already addressed that problem with the Scotland Act. The Scotland Act specifically, mainly because the electoral system is highly probably going to produce no party having a majority, provides for the Scottish Parliament to vote and approve the choice of First Minister and thereby the Government. If there was either a change in the electoral system, which you would no doubt like Lord Tyler, I think you would probably have to put that in legislative form but de facto, as Vernon has said, that is what happens now but whether you make it statutory, you would if you moved to an electoral system which was going to move away a from majoritarian result. The Scotland Act seems to work perfectly smoothly and of course Alex Salmond does not yet have power over peace or war (even though it appeared so last week!) so it is slightly different which is the main argument for peace and war. We have an interregnum between the first Tuesday in November and 20 January in the States and, leaving aside minor powers, a major power, Germany, took two months before Angela Merkel was installed. Interim governments can deal with issues of peace and war and terrorism.

Q7 Lord Tyler: I am really asking our witnesses would it not be better if we are explicit that we are a parliamentary democracy rather than implicit? I confess to having an interest because I have the scars of both February and October 1974, so I believe that if we are a parliamentary democracy the House of Commons should be where the power should lie.

Professor Bogdanor: Yes, I take your point, certainly on the formation of a Government. Tony Benn said in the circumstances of 1974, “first past the post comes to be first past the Palace”. This is highly
misleading because the Palace does not actually play an active role. There is a case for making that explicit.

**Q8 Martin Linton:** I want to take up Stuart’s point about select committees. It relates to this because in our system, Stuart, the select committees tend to be independent ginger groups who hold inquiries and they keep the Government on its toes, but in the Scandinavian system that you referred to they are much more members of the executive and of course they do not really have the concept there of government backbenchers because every member of parliament is a member of a select committee which is an executive body which filters all ministerial announcements, so every member of parliament has a hand on the levers of power and it is a completely different approach. Do you think that is a direction in which we could go? One of the strange things about our system is we have these 250 or so Government backbenchers rattling around either being lobby fodder or sometimes being loose cannons but not having any clear hand on the levers of power whereas presumably one of the objectives of select committees was to give MPs more power not just more scrutiny. **Professor Weir:** Yes, there was an excellent Hansard Society-commissioned report on accountability to Parliament which basically suggested—and Peter will correct me if I get it wrong—that Parliament should move to a much more committee-based process than it does at the moment so that committees took a much greater role. I am not quite sure whether they said that every Member of Parliament should be a member of a select committee or not but that is certainly what we have advocated in the recent work we have done. On making foreign policy, especially when you think about the role of scrutiny of European business, if select committees were empowered by additional members and resources to be able to take on some of the sifting of European Directives and proposals then that would actually integrate it, so on agriculture, on foreign policy, or whatever, you are getting a more expert group of MPs looking at proposals and to, in a sense, mainstream European business along with a lot more of the foreign policy. I think that would an admirable way forward.

**Q9 Lord Williamson of Horton:** I wanted to ask a question or two on the ratification of treaties. It is fully covered in the paper which Professor Weir has put in but I have got two points. First of all, do all of you agree that this is a relatively significant proposal here in that of course there are circumstances in which government could not proceed to ratify a treaty. That is in my opinion quite a significant proposal and we should recognise that, but there are one or two points related to it on which I would be glad to have comment. The first one—and it is not commented on in detail in your paper—is what happens if the Government restarts the process and then again and then again? There seems to be a possibility in which you can restart the 21 days, and it is hardly commented on, but of course it is an important point in that you might then get back to circumstances when the Government would end up by ratifying it. So could I just ask for any comments on the importance of the proposal and any of the conditions—I quote one but there are others—which you might think significant? **Mr Riddell:** Could I just say, it is important because it regularises the Ponsonby Rule and all that, and what has applied, and the fact that the EU treaties, which obviously you are very familiar with Lord Williamson, were anyway exempt from it in going through the parliamentary process of voted tax treaties. I was struck by that point again and again and again, perhaps a provision which says once a Session or something would be sensible there. My concern was partly defining the nature of treaties. A lot of the substantive documents are rather like statutory instruments and Directives. I saw one last week which was to do with missile defence and it was a memorandum of understanding between the US and UK Government—far more important than 90 per cent of treaties going through, a really important statement. An earlier one at the end of 2006 was on Trident, the exchange of letters between President Bush and Tony Blair on that, and was far more important than any treaty. That is where I thought the weakness was because in practice something which was implementing agreements going back to the Act and the repeal and all the stuff that Macmillan did and so on and so forth, that actually is what should come before Parliament. I think that the definition of ‘treaty’ and what was in it and what was actually being granted was desirable but no great shakes.

**Q10 Lord Armstrong of Ilminster:** I wanted to go back to the beginning of this discussion where I think all three witnesses in various tones of voice said that this was a half full glass or a half empty glass, and more trivial than real as it were. As one who has spent his career in the executive, I wonder whether there would be any support among the witnesses for the view that this constitutional reform is a never-ending process, it goes on and on, and it is an evolutionary process and whether there is something to be said for this Bill as being an evolutionary step forward where we can “suck it and see”, as you might say, before
decisions are taken as to whether to go further at a later stage?

Professor Bogdanor: I think that when Welsh devolution was being discussed, the then Welsh Secretary, Ron Davies, said that Welsh devolution was a process not an event—a famous remark. I believe that it is true, as Lord Armstrong implies in his question, of constitutional reform in general; it is a moving picture. My criticism of the priorities in the Bill are simply this: I think the whole phase of constitutional reform in 1997 has led to a very valuable redistribution of power but it has been a redistribution of power between various elites, elites in Scotland, Wales and Northern Ireland, the judges, government in London and so on, but the ordinary citizen, who may not want devolution and may not need to use the Human Rights Act, can say that it has not actually brought her more power against the governing authorities, to put it crudely, “us against them”, and it seems to me personally that the main priority for the next phase of constitutional reform should be to move in that direction rather than further redistribution of power between political and judicial elites.

Professor Weir: I think it is important to recognise that this Bill is, in a sense, only half what the Government set out in the Green Paper in July 2007, and the second half is precisely supposed to be dealing with the issues that Vernon has been raising. I think that is a very, very important missing element, and I do hope the Government is going to go further forward and faster in that process. I think to some extent the Human Rights Act has acted to improve the quality of life and the dignity of ordinary citizens, especially through the work of institutions like the British Institute for Human Rights, which has been using the HRA to deal with issues in care homes and in public services to improve their quality and to make the staff and the processes fully respect the dignity of the people that are involved there, and I think that has been important aspect.

Q11 Fiona Mactaggart: Following on from this issue about whether we are on a process and what is missing at the moment, I think Professor Bogdanor has made it very clear that his belief is the bit that is missing is the devolution of power to local communities. If you accept that this Bill is not dealing with all the most important constitutional changes that you think ought to be being developed now what, Peter Riddell and Professor Weir, would you add that is not there?

Mr Riddell: I would have everything that is here but with tightening up in various areas. I have already mentioned earlier war powers. You could argue various things about the Civil Service element and in response to Lord Williamson I mentioned treaties. You can park that and that is desirable, I am saying there is nothing undesirable, if you can tighten it up. What is missing are, in a sense, the bigger picture things, some of which are involved with what Vernon Bogdanor would describe as the “elites”, looking at the House of Lords obviously as a big thing, and we are promised some Government proposals within two months on that. There is also the electoral system, where is power shared there, and central and local government. I think that is something where, leaving aside the judicial point, we cannot yet think of a codified Constitution because we have not conceivably a consensus on what central and local relations are, not just between the centre and local authorities but between the centre and parts of England; we have an unstable relationship probably between London and Edinburgh; the relationship with Cardiff is evolving, and so on and so forth. Those are big picture things where the debate continues, to take up Lord Armstrong’s point, and I think it sounds too dismissive to describe this as a “consolidation” bill but there are aspects of that about this. In order to get a further big push, we have got to have a clear idea on these other elements which I think are very important, particularly towards central/local, do we want to have a look at the electoral system, all these bigger issues, and particularly at this point of judges and Parliament because we have got to decide how much is justiciable. One thing where very soon we will be having a debate, the Government is going to produce its statement on the Bill of Rights, and it is quite clear a lot of that is going to be declaratory and deliberately non-justiciable, and that is absolutely fundamental to everything. Until we are clear on that, it is very difficult to see how a lot goes further forward.

Professor Weir: I agree with most of the things that Peter has said but I think in terms of local communities we need to look very, very carefully at the whole structure of regional and local government in this country. The regional structures now are almost wholly unaccountable and they are very, very far removed from the lives of ordinary people and their communities, but even local authorities are too large. We have the largest local authorities in the Western world, so far as I know, and there needs to be some real effort to take decision-making at local level far further down the scale than it is and we need to really very seriously introduce a much more democratic process at regional level.

Chairman: I am sure this part of the discussion could go on for quite a long time, but I wonder if we could move to some of the specifics in the Bill and invite Lord Norton to ask some questions about the war powers aspect in particular.
Q12 Lord Norton of Louth: In a way it leads on from what has been said and you may think you have answered the questions. Peter Riddell made the point: how much can you do by legislation when you are dealing with what essentially is a political relationship and, if you take war powers, is it really a matter of statute or is it really a matter of having sufficient information? You can prescribe that Parliament votes on the issue because, as the Peter Riddle said, Parliament can force a vote anyway, the important thing is not being able to vote, the precedent being set; it is having sufficient information as the basis on which to make an informed decision. How can one prescribe for that for legislation? Does what is proposed here really get to the nut of the problem, should it go any further, or should there be some alternative for actually getting what Parliament really needs if you are actually going to change substantially the relationship between Parliament and government?

Professor Weir: I think that other countries manage to have a statutory basis for such decisions as going to war, and they seem to have enough flexibility built in. So I think it is important to have a statutory process simply because you can then start prescribing rules for the amount of information that is given. I think that it is very dangerous that the Prime Minister will still control what information is given to Parliament and the timing of any vote in Parliament, because those were precisely two of the defects in the process that took place in advance of the Iraq war.

Q13 Lord Norton of Louth: But how do you get the information? Congress is powerful, but in the last century the President deployed forces abroad over 100 times and Congress declared war twice. It is not really the formal aspect; it is making sure that the legislature has the information necessary. How do we provide for that?

Professor Weir: That is why I think it has to be in statute, because it strengthens Parliament’s ability to demand the information. We have seen, for example, with the Scott Inquiry where Mr Justice Scott, I think, was able actually to demand information, as in the precise terms of his remit, which information would otherwise have been withheld from him. Of course, if you give people the power to demand things, you are going to get the result.

Mr Riddell: My own view is you have got to tighten up the convention a lot and make it much more specific. Taking up Lord Bingham’s point that this is different from other bits of legal advice, it is neither commercially confidential---. It is accepted that the full legal advice will be available when this power is invoked. I think that has got to be made absolutely explicit. It also has to tighten up, which is very vague in the convention, the terms in which a statement is made to Parliament on the length of time of a commitment. This really did arise over Afghanistan when we had what was described as the second deployment, not the 2001 one but the expansion in Helmand, when a statement was made by John Reid which has turned out to be rather different from what has happened, as 70 families know to their cost through the death of their children. It was not a peaceful thing at all. That should have been made explicit so there you have got a bench mark of accountability. I am with Vernon Bogdanor too: one should not push justiciability too far—these are things for Parliament rather than judges—but I do think the bench mark of what is required should be much more specific than is in the current bill in relation to your responsibilities.

Q14 Lord Norton of Louth: You mean embodied in a convention.

Mr Riddell: Absolutely, and absolutely explicitly so. The precedent—there is far too much wriggle room there.

Professor Bogdanor: If one looks at the history of these matters, as I said a little earlier, there is almost a convention that one cannot go to war unless the official opposition also supports it. The question of legal advice raises an issue which is of great importance in this draft Bill, namely the position of the Attorney General. I think the difficulty over the Iraq war was that you had someone who was wearing two hats, one a political hat and one a legal hat, and the person concerned said that he could set up, as it were, a Chinese wall—I hope these metaphors are not getting too mixed—between these hats so that at one time the hat sat in one way and at another time in another way. It is like the position the Lord Chancellor used to have. Under one of his hats he was a member of the Executive, under another a member of the legislature and under a third a member of judiciary. I think it is one of the consequences of the Iraq war that the public, in general, do not believe any more that people are capable of wearing more than one hat. The public, I think, believe that the powers that are given to a politician will generally be used for political purposes and so the less those powers conflict the better. I think the whole question of the Attorney General raises very fundamental problems about the separation of powers and about whether the position of the Attorney General is compatible with the independence of other authorities such as the DPP and the SFO; whether it makes sense to have a minister who is responsible to Parliament and yet also responsible for the working of bodies which are independent. There is a huge area of difficulty here which, frankly, I think the draft Bill does not confront.
Q15 Lord Maclellan of Rogart: I am at a little bit of a loss to know what the panel members who advocate reliance on a convention mean by that. Do they mean that there is a formulation which Parliament has endorsed, and which is essentially a regulation, or do they mean some notion that the Executive can invoke and can at will alter if it does not seem apt for the circumstances in which the issue has arisen? It seems to me that the use of the word “convention” is to suggest that there is a practice which has been followed for a long time but, in fact, it is providing a cloak for Executive discretion which does not actually have any binding effect.

Mr Riddell: As far as I understand the issue, I am sure if you talked to your noble and gallant colleagues in your House who have been former CDSs, their view is basically that the forces are not taken to court. The real issue is legal action against British troops. That is what it is about. I think you can harden up a convention, whether you call it a convention or whatever. The whole issue is: does this become liable to legal action against British troops? Not against government, against British troops—that to my mind is the fundamental issue—and I think there are understandable concerns, certainly from the generals I have talked to about it, of being tied up in legal action. This is nothing to do with Abu Ghraib or anything like that, but you get into a political dispute about whether the decision was taken properly by Parliament and that leads to soldiers being regarded as legally liable. That, I think, is totally undesirable.

Professor Weir: I am sure the whole point of having a statutory process is that you get the decision right in the first place, in most circumstances, and, therefore, you do not put troops in the front line, as it were, politically unless they have been sent to the front line militarily in the proper manner.

Lord Campbell of Alloway: I wanted to say briefly that the drift of the evidence we have heard is certainly, for me, a breath of fresh air. It is fresh but it is an evolutionary situation, but we perhaps have not moved in the right direction and we are seeking to move far too fast to no good purpose. On the question of Iraq, I think the sense—I am not sure of the evidence—is we ought perhaps to steady our approach. It is quite ridiculous to say, because we were all fooled by the intelligence, it does not matter whether the Prime Minister was or he was not because clearly everybody was and for some reason or other we went to war. We cannot go into that again, but in those exceptional circumstances it would be quite wrong to change our whole constitutional approach and to try and devise statutory provision and alter the powers of the prerogative, because if we are going to war they have to be under the powers of the prerogative and it is idle to pretend that intelligence can be disclosed to either House, full, total, satisfactory intelligence, which justified action. You cannot do it. The evidence seems to me to be a careful approach, and this Bill as a whole does not really achieve any great advantage to the constitution.

Q16 Chairman: Would one of you like to comment? Professor Bogdanor: I do have, if I may say so, a great deal of sympathy with those comments. It seems to me very difficult to define what armed conflict is. I think the last time we formally declared war was in 1942 against Siam. We saw in Bosnia, I think, how easy it is for what seems like a peace-keeping mission to turn very gradually into armed conflict. I think one needs to define very carefully what it actually means to go to war, to take military action, and I believe, as I said before, that in part we are trying to deal with a non-problem because it is very difficult for a Government to go to war, certainly without a majority of its own supporters, but also without the support of the opposition. We are with a non-problem many now regret, the way they voted on the Iraq war, but that would not have been altered if this particular part of the Bill had been on the statute book. If one played the film back, there would have been nothing different in that case or in any of the other military actions of the twentieth century. There might possibly have been a vote against the Suez expedition—I suspect not, but it is possible—but that is a great exception, which perhaps does prove the point I have made again and again: how difficult it is to go to war if the official opposition do not support it.

Professor Weir: I would just like to make the point that the royal prerogative and the powers under it are far more important and far broader than simply the question of going to war or ratifying treaties indeed. All of our foreign policy, all our external policies, are basically conducted under the royal prerogative and very major issues of foreign policy, which have a real profound effect on domestic policy as well, are decided in that way and, therefore, it is really very important to lift all of that out of the royal prerogative powers and have much more statutory-based powers so we have much more clarity of what is being done and we can broaden the whole process of getting foreign policy, European policy and domestic policy into one framework.

Chairman: I think we have been over-optimistic about how much we can get into this session, and so I am going to ask Lord Maclellan to ask a few questions on the Attorney General that he would like to ask and maybe if other colleagues could ask very pointed questions thereafter and anything else perhaps we could ask you to respond to in writing if there was anything additional.
Q17 Lord MacMullen of Rogart: Perhaps the core question about the Attorney General is described as the tension, which was mentioned in Professor Stuart Weir’s paper, between a government minister acting as a senior legal adviser and the independent role that has to be considered in some of the other attorney’s functions. Is that tension best dealt with by severing the functions, as is suggested in Professor Weir’s paper, or would it be possible to contemplate the non-politicisation, if you like, of the role as a whole? Is there a case which ought to be considered for not having a political attorney?

Professor Bogdanor: It seems to me that if the Government wishes to appoint a lawyer as a government minister they should be perfectly entitled to do that, but that person should not be responsible for superintending the prosecuting authorities, the DPP and the SFIO, and so on. The Government’s argument is that they need a lawyer at the heart of government who can be responsible for these functions, and I cannot understand why it should be that you need a lawyer at the heart of government and not, for example, a doctor at the heart of government, because, after all, government deals with health matters, or a teacher or an academic at the heart of Government. What is special about the position of lawyers? It seems to me, as I said earlier, that it raises a serious problem if you say, as I believe you must, that the prosecuting authorities are independent. I think there is very considerable danger in the proposal in the draft Bill to allow the Attorney General, on grounds of national security, to direct a prosecution not be continued with because it would be perfectly possible for national security to be used as a cloak by a politician for some other matter, and there are suggestions, of course, that this has in fact happened in the recent past. I think these problems do need to be separated out and confronted. It is certainly the case, as Lord MacMullen implied, that a number of countries which have a Westminster-type government such as India and Ireland do have an attorney general who is not a minister, who is an independent figure. As I said earlier, if the Government wishes to appoint a political lawyer to the Government, then they should be entitled to do so, but that person should not be involved in superintending the prosecuting authorities.

Mr Riddell: I think there is an issue that there ought to be no part of the state which is not accountable to Parliament or the central state, and, therefore, I think there has to be someone who is accountable in that way. I do think that the regular attendance at Cabinet does produce more blurred lines in the sense that the Attorney ought to be called in only when there is a major issue on that. Also, in practice, in most cases, I think I am right in saying, and it certainly arose during Iraq, other legal advice is sought and often the Attorney is merely a channel for much more expert legal advice outside on that, and I think that where there is exemption, which is a national security exemption, from being involved in prosecution, again it has to be much, much tightened up to provide justifications, explanations, and so on, of the exemption to make it much harder than it was.

Q18 Chairman: I know, Professor Weir, you have a disagreement with that.

Professor Weir: I would only add to what has been said that I think it is wrong that the Attorney General is also the chief legal adviser. I think that should be depoliticised.

Professor Bogdanor: I do not agree with what Peter Riddell said—that every part of the state has to be accountable to Parliament. If part of the state, for legal reasons, is independent, which the prosecuting authorities are, that seems to me in contradiction to the idea that it could be accountable to Parliament.

Mr Riddell: For policy. Perhaps I should say not only individual decisions but broad policy and money.

Chairman: I think we are going to have to leave it there. We are grateful for the very interesting session. If you would be agreeable, if colleagues who have not been able to ask questions because of the time restraint could offer that to you in writing and they could be responded to, that would be much appreciated. Thank you very much indeed.

Memorandum by Professor Adam Tomkins (Ev 01)

PUTTING THE DRAFT CONSTITUTIONAL RENEWAL BILL IN CONTEXT

1. The Draft Constitutional Renewal Bill is more of a tidying-up exercise than it is a fundamental reform to the British constitution. This is not to trivialise it or to say that it contains no measures which are important in their own right. But, when compared with previous rounds of constitutional reform witnessed in recent years (eg the Human Rights Act 1998, the Scotland Act 1998 and arguably even the Constitutional Reform Act 2005), the Draft Constitutional Renewal Bill is not of the same order of importance, constitutionally. More pressingly, perhaps, neither is the Draft Constitutional Renewal Bill the most significant set of proposals
currently being debated in the arena of constitutional reform. The “national conversation” initiated by the Scottish Executive in August 2007 has at least the potential to lead to radically more fundamental constitutional reform than any proposal contained in the Draft Constitutional Renewal Bill. Parliamentary scrutiny of the future of the Union is a matter for another day, no doubt. Nonetheless, a sense of perspective is called for.

2. This is especially the case, perhaps, given the size of the gap between some of the Government’s rhetoric in its various Governance of Britain papers and what is actually proposed in the draft legislation. In last summer’s Green Paper, for example, the Government wrote about “re-invigorating our democracy” and suggested that its proposals would go a long way “to rebalance power between Parliament and Government”. From the Green Paper of July 2007 to the White Paper and Draft Bill of March 2008 there appears to have been a substantial shrinkage of the Government’s ambitions. While it may be the Government’s intention that the “Governance of Britain” or “constitutional renewal” agenda should be ongoing and should not be confined to the present Draft Bill, there is much that was canvassed in last year’s Green Paper that has not been taken forward in the White Paper and Draft Bill. Some matters remain, apparently, for the future (eg, the commitments to establish a Youth Citizenship Commission, to start a national debate on a British Bill of Rights and Responsibilities, and to revisit issues of House of Lords reform). Others are seemingly being taken forward, but elsewhere (eg, changing the conventions governing the dissolution of Parliament, such that the Prime Minister will be required to seek the approval of the House of Commons before asking the Monarch for a dissolution; and amending the Standing Orders of the House of Commons so as to enable backbench opposition Members to seek a recall of Parliament—both of these matters, as I understand it, are currently before the House of Commons Modernisation Committee).

3. Perhaps of more concern for this Joint Committee, however, is the fact that even within the areas of the Green Paper that do find some expression in the Draft Bill, there appears to be considerable slimming down of ambition. In the Green Paper, for example, it was stated that “the Government believes that the executive should draw its powers from the people, through Parliament” (para 14). I agree. But there is nothing in the Draft Bill to write such a principle into our constitutional law. In the Green Paper it was further stated, of the Government’s prerogative powers to deploy troops and to ratify treaties, that “In a modern 21st century parliamentary democracy, the Government considers that basing these powers on the prerogative is out of date” (para 17). Again, while changes of detail are proposed in the White Paper and Draft Bill with regard to both powers, it is clear that both are intended to remain firmly based on the prerogative, albeit that the exercise of these prerogative powers will be subject to moderately enhanced parliamentary oversight.

Constitutional Renewal and Constitutional Principle

4. I will return to the detail below but, before doing so, it may be worth pausing to reflect a little on the constitutional principles that may be said to underpin this incredibly important area of our constitutional law. One of the most striking features of the Green Paper were its citations of history. The proposals explored in the Green Paper were explicitly set in the context of the United Kingdom’s ongoing, historical constitutional development. A major theme of that development is the transfer of power from Crown to Parliament. As the Green Paper expressed it, “reforms have developed our country from a feudal monarchy where the King’s word was law and only a tiny minority had any real influence, to a representative democracy governed through a sovereign Parliament elected by universal suffrage” (para 2). As matters stand, however, the transfer is incomplete. Britain’s constitution, even now, is not a full parliamentary or democratic one. The Crown retains very significant powers. Some continue to be exercised by the Monarchy itself (eg, appointment of the Prime Minister, dissolution of Parliament, and royal assent to legislation) but the bulk of the Crown’s powers are now exercised by the Prime Minister and by other Cabinet Ministers and officials (eg, the making of treaties, the deployment of the Armed Forces, the conduct of diplomacy, the governance of Britain’s overseas territories, the appointment and removal of Ministers, the appointment of peers, the grant of honours, the claiming of public interest immunity, and the granting and revoking of passports, as well as others).

5. Now, it is clear that, as the Government accepted in its Green Paper, “when the executive relies on the power of the royal prerogative … it is difficult for Parliament to scrutinise and challenge government’s actions” (para 15). This is a reflection of the view established by the House of Commons Select Committee on Public Administration, which reported in 2004 that, when exercising the Crown’s prerogative powers, Ministers have “very wide scope to act without parliamentary approval” (Taming the Prerogative, HC 422 of 2003–04, para 12).

6. If we take seriously the claim—and it is the Government’s claim—that our country is a “representative democracy governed through a sovereign Parliament” (above), then it follows that current constitutional practice with regard to the prerogative is contrary to principle. The transfer of power from Crown to
Parliament must be completed. In a representative democracy governed through a sovereign Parliament such a claim would surely be axiomatic. There would be no reason to regard it as either bold or controversial. The starting principle for executive power should be the same for central government as it already is for local government: namely, that the government may exercise only those powers which are expressly or by necessary implication conferred upon it by statute. If this is sufficient for local government why should it not also be for central government? The personnel of central government is already drawn from Parliament and once in office the government is of course accountable to Parliament for its policies. Given this, there is no reason not to extend the control by Parliament over the government also to its powers. Thus, Government should possess only those powers which the people, through their elected representatives in Parliament, have expressly or by necessary implication conferred upon it by statute. This, it is respectfully submitted, is the constitutional principle on which the governance of Britain and on which a programme of constitutional renewal should be based.

7. One of the more disappointing aspects of the White Paper and Draft Bill is that, unlike last year’s Green Paper, they do not seem to reflect this underlying principle. In the Green Paper the Government expressed its belief that “in general the prerogative powers [exercised by Ministers] should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control” (para 24). (There was no suggestion that the powers exercised by the Monarchy itself should be amended in these ways.) In the White Paper and Draft Bill, by contrast, only one prerogative power is proposed to be put onto a statutory footing (ie the power to manage the civil service—clause 27) and the proposed increases in parliamentary scrutiny and control fall considerably short of what they might have been.

8. Three areas of the prerogative are proposed to be reformed in the White Paper and the Draft Bill: the management of the civil service, the ratification of treaties and the deployment of the Armed Forces. It is not clear why these particular prerogative powers (and not others) have been selected for “renewal”. While the most recent political controversy concerning a prerogative power revolved around one of these three—the Blair Government’s deployment of the Armed Forces in the Iraq War—recent decades have witnessed controversy in other areas, not touched on in the Government’s present proposals. One obvious example is the use by Ministers in John Major’s Government of the prerogative power to claim public interest immunity (PII) in order to attempt to prevent what turned out to be material evidence from being disclosed to the defence in a series of criminal trials in the early 1990s, trials concerning the export of arms and “dual-use” goods to Iraq. It was the scandal which this gave rise to that led to the establishment of the Scott Inquiry, which reported in 1996. One question which may usefully be explored, perhaps, is why the Government finds it necessary or appropriate to make amendments only to some of its prerogative powers, and not to others. As the example of PII suggests, it cannot be because all other prerogative powers operate without difficulty. The Government’s current proposals for piecemeal reform are difficult to reconcile with its more robust statements in last year’s Green Paper (eg at paras 15 and 24, cited above).

**The Ratification of Treaties**

9. The Government proposes in essence to convert the existing convention governing Parliament’s role in the ratification of treaties (the Ponsonby rule) into a rule of law by enacting it in statute. While doing so, it should be pointed out, the rule will be strengthened in terms of its legal effect, in that, under the Government’s proposals (and subject to exceptions—clauses 22–23), it will be legally impossible for the Government to ratify a treaty should the House of Commons vote against its ratification. Thus, while the power to ratify treaties will remain a prerogative power in the hands of Ministers, the lawful exercise of this power will be conditional upon the Commons’ approval. (Such approval does not have to be express: as the Draft Bill stands a treaty may be ratified as long as neither House resolves that it should not be ratified—clause 21.) If these proposals are enacted, were the Government then to purport to ratify a treaty in the face of a Commons vote that it should not be ratified, a court of law would likely be able to quash such a ratification on a claim for judicial review. I say “likely” because there is House of Lords authority in support of the proposition that the ratification of treaties is a non-justiciable issue (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 418, per Lord Roskill). Notwithstanding its source, it may be doubted that this ruling would survive the passage of legislation such as that proposed here. For the avoidance of doubt, however, it may be that Parliament should consider whether it might expressly provide that any future ministerial attempt to ratify a treaty in the face of the opposition of the House of Commons is intended to be a matter amenable to judicial review.

10. Parliament might also be advised to consider whether the extensive ministerial discretion retained in clause 22(1) is appropriate (the “exceptional cases” clause). Parliament’s position might be better safeguarded, for example, by the addition of a statutory duty on the Secretary of State to take all such steps as are reasonably
practicable to ensure that no treaty is ratified without the conditions in clause 21 having been met. Whether such a duty should be enforceable by Parliament or in the courts of law (or both) is a further matter that might usefully be considered.

The Deployment of the Armed Forces

11. The Government proposes the creation of a new resolution of the House of Commons, detailing Parliament’s role in decisions to deploy Her Majesty’s Armed Forces in armed conflict overseas. The principle, new to our constitution, to be articulated in the resolution, is that the approval of the House of Commons should in general be obtained before the Government deploys the Armed Forces in conflict overseas. Currently there is no such requirement for parliamentary authorisation, even if, as was the view for example of Prime Minister Tony Blair, the events of 2002–03 leading up to the Iraq War had made it politically unthinkable that Government would in the future deploy troops in overseas combat without parliamentary debate. The new principle is warmly to be welcomed. It is an important step in the rebalancing of power from Crown to Parliament that was referred to above.

12. However, while the headline move is to be welcomed, the detail of the Government’s proposals leaves much to be desired. The following are examples (see White Paper, paras 218–23):

   (a) The Government currently proposes that there should not be a requirement to obtain retrospective approval for a conflict where prior approval was unable to be sought;

   (b) Similarly, the Government does not currently accept the need for a requirement for any regular parliamentary re-approval;

   (c) The Government is opposed to making any special arrangements for the recall of Parliament if a deployment is necessary when it is either adjourned or dissolved;

   (d) The Government believes that it is for the Prime Minister to determine what information should be supplied to Parliament in the approval process;

   (e) The Government is opposed to allowing the legal advice of the Attorney General as to the legality of the proposed action to be disclosed to Parliament;

   (f) The Government is of the view that it is for the Prime Minister to determine the appropriate timing for the involvement of Parliament in the approval process.

   Each of these facets of the Government’s proposals has the potential significantly to reduce—perhaps even to undermine—the headline move.

13. For reasons of constitutional principle, this is greatly to be regretted. But it is not difficult to remedy. What is needed is a clear starting point. Three such starting points suggest themselves:

   (i) priority should be accorded to the fundamental constitutional principle that in the exercise of its powers the Government should be as fully accountable to Parliament as possible;

   (ii) priority should be accorded to what the Government calls the “imperative of the safety and effectiveness of our Armed Forces” (White Paper, para 221), bearing in mind all the time the great variety of circumstances in which they may find themselves, and the consequent need for flexibility and speed of response; and

   (iii) recognition should be given to the fact that these principles collide and that a sensible policy approach would be to seek to balance or reconcile them as far as possible.

14. Now, it may be argued that, in a process of “constitutional renewal”, if we are to take the idea of renewal seriously, the matter should be approached in the first of these ways. As the Government’s proposals stand, it is clear that the second of these ways has dominated the Government’s thinking. This explains the Government’s stated preferences in points (a)–(f) above. Wherever there is a clash between the interests of constitutional accountability to Parliament and those of retaining maximum government flexibility and control, the Government’s current proposals come down uncompromisingly in favour of the latter.

15. By way of contrast, it may be worth sketching what points (a)–(f) might look like if either the first or third approach were to be adopted instead. The first approach, rooted most strongly in constitutional principle, would lead to the following proposals:

   (a) that retrospective parliamentary approval would always be required should prior parliamentary approval not be available;

   (b) that regular parliamentary re-approval would be a routine aspect of the system;

   (c) that Parliament should be recalled if its approval was needed when it was adjourned or dissolved;
(d) that Parliament should have the right to demand any information it required in order for it to have as full knowledge and understanding as possible of what it was being asked by the Government to approve (albeit that there might need to be special provision made for some such information not be released into the public domain);

(e) that while the legal advice of the Attorney General should not normally be disclosed, the decision to send the Armed Forces into conflict overseas is of such importance as to warrant an exception to that general position; and

(f) that the Speaker of the House, or the Chairman of the Liaison Committee (or of the Defence Committee or the Foreign Affairs Committee, etc) should determine matters of timing.

16. Alternatively, were it to be felt that the two approaches should be balanced against one another, the position might look something like this:

(a) retrospective parliamentary approval should in principle be required where prior parliamentary approval is for some reason unavailable; it would surely be only in the most exceptional circumstances that such retrospective approval would be refused—Parliament would not act in this manner unless it had a compelling reason for doing so; if such a compelling reason exists, then it follows that Parliament ought to have the power to intervene;

(b) regular parliamentary re-approval should be a part of the system; the arguments in favour are stronger than those against—in particular it is important to guard against "mission creep" and this would be difficult without some facility for regular re-approval;

(c) Parliament should be recalled if necessary; the Government has offered no strong counter-argument, and none exists;

(d) Parliament should have as much control over the information flow as is possible; disputes between Government and Parliament about access to information could be referred for mediation to the Information Commissioner; peculiarly sensitive information could be communicated to senior parliamentarians on Privy Counsellor terms;

(e) where there was cause for disquiet about the legality of proposed conflict, the Attorney General’s advice to the Government should be disclosed; the decision to deploy the Armed Forces in conflict overseas is of such a magnitude that it trumps otherwise sound arguments in favour of legal confidentiality; and

(f) questions of timing ought to be negotiated between the Prime Minister, the Speaker and senior parliamentarians such as the Chairs of relevant Select Committees.

17. The conclusion is self-evident: whether an approach rooted in constitutional principle is adopted, or whether what I have called a more balanced approach is taken, the shape and the workings of parliamentary involvement in decisions to send the Armed Forces into conflict overseas look very different from the proposals currently offered by the Government. To add a footnote to this point, it is worth noting that a large majority of the respondents to the Government’s consultation exercise on war powers and treaties were in favour of incorporating retrospective approval into the system, of recalling Parliament where necessary, of requiring the Prime Minister to provide much fuller information than the Government is suggesting, and of incorporating regular re-approval in the system so as to guard against mission creep (see Governance of Britain—Analysis of Consultations, Cm 7342–III, paras 309, 315, 321, 335).

18. Even if either of these approaches were to be adopted, however, the reform effected by such a resolution would be relatively modest. It would still not be the case that the executive power to deploy Her Majesty’s Armed Forces in conflict overseas would be “drawn from the people, through Parliament” (cf Green Paper, para 14, cited above). On the contrary, it would remain firmly rooted in the prerogative powers of the Crown. Only statute could effect reform to this, the underlying constitutional problem from which the issues addressed here flow. Subjecting the Government’s prerogative power to wage war to parliamentary oversight is a welcome move, but it is no substitute for the constitutional reform we really need.

11 May 2008
Examination of Witnesses

Witnesses: Ms Elizabeth Wilmshurst, Associate Fellow, Chatham House, and Visiting Professor, University College London, Professor Steven Haines, Professor of Strategy and the Law of Military Operations, Royal Holloway University of London and Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow, examined.

Chairman: Good afternoon, thank you and welcome to the committee. We are grateful to you for having made your time available and, Professor Tomkins, thank you for the paper that you presented in advance. We are conscious of the time restraint and we do apologise that we are a little late in kicking off but we will try and go as expeditiously as possible. Can I call on Lord Williamson to ask the first questions?

Q19 Lord Williamson of Horton: Can, first of all, I ask whether all of you share the view which I think is expressed by Professor Tomkins in his note, which I have read with great interest, that this is more of a tidying up exercise in which they have selected a number of things and a lot of other things are not covered? That is my first general question. As we are having to put a lot of questions together, I will put one general one and then one specific one. That is my general point. Is that what most people think? The second one relates to the ratification of treaties, which is a quite specific point. Do you think that the change which has been made is a really significant one because, of course, it does make it possible for Parliament to stop the ratification of a treaty, although you could represent it for another 21 days, which is a separate point? Do you think that is really significant, and, if so, do you think the conditions surrounding it are damaging? That is to say that, though there is that power, the exceptions and other limitations are important? I am sorry to put so many things in one question, but that is what we have been told to do by the Chairman, and I am doing it.

Ms Wilmshurst: I do not want to talk about the proposals other than treaties and war powers. On treaties, I do not think that what has been done is significant. I do not think it really attacks the main problem, and on war powers I think it is a big first step but the devil is in the detail and, as was pointed out by previous witnesses, most of the exceptions and qualifications take away from the big statement that is being made. On treaties specifically, the proposal is largely presentational, apart from the fact that the Commons can, indeed, stop the Government ratifying a treaty, which is a power unlikely to be used very much. The proposals simply legislate for what is already done under the Ponsonby Rule. I see a real problem about treaties which is that Parliament does not actually scrutinise them, and the provisions in the Bill do not do anything about that. I think it would need a change in the committees, but I know proposals have been looked at in the past to allow more committees to scrutinise treaties and Parliament has not really wanted to do that. So I see the problem as getting Parliament interested in significant treaties and the Bill does not do that.

Professor Haines: I would prefer to keep off the issue of treaties. My particular expertise is in the war powers area. My only comment about the treaty proposals is that, of course, Parliament does review a lot of what goes into treaties in the process of making sure that the legislation is acceptable prior to government ratifying. If it did not do that, we would not be able to meet our international obligations. I have not concentrated very much on the treaty side of this, but for some members of the general public certainly, and I would not suggest members of the committee, the idea is that Parliament currently does not review anything to do with treaties, which I think is quite wrong. I remember some years ago, when I was looking closely at the law of the sea convention, for example, in order for that to be ratified there was a whole raft of legislative action that needed to be taken before government could ratify, and so I am not entirely convinced that everything is all so bad in terms of Parliamentary scrutiny of treaty ratification. On the subject of war powers, which is what I really came here to talk about and feel I have got some expertise in, the proposal in the resolution, in effect, it seems to me, is largely what we already have because, of course, the reference to Parliament formally in accordance with the resolution is de facto already happening and, on that basis, I am reasonably content with it because the issue of the detail, what principally concerned me when the proposal was first put forward some of months ago, was that we did not get into a position where Parliament was actively involved in decision-making during operations. It very much concerned me that we were going to get into that sort of situation at one point. As the debate progressed it became clear that this was not the general feeling, certainly in those sessions of conferences, and so on, that I attended, that this was the way we were going and I think the draft resolution contained in the White Paper is not too far wrong, frankly.

Q20 Chairman: We are going to come back on that a little more. Thank you for your paper as well. I did not say that at the beginning. We are most grateful. Professor Tomkins.

Professor Tomkins: The answer to your first question is, yes, I do agree with what I wrote a couple of days ago. I have not changed my mind in the last couple of days. I say it is a tidying up exercise not in any sense to demean it, there are some very important
Ms Elizabeth Wilmshurst, Professor Steven Haines and Professor Adam Tomkins

Q21 Chairman: On a point of detail, do you think it is right that the Government should be able to introduce a treaty resolution if it has been rejected by the Commons and, if so, how soon or how often?

Professor Tomkins: I do not have a problem with there being more or less endless dialogue or discourse between parliamentarians and members of the Executive with regard to what should happen to a treaty that the Crown has signed but has not yet come into force through ratification. It seems to me that the Executive is likely, if I may put it like this, to be bloody-minded about it only if the Executive has reasonable ground for behaving in this way, and likewise with Parliament, and if there is a genuine disagreement, let that disagreement be had.

Ms Wilmshurst: The other point is that it may be a treaty which is subject to reservations, and the Government may decide to put in reservations after the Commons have said, no, or circumstances may change. Other states may become parties, or a shift in the conditions for membership. One could think of all sorts of reasons why the Government should be able to submit and resubmit.

Q22 Chairman: Do you have a view, if the House of Lords rejects, on a vote, a treaty, how that should be treated?

Ms Wilmshurst: I think it was a quite elegant solution in the suggested provisions, that you then do not go ahead, I think, unless the Commons come in and say, yes. It does give the House of Lords a real voice.

Q23 Lord Maclemman of Rogart: In an earlier session, which I think some of you heard, this afternoon, Mr Peter Riddell said that he did not think (and I paraphrase what he said) that war powers should be placed on a statutory footing because it was necessary to have flexibility, and flexibility seems to be the argument that is being deployed quite generally against putting the prerogative powers on a statutory footing. Professor Tomkins, you have written about this. Do you think that argument holds up?

Professor Tomkins: With respect, no, I do not think it holds up at all. There are lots of examples on the statute book of very general statutory powers which are enjoyed by the Executive—section one of the National Health Service Act is a good example: there shall be a duty on the Secretary of State to (I forget the verb) to provide for a National Health Service. There was a lot of talk in the earlier session about justiciability. That in itself is not a justiciable duty, because it is a duty which is owed by the Secretary of State to the public at large and not to a particular group of identifiable potential claimants, but it is a perfect example, it seems to me, of a statutory duty placed on the Executive which has an appropriate but a very significant amount of flexibility inherent within it. There are lots of different ways in which the resolution versus statute argument with regard to war powers cuts, but I do not think that it cuts in
terms of inflexibility or rigidity. For me, there are two points of constitutional principle at stake in terms of thinking about war powers and legislating on war powers. The first is (and this is an echo of what the Government said in its Green Paper last July) that in constitutional principle it ought to be the case that the Government of the day has only those powers which the people, through their representatives in Parliament, have by legislation conferred upon it either expressly or by necessary implication. That, it seems to me, is a principle of our unwritten constitutional order and has been for some hundreds of years—since the mid-seventeenth century. I would date it—and so, if we are to take that principle seriously, it seems to me to lead to the conclusion that all prerogative powers should be abolished and replaced with statute, and that seems to be the direction in which the Government was proposing to push in its Green Paper last July, which was, given that it was a Government paper, genuinely interesting. This is my second point of principle, I suppose. Even if that approach is disfavoured for some reason, it still seems to me the case that there is a very powerful constitutional argument in favour of subjecting the exercise of non-statutory or of prerogative powers to parliamentary account, and that, it seems to me, could be done equally well by statute or by resolution, and that is what is proposed here, of course. It is not proposed to turn the war power into a statutory power; it is proposed to subject the exercise of the war power to rigorous parliamentary accountability; and there the issue is not whether you do it by statute or whether you do it by resolution, you could equally well do it by either; there the issue is what is the content of the resolution or what is the content of the statute, and that is an issue you might perhaps want to talk about in a few moments.

Q24 Lord Maclennan of Rogart: The issue of the protection of our troops, of our service men serving people, from charges of illegality has been raised. Would they be better protected by a parliamentary convention or by statute?
Ms Wilmshurst: In the Bill which was put forward in the consultation paper there was a specific provision ensuring that the troops themselves would have immunity from prosecution in relation to any doubt or question about whether parliamentary approval had been achieved or not; that is a perfectly possible solution. I was puzzled by Peter Riddell’s insistence on that problem as a reason for not legislating. It is very easy to solve the problem.
Professor Haines: Can I just say that I have always been very bemused by this great concern about our troops being somehow legally responsible for a decision to deploy force overseas, and, obviously, the clear example of this sort of action is the Iraq invasion of four or five years ago. It is not they that bear that responsibility, and the sort of erroneous claims that have been made and, indeed, made by some people who ought really to have known better, that somehow members of our Armed Forces are likely to face prosecution for the fact that the United Kingdom arguably waged an unlawful military operation is simply not true. They do not have that responsibility. The way I describe it, if I am trying to describe it to people, is that the responsibility of soldiers, sailors and airman is largely a tactical responsibility. The responsibility to decide whether or not we deploy armed force is strategic responsibility, and the only people that can be held responsible for decisions at each of those levels are those people that are exercising those responsibilities. It is not any part of a soldier or sailor’s responsibility to exercise his or her judgment over the decision to go to war in the first place. They are, of course, accountable to other things, like the law of armed conflict or international humanitarian law, as we often call it, the Geneva Conventions and so on and so forth, but in terms of the use of force, the decision to use force, this is not something that they are subjected to. If you are focusing in on somebody like, for example, the Chief of Defence Staff, then, clearly, the CDS, in producing his CDS’s directive to mount an operation, has to consider, as does his staff, the legal side, but, as Lord Boyce did in the case of Iraq, that is a responsibility that discharges simply by asking government to confirm the legality of the action; but servicemen, generally speaking, are not responsible for those sorts of decisions.

Q25 Lord Morgan: It seems to me the thrust of what you have said is that we should have a different language, a different way of looking at the constitution, a more formal way, and a constitution that is based less on convention, which may or may not take a written form. It seems to me this underlines many of the points, and a point with which I agree actually, about war-making powers and the Armed Forces in other ways. Are you all really asking for a form of constitution of a kind that we have not had over the centuries and one which would involve active citizenship and formal ways of defining that citizenship? The other thing I would like to ask, slightly more specific, is about the provision of information. The decisions about war-making powers, whether they are taken through convention or through some kind of legislative procedure, depend on correct information being provided, including legal information perhaps from the Attorney General. How does one actually achieve
that and how does one reach the situation whereby
we avoid the ignoring of official information, as I
gather led to the resignation of one of the panel, or
whether, alternatively, as happened in the time of
Suez, that information was mooted and then thrown
away, and in this case the information from the
Attorney General Manningham-Buller, who should
have resigned but in fact became Lord Chancellor,
that in fact information was taken from elsewhere.
Without some kind of legislative formal sanction,
how do we avoid that kind of subterfuge?

Professor Tomkins: In terms of your first question
about the form of the constitution, I do not think I
am advocating a new form of the constitution. No, I
think I am advocating a strengthening of a very old
form of the constitution. I think the British
constitution is a parliamentary constitution. We
have, in a sense, two sovereign authorities in the
British constitutional order, we have the Crown and
we have Parliament, and the grand narrative of
British constitutional history is of a tussle of power
between the authorities of the Crown and the
authorities of Parliament. That is what reform of the
prerogative is about. It is about Parliament trying to
reclaim, or perhaps to claim for the first time,
ownership of these sorts of powers. It does seem to
me that a resolution as opposed to a statute is a
perfectly sensible way of proceeding here, and we
have got a good relatively recent precedent—lawyers,
of course, love precedents—in the resolutions that
both Houses passed just before the 1997 General
Election on ministerial responsibility and
accountability to Parliament, which of course had
been a matter of huge controversy during John
Major’s time in office, with several ministers trying
deliberately to rewrite the rule book that governed
them because they could, because the rule book that
governed them was an internal government
document then called Questions of Procedure for
Ministers, now called The Ministerial Code; and after
the Scott Report, the Public Service Committee of the
House of Commons, as it then was, chaired by Giles
Radice at that time, tried to take ownership of these
questions and say: “Look, these are constitutional
obligations of accountability that are owed to
Parliament and we, Parliament, will take ownership
of the rule book and we will say these are the terms
and conditions on which ministerial responsibility
will now be understood”, and this was then written
into the constitution in the form of the passing of
these two parliamentary resolutions which are now in
paragraph one of The Ministerial Code, but no longer
for the Government itself to change when it suits the
Government of the day because of the exigencies of
any particular political scandal. The form of the
constitution that I am advocating in terms of reform
of the prerogative is a form that follows on from this
history, it seems to me, a history of Parliament
claiming for itself the constitutional responsibility,
the awesome constitutional responsibility, of holding
the Government to account for what it does and for
what it proposes to do. So I do not see it as a new
form of constitution or necessarily as having very
much to do with active citizenship. I think it has at lot
to do with active parliamentarians though. I suppose,
if we were to pan back a little bit and to think about
the vast array of constitutional reform that we have
witnessed in Britain in the last ten or 11 years, it
might be that we can say this about it. There are only
really two great institutions that we have invented to
which the exercise of government power can be held
to account—there is politics and there is law—and
what we have done in the last ten years in the United
Kingdom is greatly to increase the ability of the law,
in particular the ability of the courts, to hold
government to account. That is the most significant
consequence, for example, and it is just one example,
of the Human Rights Act. What we have not done
very much of in the constitutional reform that we
have seen in the last decade is to improve the way in
which the institutions of politics—and, in particular,
Parliament—can hold government to account.
Again, that is why I thought that last summer’s
Green Paper was so genuinely interesting, because it
seemed to be recognising that and wanting to do
something about it. On your more detailed point
about information, this is not a new problem.
Parliament wrestles all the time, on a daily basis, with
government about access to information; it is what
Parliamentary questions are all about. To go back to
the Scott Report, which has been mentioned several
times this afternoon, a big part of the argument about
the Scott Report was all about the quality of
information that ministers were prepared to give in
to answers to Parliamentary questions. Parliament, it
seems to me, already has a whole range of offices that
enable it to negotiate with the government about the
provision of information; you have the Table Office,
you have the Speaker’s Office and now, of course,
also you have the Information Commissioner. It
would surprise me (and I am not a freedom of
information expert) if between those institutions
Parliament could not figure out a way of getting
access to the information it needed in order to make a
full and informed vote on whether to send troops into
conflict overseas.

Chairman: Could I say, I do apologise to witnesses
but I know that the Committee has to stop at about
3.30 because there is a Statement in the Commons. So
what we would like to do in the last ten minutes is to
look specifically at some of the issues relating to the
war powers. I know we have strayed into them
already, but I have Lord Maclean, Lord Norton,
Lord Campbell and Lord Armstrong. I wonder if
they could be as brief as possible.
Q26 Lord Norton of Louth: It really follows up on what Professor Tomkins has said; he has indicated that it does not matter whether it is statute or resolution in terms of stipulating the right relationship between Parliament and government when it comes to the Armed Forces. In terms of the resolution, the appendix to the Government’s paper provides us with a template (in the light of what Professor Tomkins has said I address this as well to Professor Haines), if you had to write the resolution, how much different would it be from what is actually in Annex A? I think Professor Haines said it would relate particularly to definitions within that. Is there anything that should not be there or, perhaps, more importantly, that is not there?

Professor Tomkins: I took up a lot of time with my last answer. Maybe I can refer you, Lord Norton, to my written evidence, because I actually address that question in paragraphs 13 to 16. I would prefer that the constitutional principles, I think, should inform this debate rather than in the way that it is currently drafted, with those points (a) to (f) that are listed.

Q27 Lord Norton of Louth: It actually fundamentally changes it. So, in fact, you want something that is very different, if you pursue what you identify there.

Professor Tomkins: It is different in the detail. The headline remains the same. The headline is that it remains a prerogative power, exercisable by Her Majesty’s Ministers but they are accountable for the exercise of it to Parliament. I suppose what I am trying to do is to beef up what the accountability amounts to. So, yes, there should be retrospective approval if there is not prior approval; yes, there should be regular Parliamentary re-approval; yes, there should be a recall of Parliament if necessary—it should not be for the Prime Minister uniquely to determine what information is given to Parliament. I agree with the points that have been made earlier about legal advice from the Attorney General being disclosed in these sorts of questions, and the questions of the timing, again, should not be uniquely for the Prime Minister.

Professor Haines: I am reasonably happy with the resolution; I think, in a sense, it is telling us what we already know and what we already do. I was slightly concerned when I saw the consultative paper from the Ministry of Justice last November about reliance on the law of armed conflict as a means of defining what sort of military operation we were going to be seeking Parliamentary approval for. I am sort of persuaded, I think, that what we have got in the resolution is okay. The difficulty for me was at the other end of the scale; in other words, what I was saying was that I did not want to see Parliamentary involvement in the decision-making around all deployments of military force. I am very happy indeed (and, indeed, it already happens, does it not, with Parliamentary debates and votes in the case of the Iraq war) over major combat deployments along the lines of the Falklands, the two Gulf Wars and Kosovo. This is already happening, and I do not have a problem with it. Of course, in those circumstances we are talking about the law of armed conflict applying. I think that is okay. The other emergency deployments—the sort of thing that I was thinking of, like a non-combat evacuation operation, for example—would be covered in the resolution by the emergency condition in paragraph whatever it is (3.2). “Approval is not required for a conflict decision if the emergency condition or the security condition is met”, and the emergency condition is that a conflict decision is necessary for dealing with an emergency. A non-combat evacuation operation, for example, would be precisely that. So that resolves that. Can I just say something, though, since I am speaking, about this business of accountability? The point that I made to the consultative process back in January (and I copied that to the Committee in lieu of my proper submission later on) is that I believe in some ways we have got it wrong. If we are trying to restrain government in any way I think the answer is post-deployment scrutiny of the information. The information that is going to be provided by the Prime Minister, Government and so on in providing the backdrop to any decision is not going to be—this resolution would not have had any impact, for example, on the decision over Iraq five years ago; this resolution, if it had been in place then, would not have had an impact on that Parliamentary vote. The problem that I have, of course, with that vote was that I felt that the decision to go to war was wrong, and it was wrong for a variety of reasons, strategic as well as legal, but the legal one, in particular, I think is very important. I think it is important that Parliament has the ability to scrutinise very rigorously the legal basis for an operation. If that operation is determined to be unlawful then there should be steps beyond simply Parliamentary scrutiny, which I have mentioned in my submission. That is the end that I would like to see tightening up—the scrutiny process once the decision has been made and the deployment has been completed.

Ms Wilmshurst: If I can just add: on the question of timing—when should the Prime Minister go to Parliament to ask for approval after taking the decision—there is nothing about that in the resolution. There is the question of information—it is left entirely to the Prime Minister without any benchmarks. There is the question of re-approval if the mandate had been changed—it is left entirely, all of this, to the Prime Minister. The only way that I could see to solve these real difficulties would be to
strengthen Committees’ abilities to discuss and question the Prime Minister. I do not actually agree that the Freedom of Information Act is going to help us here; I think it really has to be Parliament, and, it is necessary to put into the resolution some benchmarks as to what the Prime Minister should consider in giving this information. As to the legal advice, a previous witness stated that the Attorney General ought to give his advice and it ought to be available to Parliament. What sort of advice would an Attorney General write if he knew it was going to be available to Parliament? What sort of advice would he have written on Iraq? He would have written only the positive parts; he would not have written: “No, Prime Minister, these are my qualifications...”; he would have given that orally to the Prime Minister. I think it has to be for Parliament to say: “We will call in the Attorney General and question him, and call in the Prime Minister, or whoever, and say: ‘This information—we are not sure it is right’”, and do that in a Committee structure, and it may be necessary to have information before that Committee not available to the rest of the House.

Professor Tomkins: There is just one tiny point: would there be anything to stop Parliament from seeking its own legal advice?

Q28 Lord Mackinnon of Rogart: Is there not a difficulty with a resolution approach that that is something which can be altered in the light of the circumstances of the day, whereas a statute has got the force that it is there and it is the backdrop against which the executive has to take its decision.

Ms Wilmshurst: It is for that reason that I would have a preference for a statute, yes.

Q29 Lord Mackinnon of Rogart: Professor Tomkins has six points he has made in paragraph 12 of his paper, all of which ought to be in the resolution, if there is a resolution. They would equally be capable of being translated into a statute position.

Professor Tomkins: They would. As for questions of content it does not matter whether it is a resolution or a statute; you can have the same language in either a resolution or in a statute.

Chairman: I wonder if Lord Armstrong and Lord Campbell will forgive me, because you were to come in, but I am conscious of my MP colleagues. Are they able to stay for five minutes? With some reluctance, I can see!

Mr Chope: It is only that, as you know, Chairman, if you are not in for the beginning of the Statement you rule out the opportunity of asking any questions.

Q30 Chairman: I think, probably, we ought to call a halt. I do apologise to the witnesses because this happens in Parliament. Can we thank you very much for coming, and can we add that if there is anything we wish to ask you—and you have been already very kind—you will be able to respond to the questions we did not get round to?

Professor Haines: Certainly, yes.

Chairman: Thank you very much indeed.
WEDNESDAY 14 MAY 2008

Michael Jabez Foster, in the Chair

Present
Armstrong of Ilminster, L
Campbell of Alloway, L
Hart of Chilton, L
Maclellan of Rogart, L
Morgan, L
Norton of Louth, L
Tyler, L
Williamson of Horton, L

Mr Christopher Chope
Martin Linton
Ian Lucas
Fiona Mactaggart
Emily Thornberry
Sir George Young

Examination of Witnesses

Witnesses: Admiral Lord Boyce GCB OBE DL, Former Chief of the Defence Staff, a Member of the House of Lords, Field Marshal Lord Bramall KG GCB OBE MC, Former Chief of the Defence Staff, a Member of the House of Lords and Marshal of the Royal Air Force Lord Craig of Radley GCB OBE MA DSC, Former Chief of the Defence Staff, a Member of the House of Lords, gave evidence.

Q31 Chairman: Welcome and thank you very much indeed for coming to meet our committee on this pre-legislative scrutiny exercise. We apologise, first of all, for keeping you, but I am sure that you are all aware of the troubles that the House of Commons have in arranging votes. We think there will be no further votes during the next 45 minutes, and we also think it is unlikely there will be any Lords votes, but if there are then you will probably need to leave as well. Thank you very much indeed for coming. Can I kick off by asking, do you think there is a case for reform of the prerogative power to engage in armed conflict and, if so, what change, if any, would you wish to see in the current arrangements?

Lord Craig of Radley: I do not know whether hon members and noble lords have had an opportunity to read my short speech in the House of Lords.

Q32 Chairman: We have.

Lord Craig of Radley: I do not know whether you want those who are in favour of the status quo to speak first or the other way round?

Lord Bramall: You are going to get three completely different views.

Chairman: A “yes”, a “no” and a “maybe”. Lord Bramall, perhaps you could start.

Lord Bramall: I do not know whether hon members and noble lords have had an opportunity to read my short speech in the House of Lords.

Q33 Chairman: We have.

Lord Bramall: I tried very hard, on my part, to put the case of why I thought it was necessary for Parliament to be much more involved than they are constitutionally at the moment, and also why I thought it was possible to bring this about despite the fact that there were, of course, lots of complications in all this which might need various caveats and so on; but, in general terms, I thought it was absolutely unthinkable that in this day and age our democratic government should commit armed forces to a substantial war without the prior and manifest assent of Parliament. I based it on that and then I gave my reasons of why I thought this was still possible, although in certain circumstances, of course, it would be difficult. The question of conflict: I made a clear distinction between actual conflict, in which you commit armed forces to action, and deployment of armed forces, some of them in accordance with treaty obligations, and possibly in a deterrent posture, to try to put off and prevent armed conflict happening, and I felt that deployment must remain a matter for the Executive and the chain of command but, at the point that they decided to commit forces, then I thought that it was absolutely vital that Parliament was asked for its final authority. What constitutes conflict, of course, is of course a very, very complicated one. It is very easy to pick out ones which are and which are not. In my opinion, in my experience, Suez, going back to the fifties, certainly was armed conflict, the Falklands was armed conflict, the first Gulf War, the Iraq War and, of course, Korea before that, but you can think of other areas where we use military force which does not quite come into that same category and, therefore, has got to be handled by the Executive as a matter of urgency, and possibly in some secrecy, and then Parliament informed afterwards.

Q34 Chairman: Lord Craig.

Lord Craig of Radley: Thank you, Chairman. May I start by saying I am very supportive of the concept of parliamentary support for whatever it is the Armed Forces are being expected to do. Where I part company somewhat from what is being proposed is that Parliament itself should be an executive body and make a decision. The Armed Forces are, obviously, trained to respond to direct orders and expect to get clear directions. I think there is a number of stumbling blocks in the present proposals. The first I have already mentioned, Parliament being
a legislative body, because that in turn could lead to
difficulties. If the whole idea of bringing Parliament
in is to give confidence to the troops and everybody
involved that they have got parliamentary support, if
Parliament takes a vote on it and it is a hung
Parliament or a narrow majority is achieved, that I
think raises the question as to whether that is more
encouraging to the opposition than it is to our own
forces. Another stumbling block, I think, is that the
description of “armed conflict” is vague. As has
already been mentioned, some deployments are
designed to deter conflict and to deal with preventing
the escalation of what proves or might prove to be
a small problem, but that may or may not
succeed, and you will only really know with hindsight
whether that has turned into an armed conflict. We
are not clear, at least I am not clear, as to whether we
are talking about boots on the ground or the
employment of air or maritime power; indeed, the
nuclear deterrent is not brought into this discussion
either. I myself assume that is outside any of this
discussion, but on a number of occasions air or
maritime forces could be employed. Are they going to
be also put through this Parliamentary approval
process? I think that has to be much clearer than it is
at present. Much of this, I think, has been sparked by
the last Iraq war, which was a premeditated,
pre-emptive invasion of a foreign sovereign state. I hope
that is not going to be a regular feature of our
activities, and I think we must be careful not to
generalise from one particular. Indeed, I do not think
that the Armed Forces are in a very fit state, now that
they are so fully committed, to be involved in any
further pre-emptive invasion. Then problems of what
I call mission creep: does Parliament get involved in
a regular re-approval process? By mission creep I
mean if there is a need to increase the size or numbers
of forces deployed or the areas to which they are
deployed. So that is not dealt with. Nor is
withdrawal. Nor is, indeed, surrender. Are we going
to put all of those also under the control of
parliamentary decision authority? I am raising these
not necessarily to try and suggest the answers but just
to try and underline my point that there are a large
number of issues which are not directly addressed in
the draft resolution. We are all agreed, I think, that
much would have to remain with the Prime Minister
anyway. If there was a security situation or an
emergency situation, then the Prime Minister could
exercise, in effect, the Royal Prerogative, and those
situations are for himself to decide. So it seems to me
that much of what might happen would still remain
within the compass of the Royal Prerogative, and,
indeed, as I follow the suggestions, there would be no
actual question then of parliamentary approval
having to be sought post event. You could have an
argument about that, but, generally, I think it is
recognised that that could cause even more trouble
than any other arrangement. So I am unhappy with
the drafting of the resolution, which I think is a
fudge. Maybe I am speaking out of court now and
being critical about something in the other place from
my point of view, but it seems to me we are talking
about a conflict decision. As I understand it, if
Parliament is to be involved and to be the decider,
then it is a conflict proposal by the Prime Minister
and the Government to Parliament, so I think the
wording is misleading as it presently is.

Lord Bramall: Chairman, before you ask Lord Boyce,
may I make one point which I think will be very
helpful to my Lords and hon members. Each one of
the chiefs of staff here was personally involved in a
conflict: I was chief of staff during the Falklands
campaign, so at the end of the war there, David
Craig, of course, was for the first Gulf War and the
recapture of Kuwait and Lord Boyce was for the Iraq
War. So we have each had personal experience of
actually committing troops to a war-like situation. I
thought that might be useful.

Q35 Chairman: That is extremely useful. Thank you.
Lord Boyce.
Lord Boyce: Thank you very much indeed, Chairman.
I think one needs to be very careful from the outset,
although it may not be the consideration of this
committee, to realise that there is no operational
added value to what has been proposed here at all. In
fact, I see it being fairly negative, particularly for
those units which are deployed. We are not, as I
understand it, now looking for approval for
deployment, which was the original concept, but
approval for conflict or, rather, to enter into conflict.
If we take those units which deploy on deterrent
missions, on missions which may be, for example,
non-combatant evacuation operations, peace-
keeping missions, and so forth, which can slide very
quickly to where the use of armed force is required,
the lack of any sort of definition of what conflict or
use of armed force is is really going to make it
extremely difficult for commanders to understand
how to carry out their business properly, let alone the
delay that is likely to be incurred waiting for this
approval process to grind its way through. I
know that in the resolution, under the paragraph called
“Exceptions for requirement for approval”, there are
various let-out clauses there which will no doubt
help, but, frankly, I can see everything coming under
those let-out clauses come the time, unless there is a
very long build up where conflict, at the end of the
day, is likely to happen. I have a real concern,
particularly if, rather than notifying the House and
getting the support of the House in general terms,
where the approval of the House is in the decision chain, the House of Lords is going to be involved as well. If that actually happens, at the appropriate time must we wait until the House of Lords is again sitting before they make a decision, or make a comment, rather than approval? I can see operational command being very frustrated. All my experience of watching countries who have this type of process is that they are operationally ineffectual.

Q36 Lord Williamson of Horton: What is proposed, of course, is a parliamentary resolution. You have already indicated that there is something about the resolution you do not like, but as far as the draft legislation is concerned, it is still under the Royal Prerogative; that is to say it is not a statutory solution, it is a resolution of Parliament. If we are going in this direction, do you think it is reasonable to act by a resolution rather than the statutory solution which imposes obligations in relation to Parliament?

Lord Boyce: I am afraid you would have to define for me what the niceties of that are. I am not a sufficiently good expert in this area, but if there is a resolution which has been presumably approved by the House as a conceptual idea, which is what I imagine is what is going to happen here, and if it says the approval of House should be obtained before a conflict decision is made, I am afraid I cannot see the distinction between having a legislative piece of work or a resolution piece of work if the approval of the House is required before conflict is engaged.

Q37 Chairman: Would you like to comment on that, Lord Bramall?

Lord Bramall: Let us just take one which is simple. I think we are all agreed that there are certain deployments, certain special forces actions, such as the release of hostages in Sierra Leone, where secrecy is all important, and the Executive has got to be able to take a decision on that and refer afterwards to Parliament what it has done; but let us just take the Falklands, which I knew intimately. When the Falklands broke very unexpectedly, which mystified the Foreign Office and mystified a lot of other people, the Royal Navy were able to react because they had a taskforce off Gibraltar and were able to inform the Prime Minister that they could get a taskforce down to the South Atlantic. Even with the best will in the world wanting to solve this by diplomatic means, you were not going to get very far if you had absolutely no muscle nearer than 8,000 miles away, and so the deployment of the task force was something which, I think, was absolutely the appropriate and effective thing to do, but after that the Prime Minister would have had two opportunities to refer to Parliament to get their authority and their backing.

Q38 Ian Lucas: I was going to ask Lord Craig and Lord Boyce in particular, do you not think that in the modern media age it is extremely difficult to use war as an instrument of policy without democratic consent behind it?
Lord Boyce: I think it is, absolutely so. Of course, I have said this before. I think more and more—

Q39 Ian Lucas: I know you agree with me. It is the other two.

Lord Boyce: I am still waiting for someone to give me a definition of what is actually meant by “use of force”, because if you are talking about sending out the size of force we sent to Iraq, that clearly falls into one category. If you are talking about some of the things, for example, what we did in Macedonia in 2003 or Sierra Leone in the late nineties, that is a different scale; or, indeed, something even smaller still.

Q40 Ian Lucas: If I can use Lord Bramall’s definition: deployment of troops on the ground, for example, in Sierra Leone, for example in Iraq.

Lord Boyce: What about the International Security Assistance Force to Afghanistan in 2002? In the definition of the resolution, as currently couched, no parliamentary approval of one sort or another would be required because it was not going to be for the use of force.

Q41 Ian Lucas: Can we not get bogged down in the wording of the resolution, but can we look at the principle of whether, before committing troops, for example in Iraq or in the Falklands, it is not beneficial to have an expression through Parliament of popular support for military action?

Lord Craig of Radley: If you are talking about obtaining parliamentary support or national support, through the media or any of those things, for what the Armed Forces are going to be required to do as a result of being ordered to go into this conflict situation, I am all for that. My difficulty is, and maybe it is somewhat technical, but I do not think that Parliament is an executive body, it is a legislative body. Parliamentary support is essential if the Executive is to carry the country and give the Armed Forces confidence that what they are being asked to do is right and sensible, but that is seeking support, and there are obvious ways, which obviously you know, how you can do that, but I baulk at the concept of the Prime Minister saying, “May I do this, oh Parliament, or Commons?” and the Commons saying, “Yes, get on with it”, or, “No, we do not like it. We think you ought to do something else”. Then where are we?

Lord Boyce: Chairman, if I may add to that, we were painstaking to make sure that Parliament was kept informed of what was going on in the various conflicts in which I was involved. There were regular statements to the House, often in advance of something actually happening rather than retrospectively, and I believe that is really good and I certainly agree that the support of the House, both Houses, and the support of the country, is very important, and so I would absolutely agree with that; but there were mechanisms, after a statement by a minister in the House, presumably for the House to make a motion for there to be debate on the subject if the House was sufficiently troubled. I could give no instances, other than special forces or very secret missions, where the House was not kept apprised of what the Armed Forces were doing on deployment, let alone use of force.

Q42 Chairman: Lord Bramall, did you have something to add to that?

Lord Bramall: No. I think not only is it the support of Parliament, and I know that you can technically argue that Parliament is the supreme authority, it gives the campaign, if you like, a legality, which is very important to have these days. You may say you needed some sort of international legality as well, but the international law is much more confusing and much more susceptible to different interpretations; but if you have got Parliament behind the country, every soldier, every sailor, every airman knows that the orders he is getting are absolutely cast iron. He may not particularly like what he has to do, but he knows that there is a legality there, which does not exist if Parliament has not actually given its trump.

Q43 Lord Norton of Louth: There are clearly three choices. One is statute, which would presumably hold out the prospect of the issue being justiciable and an element of inflexibility; a resolution, which arguably would give greater clarity with greater flexibility and the status quo where Parliament could, if it wished, force a vote anyway, and over time it may develop into a convention. The Government’s preferred option in the White Paper clearly is to go down the route of a resolution, and you have indicated differences of views as to the utility or the appropriateness of that particular approach. If we take it that is the preferred option, what are the problems with the resolution as it appears as an appendix to the White Paper? Lord Craig, you have indicated what you see as flaws with the resolution as drafted. If you had the opportunity to re-write the resolution, what would be the principal changes? Clearly there is the definition and, presumably, other changes as well.

Lord Boyce: I support what Lord Craig is saying really: we are looking for words of support rather than actually being part of the approval process.

Lord Craig of Radley: If you have got the wording in front of you, Chairman, the first clause, rather than talking about “the approval of this House should be
obtained for a conflict decision”, because that implies that the decision has been taken, I think it should be “for a conflict proposal”, obviously being made by the Prime Minister or the Government, and I think from there on, if you remove “decision” and put in “proposal” or refer to the use of armed forces, the proposal to deploy armed forces or commitment to conflict. Maybe I am barking up the wrong tree here, but in my simple way of thinking as a military man, a decision is made by the commander or the chap in ultimate charge. If you are going to go down this route, it is apparent it is going to be Parliament who is going to be the deciding authority with the final decision. Up until then everything is a proposal. The Government may want to do it, but they can do no more if this is the arrangement. They propose that they send the forces.

Lord Bramall: I think, Chairman, you have either got to accept the primacy of Parliament or not. To someone who says, let us just get the support of Parliament, if Parliament is not the top person, the Prime Minister remains responsible and, if he does not get the support of Parliament, presumably he can then go ahead and do the operation anyhow. If, on the other hand, Parliament has primacy and does not get the support, then, of course, he cannot carry out the operation, and I think this is the important thing. You have got to weigh up all things. I think the hon member mentioned it there. In this day and age, unless the conditions on which you fight a war are pretty clear-cut, not only the old principles that were just war, but self-defence, one questions whether they really remain, in the modern world, a proper instrument of policy. Therefore, the fact that you make it slightly more difficult for yourself to slide into warfare I find intensely reassuring.

Q44 Martin Linton: I have two short questions: one for Lord Bramall and one for Lord Craig. Lord Bramall, are you saying that a Parliamentary vote would confer legality in the sense that it would protect the troops from having to appear at the International Court of Justice. In other words, would a parliamentary vote override any advice given by international lawyers?

Lord Bramall: This is a very, very difficult question, but as a soldier, as a military man, while international lawyers are arguing it, I would be 100 per cent happy that I was in fact doing a just thing if Parliament was behind me. I would be less happy, particularly if there were some problems in the international field, if Parliament was not behind me. Suez is a case in point.

Q45 Martin Linton: Thank you for that answer. I think that is one of the issues that we have to resolve. The other is to Lord Craig, which is really whether Parliament is an executive or a legislative body. In a sense, a lot of what we are discussing on this committee will revolve around that question because there are aspects, senses in which Parliament is an executive body. We approve budget measures, we appoint some people and one could argue, equally, that the executive power of the Government derives from Parliament’s executive power. Would that change your view at all?

Lord Craig of Radley: I go back to the simple separating of powers, the Judiciary, the Legislature and the Executive.

Q46 Martin Linton: Which is the Executive?

Lord Craig of Radley: The Government of the day are the Executive in my language.

Q47 Martin Linton: Okay; I just wanted to understand the basis on which you were saying that.

Lord Craig of Radley: I accept that I may not be entirely down the middle there, but by and large this is my approach to this, and I am uncomfortable with the concept of the legislative body, albeit that it has some executive part, although it does much of it on the supply side, but for the rest it is Parliament, not just the Commons. So there are only some areas even within your description where it could be deemed executive.

Q48 Martin Linton: Unless the executive power of the Government derives from the executive power of Parliament. Maybe that is a question that the committee should discuss itself.

Lord Craig of Radley: I think that is one for the constitution lawyers. I am no constitution lawyer.

Q49 Chairman: One of the problems you seem to be identifying is that of definitions. We are conscious that the definition of “conflict decision” is such decision as the Government takes, which is a little bit difficult to understand, and then “UK force” also seems to be a bit vague. What do you say about those definitions? Could you offer us any improvements on them?

Lord Bramall: Improvement on what?

Q50 Chairman: On conflict decision. Do you think that the definition of “conflict decision” simply being a decision of Her Majesty’s Government to authorise the use of force, which is the suggestion in the annex, is a sufficient definition for you? I suppose it depends where you come from to begin with.

Lord Bramall: At the moment, it is the Royal Prerogative, which, of course, means the Prime Minister of the day. I suggest that if it is a major operation there is another hurdle that he should have
to cross, and that is to get Parliamentary approval. Take, for instance, the Iraq War, very interesting, at some stage, and it would be entirely up to the Prime Minister, he would put the thing to Parliament, as, indeed, he did. Some would say it was put on the wrong premise, but he put it to Parliament, and so you cannot complain about that. Parliament could have said, “No, you cannot use force”, in which case he would not have been able to do it under the new system that, I believe, is possible—it would not have made him very happy—or they might have said, “You can only use force if you get a clear-cut, new United Nations resolution”, in which case he would have had to amend it to that. I believe that if you keep the Royal Prerogative it would have to have the qualification that if he wanted to commit forces into a sizable military conflict—and, I agree, it is very difficult to put a definition on exact size, but you know the ones that are and you know the ones that are not pretty instinctively—he would then have to the get approval of Parliament.

Lord Craig of Radley: I recognise the clear difficulties which you must have, and I think everybody has, trying to decide what is “armed conflict”. The earlier papers on it had some difficulty with it, and I have not myself been able to think about a helpful or satisfactory answer to that. Also, when it comes to what we are talking about deploying, what the armed forces is, there again, for the purpose of a resolution I think you have got to be extremely vague and just talk about armed forces, but I think you ought to think in terms of whether this is the right way to be going, and maybe you will accept that it is, but armed forces is as long as your arm. Is it the boots on the ground, is it aircraft, is it maritime and what numbers of different theatres, because you are adding to something that has already happened or is happening maybe elsewhere? It may be extremely difficult for the Armed Forces to come up with another lot of forces, and that might be a view which Parliament, if it was the Executive, would want to take about this. So there are other issues in all of this. I am afraid, for the purposes of a resolution, you have got to leave it pretty loose, and I cannot help you other than to say do not do it.

Q51 Lord Norton of Louth: If we come to process, following Lord Bramall’s point that parliamentary approval should be given, the way the resolution is drafted there is a central role for the House of Commons and potentially a role for the House of Lords, that it may be requested for an opinion. Do you think that is appropriate or should the House of Lords have a more central role in discussing what decision should be made?

Lord Bramall: I believe most of us feel that the House of Lords should not be brought into the decision-making process but it should have an opportunity to discuss it before the House of Commons does because some of the views expressed might be helpful, but I think it remains in an advisory capacity.

Q52 Lord Norton of Louth: The way it is drafted it says the Commons may invite, basically, the opinion of the Lords. Would your view be that it should read “shall invite the opinion of the Lords”?

Lord Craig of Radley: I think there is a caveat here. If we are going to go through a due process where the Lords is called upon to have a debate about it and then there has got to be some significant period of days, hours, or something, before the Commons can get cracking and decide what to do, that worries me in the practical sense of what are the troops doing or not doing or being expected to do during this Parliamentary process? I am all in favour that the House of Lords with its expertise, not just military but other expertise, would be valuable, but there is a further complication in terms of getting a quick decision.

Lord Boyce: I do not think, Chairman, that the House or Lords should be involved in the decision process, but the way the resolution is currently drafted absolutely breeds delay, which is already pretty bad anyway. If there is going to be a debate in the House of Commons and then a message is sent to the House of Lords asking for its opinion, and then we wait for the House of Lords to sit, if it happens on a Friday it is the following Monday, you have probably lost a week and you have probably lost your war as well.

Q53 Lord Norton of Louth: There are two issues. One is, if you like, the principle of inviting the opinion of the Lords and then process could be a problem with the way this resolution is drawn up. There is no reason why it could not automatically invite the Lords’ opinion straightaway and the Commons debate the issue immediately after they have heard from the Lords. I do not quite see why there needs to be any delay.

Lord Boyce: It would seem more sensible that way round.

Q54 Lord Hart of Chilton: By way of explanation, I understand the point you make about Parliament being supreme. If it is put to the vote and there is a mere majority of one, how do you then feel about that?

Lord Bramall: Because there is a political majority of one, that does not mean, of course, that Parliament will not vote for the sensible thing. Wars come in two categories: there are wars of survival and wars of
choice. Wars of survival. I do not think you would have any trouble with Parliament whatever the majority was. This would not be fought on party lines, or I hope it would not be. Wars of choice: if the facts are there, the impetuous is there, the need is there, the Prime Minister is able to put it across properly, there is absolutely no reason, even with a majority of one. After all, the country has often been governed by a majority of one—not often but it has been in the past—and, I think, going to war, there is no reason why they could not come to the right decision.

Q55 Lord Hart of Chilton: But going to war on a majority of one—

Lord Bramall: I see what you mean. You mean that they did not vote for it or against it, they actually split down the middle.

Lord Hart of Chilton: Yes.

Q56 Chairman: Lord Craig, you no doubt have a view on that.

Lord Craig of Radley: Yes. I think I may be touched on it earlier. Bearing in mind that one of the reasons why I am led to believe this is all a good idea is that it would give the troops—those are the people we have to think about—a feeling of confidence that both Parliament and, through Parliament or the Commons, the country was behind what they were going to do and are being asked to do. I do not feel at all confident that a majority of one would transmit that sense of confidence. I think the confidence would be transmitted to the opposition or the enemy rather than to our own troops. So it is another hurdle, as far as I am concerned, in this whole process.

Lord Bramall: This would put the whole onus back on to the Prime Minister. Technically he would be within his rights to go ahead with it, but he would have to think whether he was himself taking the right decision in view of that.

Chairman: That is a very good point at which to bring in Lord Morgan, who is going to ask some questions about the Prime Minister’s discretion and that area of the proposals.

Q57 Lord Morgan: Thank you, Chairman. It does bear on what we have been discussing. It seems to me, whatever the existing role of Parliament, it depends on satisfactory information being provided, and in the speeches and the debates which, I think, many of us took part in in the Lords, it was said, firstly, that it was very difficult to form a decision because Parliament would not have adequate information. On the other hand, there were also suggestions it was undesirable of Parliament, it was a circular argument really that it could be dangerous to security if Parliament got this information, and it seems to me that something should be done about this. I invite the panel’s view, including legal information, in view of the totally unsatisfactory situation during the Iraq War. I was wondering if you could kindly give your thoughts on that. While we were told initially that Iraq is a sort of special case and it should not be made the norm, it is a pretty important special case and one that will affect this country for generations to come. Bearing on that, the suggestion in the Government’s White Paper is that information should be determined by the Prime Minister. In other words, we, again, are circular. This is purportedly a White Paper to cut back the Royal Prerogative and, in fact, it is bringing us back exactly to the status quo. The Prime Minister will decide about the objectives, locations and legal matters. I was wondering if the panel could kindly suggest how we try to provide something new, some new status and authority in what we agree ought to be a new situation.

Lord Boyce: I think there are two answers that need to be looked at here. One is whether you go to engage in armed conflict or not, and I intend to keep returning to this business about what are you talking about, how big a thing are you talking about. The second is, what is the nature of the forces are you going to provide? As far as the latter is concerned, I have a real fear that Parliament will want to get engaged on whether it should be 1,000 people or 2,000 people or one ship or two ships or three aeroplanes or four, and that is something on which, on the whole, I do not think Parliament is competent to judge. They will have to take the advice through the Prime Minister and what he has been told by the Ministry of Defence and his chiefs of staff. The thought of having a debate about whether it should be 1,000 people or 2,000 people to go and solve the problem is something which is of real concern. So far as whether one should go to get engaged in the armed conflict in the first place, that is one which can be and should be perhaps properly debated, provided Parliament can be given the right amount of information on which to make a judgment. Some of that information, though, will be secret, and I do not know how Parliament is going to handle that in the House, in the chamber, unless it has some special committee, whether it is the Privy Council or whether it is another committee which takes a view on the secret information and, through a Chairman of that committee, the House is told, “Yes, I think this is a fair assessment of the situation in broad terms” which does not compromise operational security or intelligence security or anything else.

Lord Bramall: On the first point Lord Boyce has made, of course, I am entirely in agreement. Once it is decided that you are entering armed conflict, it is
then a matter for the Executive and the chain of command to decide how this is done, and the forces, and so on, but on this very important question of information, you do not go to war, you hope you do not go to war, out of the blue. You go to war because the information tells you that it is the right thing to do and you will benefit from doing it because the alternative would be so much worse. Therefore, Parliament, presumably, has got to receive the same information that the Cabinet would have to make the decision to go to war or not to go to war, as the question may be. There is this question of secrecy. Whether there would have to be some filter committee, I do not know, but, in general terms, they would have to have enough to make the decision to see the war in the same way as the Prime Minister and the Cabinet would see it.

Lord Craig of Radley: What would be very important in this area, from the point of view of the troops, is that they did not feel that their security was being jeopardised by release of information which could be of value to the enemy. That seems to be the absolutely guiding principle in all this. Whether the Commons could meet in camera or something, I do not know, but I would be very against it because I think, in this modern day of communications, even that might not be secure.

Lord Bramall: Chairman, on the Iraq War, information obviously was—. If you take both the Falklands and the first Gulf War, the information was obvious. The thing that made you go to war was that a country had pinched something which was your sovereign territory with your national kin without any authority to do so, and exactly the same under international law on the question of Kuwait. That was quite simple. There was no need for any very subtle intelligence or any very secret intelligence; the event stood out.

Q58 Chairman: You are not suggesting a sort of schedule of different options: if it was a pre-emptive strike or a responsive strike there should be a different process. Would you go that far or not?

Lord Boyce: I think, before answering that, if I can pick up Lord Bramall’s point and say that life is not always that simple. If you take Macedonia, for example, that was something you could not actually expose, the reasons why we went in there. Sierra Leone was another good example as well. It comes down to the scale of the deployment.

Lord Bramall: Those two places, if I may say so, Chairman, of course, would not come under these new arrangements, Sierra Leone in particular, because, obviously, secrecy and speed was of the essence; but let us take, if I may suggest to your noble Lords and hon members, the very interesting case of Afghanistan at the moment, because if you take what I call the first the barrel of Afghanistan, which was on the rebound from 9/11, it was attacking definite camps, special forces, air attack, very small forces, and so on. That, I believe, would have been entirely a matter for an objective, because a lot of secrecy was involved. Were you going to do it? Were you going to go to camp? This would not have been a thing to have referred to Parliament, but, of course, Parliament would have had to have been informed very soon afterwards what had happened and whether they had approved what had been done. When you came to the second barrel of Afghanistan, I think the Prime Minister would think that you carried that on the back of the first one, that they were somehow connected, although you were actually producing a sea-change in the sort of conflict that you were going into, and, of course, then it becomes a question, at some stage, when you say, “We have done all this but now we are going to slightly alter the rules of the game and we want to come back to Parliament.” I leave that one for your noble lords and hon members to work out.

Lord Boyce: May I remind Lord Bramall, he has missed out a stage of Afghanistan which is actually quite important, and that was the deployment of the International Security Assistance Force. Of course, that is a very good example of what I mean about what you set out originally which you would not inform Parliament of on this resolution because it was not designed as a force to use force but, of course, then had to use force once its was actually out there. So that is another consideration why I think that it is very important to get these definitions correct, because the International Security Assistance Force was not meant to go into conflict.

Chairman: Unhappily, we only have five or six more minutes left on this session, and so I wonder if colleagues could be restrained about their questions.

Q59 Lord Morgan: Could I ask one supplementary? I wonder if I could ask Lord Craig: of course one would want to protect British troops, but is it not more dangerous to the lives of British troops if the information given out is of one source and in fact deals with a situation that is quite fictitious or fallacious? It might involve the long occupation of another territory, as in Iraq, which the soldiers did not anticipate. Is that not more dangerous?

Lord Craig of Radley: It is very difficult to generalise from particulars other than to say, a point I did make in terms of generalisation, that one does not want from a serviceman’s point of view information released. Whether Parliament can be satisfied because it is going to be the Prime Minister who is going to tell them what he wants them to know, we
have seen in recent years that that cannot necessarily cover the whole actual situation. Is that satisfactory from Parliament and the Commons’ point of view? I do not think it is. It is one of the hurdles.

**Chairman:** I have Lord Campbell, Lord Armstrong, Lord Williamson and Lord Maclellan who all wish to ask questions on this area. Perhaps we could start with Lord Campbell.

**Lord Campbell of Alloway:** It has to be accepted, I think the noble and gallant lords will agree, that there is a fundamental division of opinion, and it is basically a division of opinion best expressed if the noble and gallant lords will remember it, by Lord Guthrie of Craigiebank, who said, “I do not believe that one should legislate and have a statutory solution. Deployments vary so much, are accompanied by much uncertainty, one template rarely works for all situations, the best solution being a formal, but not statutory, convention.” I ask the noble and gallant lord, Lord Craig, that virtually marries with his concept, does it not, and does it not wholly disagree with the concept of the noble and gallant lord, Lord Bramall, and is it not compatible wholly with the speech of the noble and gallant lord, Lord Boyce, in the House of Lords? So, for our purposes, what is the use of talking about primacy of Parliament when the noble and gallant lords are totally split on this and it is at the moment one against three? One has got to accept this situation. The only other point is that we are invited to consider the distinction between deployment and commitment. It is about as difficult as distinguishing between faith and doctrine and the Christian church. There is no way that you would ever be able to assimilate a statutory definition to deal with a situation without putting the whole of our defence in utter jeopardy. Is that not right?

**Chairman:** Would you mind if our two colleagues asked their questions as well and perhaps we could wrap up the three. Lord Armstrong.

**Lord Armstrong of Ilminster:** I think mine was a very brief question, arising really out of the question earlier by the Chairman about the definitions of Armed Forces. I take it, from something that I think Lord Bramall said, that you would probably all agree that, where special forces are involved, the question of Parliamentary approval or sanction would not arise, but the Executive, the Prime Minister or the Government, must be free to commit special forces without seeking the approval of Parliament before doing so or, indeed, not until they can do so without risk of danger to those forces or breach of security?

**Lord Maclellan of Rogart:** Mine is also a very brief question really arising from what Lord Bramall said about the overriding desire to have sense of the legality. In those circumstances, do any of the panel regard it as acceptable that the Prime Minister should have a discretion to withhold the legal arguments about the war, as the draft resolution would appear to provide?

**Q60 Chairman:** Who would like to kick off?

**Lord Boyce:** The answer to Lord Campbell is, yes. The answer to Lord Armstrong is, yes. As to Lord McLennan’s point about legality, first of all, I do not think that the voice of Parliament, the vote of Parliament, confers legality in the legal sense, but there are lawyers here who may disagree; on its own it is legal with a small “I” maybe. I do not have a problem with the Prime Minister having to explain the legal situation in the House, whether it is looking for the House’s support whether in a general sense or whether in a convention such as we are looking at here.

**Lord Bramall:** The only thing that I do not agree with Lord Campbell is that I do not think that if you have flexibility in the system it ruins the whole thing. Of course I agree with Lord Armstrong that, not only special forces, but with any operation which demands secrecy and a very quick reaction, this should remain with the Executive. I am talking about much more ponderous operations, when I do think that the Prime Minister should have some legal obligation. Whether you do it by statute, I think I am perfectly happy to see it done by convention, but he should have some legal obligation to refer a major war situation to Parliament and he should have to take some notice of what Parliament says.

**Lord Craig of Radley:** As far as the special forces point, yes, bearing in mind that it is dealt with as an exception in the resolution, I think that is absolutely right. Regardless of whether there is a resolution or not or a statutory situation or not, I would expect, and I am sure the Prime Minister would expect, to make the legality of what has been proposed clear to Parliament. I would be very surprised if Parliament did not ask him the question in this day and age. I do not know if you can remember Lord Boyce asking the very question ahead of the Gulf War, the second Gulf War, the Iraq War, so I have of no difficulty with the concept that the legality must be brought forward, but I do not think that is really the point. The point is whether it is Parliament that is approving or whether it is supporting.

**Q61 Chairman:** We are most grateful to you. Thank you very much for coming. We do have a whole series of other questions that we have not been able to cover on ratification of treaties and other issues. I wonder, if you would be good enough, if we could write to you with those and ask for your written responses. The only other question I had was for Lord Boyce as to
14 May 2008
Admiral Lord Boyce GCB OBE DL, Field Marshal Lord Bramall KG GCB OBE MC and Marshal of the Royal Air Force Lord Craig of Radley GCB OBE MA DSc

whether he had his winkle with him as the President of the Hastings Winkle Club!

Lord Boyce: On that, I am afraid, I owe you a pound.

Q62 Chairman: A pound goes to charity. Thank you very much indeed.

Lord Craig of Radley: I have no view on treaties.
Lord Boyce: Nor do I.
Lord Craig of Radley: I do not think I am a competent person to advise on that.
Chairman: In which case we will not trouble you. Thank you very much indeed.

Supplementary memorandum by Lord Bramall (Ev 64)

My written responses to the questions on war powers are as follows:

i) The Government’s Proposals Overall

(1) Is there a case for reform of the prerogative power to engage in armed conflict? What changes, if any, would you wish to see to the current arrangements?

1. Yes! Make it obligatory to get House of Commons before committing troops into a major conflict situation.

(2) If reform does proceed, is a Parliamentary resolution preferable to a statutory solution, as the Government suggest?

2. Probably yes.

(3) What is your overall impression of the Government’s draft Commons resolution?

3. Moving in the right direction.

(4) Is the wording of the resolution clear in its meaning and intent? Are there any changes that you would propose to the text of the draft resolution?

4. Fairly clear in its meaning. There must be a distinction between deployment—a matter for the Executive—and major commitment—a matter for Parliament.

ii) Definitions

(5) Are the Government’s proposed definitions of “conflict decision” and “UK forces” adequate? Can you suggest any alternatives?

5. “Conflict decisions” and “UK forces” must make it clear that the conflict commitment for which Parliamentary authority would be needed was one which a large number of formed bodies of troops had been committed on prolonged operation, not “in and out” rescue or punitive operation by troops or aircraft.

iii) The Role of the House of Lords

(6) Do you agree with the Government’s conclusion that the House of Lords should have a debate, but not a vote, on the question of going to war? Does the resolution as drafted provide sufficient leeway for the Lords to fulfil its role effectively?

6. Yes. The House of Lords should have a debate but not a vote on a “going to war”. The draft resolution should provide sufficient leeway for the Lords to fulfil its role.
iv) Exceptional Circumstances and the Prime Minister’s Power of Discretion

(7) Is it necessary to have an “exceptional circumstances” procedure in cases of emergency or national security? Is there a case for the Government to be required to seek retrospective approval in such cases? What do you make of the Government’s arguments that a retrospective approval procedure could give rise to “some very serious and undesirable consequences”?

7. Yes, necessary to have an exceptional circumstances procedure. There is clearly a case to keep Parliament retrospectively informed, but only if emergency seems likely to develop into full blown conflict situation (see above) should retrospective approval be necessary. There are always political compromises of Parliament overriding the Executive.

(8) Is there a case for a formal re-approval process in the case of an ongoing deployment? Are the Government right to argue that existing parliamentary procedures are sufficient?

8. Yes to both.

(9) Is the degree of discretion that is left with the Prime Minister in the draft resolution appropriate? Are there sufficient safeguards to ensure that such residual powers were not open to abuse? In particular:

a) Should the Prime Minister determine the timing of a Parliamentary vote?

(b) Yes the Prime Minister should determine its timing.

b) The draft resolution states that the Prime Minister’s report to Parliament will include information about objectives, locations and legal matters that he thinks appropriate in the circumstances. Should the Prime Minister determine what information should be supplied to Parliament? Should the Prime Minister determine what information should be supplied to Parliament? Does the wording of the draft resolution provide sufficient safeguards and guarantees?

(b) The Prime Minister will usually decide what information is sufficient to Parliament, but it must be the same information, or objectively amassed and accurate as possible, as he and the Cabinet would have required to initiate the Royal Prerogative.

c) Should it be for the Prime Minister to determine if the “emergency condition” or “security condition” are met, thereby circumventing the requirement for parliamentary approval?

(c) Yes.

d) Where a report of explanation is laid before the Commons in the event that the normal process is circumvented, should it be for the Prime Minister to determine if the security condition continues to exist, or if the laying of a report could prejudice national security?

(d) The answer must be yes but the Prime Minister must appreciate the authority of Parliament in War Making and the obligation to it.

v) Special Forces

(10) Is it right to provide a further exception in the event that a conflict decision involves or assists the special forces? Who should decide if such a condition has been met?

10. No further exception is needed. The use of Special Forces and their way of working would be taken into account when deciding whether a full conflict situation had been reached or whether a general exemption, temporary or otherwise, would be needed.
vi) ARRANGEMENTS WHEN PARLIAMENT HAS BEEN ADJOURNED OR DISSOLVED

(11) Do the Government’s proposals for arrangements in the event that Parliament has been adjourned or dissolved provide a sufficient safeguard?

11. Yes.

June 2008

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

SUMMARY

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

— There could be closer scrutiny of the civil service, and greater independence for the Civil Service Commissioners.
— The model resolution on War Powers should specify the size of the forces to be committed, and timescale of the operation.
— Parliament should scrutinise appointments of the most senior judges (Supreme Court, and heads of division in the Court of Appeal).
— Parliament should consider establishing a dedicated committee to scrutinise Treaties.

POLITICAL CONTEXT

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

1.2 This is reflected in the Constitutional Renewal Bill, which contains a range of small reforms, none of great significance. They are the things which can be legislated for now. Other, bigger reforms are in preparation, but in slower time, because they are politically more difficult and need more consultation. The government is planning a further White Paper on Lords reform, further proposals to control party funding, a Green Paper on a British bill of rights, and a wide ranging consultation exercise on a British statement of values. Further publications on these can be expected from the government in the summer of 2008.

PARLIAMENTARY SCRUTINY OF PUBLIC APPOINTMENTS

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

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

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

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

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

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

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

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

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

Statutory Regulation of the Civil Service

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

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

4.3 It makes little sense to single out the Civil Service Commissioners (CSC) for special treatment and do nothing about the other Cabinet Office bodies. Under the new statutory regime the CSC staff with a staff of eight will have to establish separate human resources and payroll functions, annual accounts etc. They could have shared these functions with the other Cabinet Office bodies (which all have tiny staffs), if they had all been put on a statutory basis. Alternatively, Part 5 of the draft bill could have created an umbrella body, or prototype statutory framework for each body, into which the other bodies could have been slotted in due course.
4.4 The Civil Service Commissioners are to be an executive non-departmental public body, funded by the Cabinet Office and appointed on the recommendation of the Minister for the Civil Service. They must uphold the principle of appointment on merit, on the basis of fair and open competition, and publish a set of recruitment principles. The Bill also enshrines the core civil service principles of integrity and honesty, objectivity and impartiality. The main vehicle for managing the Civil Service will continue to be the Civil Service Code and the Civil Service Management Code. Civil servants can complain to the Commissioners if they believe they are being required to act in breach of the Code, but the existing Code requires them to exhaust internal lines of appeal first, and that requirement is likely to be retained.

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

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

Dismissal of Commissioners should require resolutions of both Houses.

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

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

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

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

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

4.6 No one should expect Part 5 of the Bill to transform the standing of the Civil Service, or halt the gradual erosion of its power and influence. That started under Mrs Thatcher and continued under Tony Blair. It is attributable to a wide range of factors which have served to erode the confidence and authority of the Civil Service. Not all of these are necessarily negative: it was time to end the Civil Service monopoly of advice. But the pendulum has swung too far the other way. One central problem is the attitude and behaviour of certain Ministers, who exclude civil servants from proffering advice and discussion of that advice. The tone is set by the Prime Minister. If the Prime Minister is in the habit of excluding civil servants from key meetings, of sometimes excluding relevant ministers, of not encouraging proper advice or a written record, it is not surprising if some Ministers follow the same exclusionary behaviour in the way they treat their ministerial colleagues and run their own departments.

Role of the Attorney General

5.1 The government’s main concern was to restore public confidence in the role of the Attorney General, following three controversies which had dogged Lord Goldsmith QC, Attorney General from 2001 to 2007. These were over his advice on the legality of the invasion of Iraq in 2003; the decision in Dec 2006 to stop the Serious Fraud Office investigation into BAE’s alleged bribes to secure a defence contract with Saudi Arabia; and the controversy over whether the Attorney should be involved in the decision whether to bring prosecutions in the “cash for peerages” affair.
5.2 In July 2007 the government issued a consultation paper (CM 7192) on the role of the Attorney General, which asked whether:

- the Attorney General should continue to be both the Government’s chief legal adviser and a Government Minister;
- the Attorney General should remain as superintending Minister for the prosecution authorities;
- the legal advice of the Attorney General should be made public;
- the Attorney General should attend Cabinet only where necessary to give legal advice; and
- a parliamentary select committee should be established specifically to scrutinise the Attorney General.

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

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

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

- the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in cases of national security);
- the requirement to obtain the consent of the Attorney General to a prosecution in specified cases will, in general, be transferred to the DPP or specified prosecutors;
- the Attorney General’s power to halt a trial on indictment by entering a nolle prosequi will be abolished; and
- the Attorney General must submit an annual report to Parliament.

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

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

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

**WAR POWERS**

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

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

**JUDICIAL APPOINTMENTS**

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

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

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

- It is now recognised that in landmark cases the top courts effectively have law making powers. Appointment to such powerful positions should be subject to parliamentary scrutiny.
- Parliament nowadays has little contact with the judges. The senior judges are largely unknown to MPs. Supreme Court justices will be unknown to the Lords once the law lords have departed. There is value in a formal presentation of the senior judges to Parliament, to foster continuing dialogue.
- The top judges should meet the body vested with the constitutional power to dismiss them. Senior judges can be removed only by resolution of both Houses of Parliament.

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

7.4 Two final points about the Judicial Appointments Commission. First, the arguments for a single non-renewable term (which the government has accepted for the Civil Service Commissioners, and similar watchdogs) apply with equal force to the JAC. Second, the early operation of the JAC has brought out the political difficulties when a watchdog like the JAC has a high degree of independence but limited accountability. There have been operational difficulties and unacceptable delays. The Lord Chancellor still feels responsible for the overall system of judicial appointments, but has few levers to improve matters. The White Paper proposes he should be given a power to set targets and give directions to the JAC. We would support this, provided that it is accompanied by close scrutiny by parliamentary committees (the Lords
Constitution Committee, and Commons Justice Committee), and power for the JAC to issue a special report at any time if it feels that it is being improperly pressured by the Lord Chancellor. The JAC should not be made accountable for individual decisions, but it does need to be made more accountable for its overall performance.

**Church and State**

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

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

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

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

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

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

8.6 But there was also a further twist. When the Lord Chancellor, Jack Straw, introduced the White Paper and draft Bill on 25 March, he seemed at one point to suggest that the government was prepared to look deeper into the late 17th/early 18th century religious settlement that still governs church/state relations as well as the personal religion of the sovereign. This arose when he replied to a supplementary question from a Scots Labour MP, Jim Devine, about the future of the Act of Settlement 1701. Jack Straw said

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

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

¹ Lord Forsyth of Drumlean, Conservative, introduced a motion to that effect (Hansard, Lords, 2 December 1999, cols 917–919), Kevin McNamara, Labour, a Treason Felony, Act of Settlement and Parliamentary Oath Bill (Hansard, Commons, 19 December 2001 cols 319–323), and Lord Dubs, Labour, a Succession to the Crown Bill (Hansard, Lords, 14 January 2005, cols 495–513). Edward Leigh, Conservative, sought leave to introduce a Marriages (Freedom of Religion) Bill (Hansard, Commons, 8 March 2005, cols 1392–4), and John Gummer, Conservative, similarly sought permission for a Catholics (Prevention of Discrimination) Bill two years later (Hansard, Commons, 20 February 2007, col. 154–6).
8.8 In the past, the Government has always said that it has no plans to end the religious discrimination in the 1701 Act. During the debate on Lord Dubs’ Bill, the then Lord Chancellor, Lord Falconer of Thoroton, described the necessary changes in the law as “complex and controversial” and said that they would raise major constitutional issues which would involve the amendment or repeal of a number of statutes. Moreover:

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

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

Parliamentary Scrutiny of Treaties

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

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

Bibliography

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Chairman: Thank you very much for coming. We are so sorry to have kept you. Thank you very much for your written representations as well; that is very helpful. I am going to ask Lord Tyler to kick off here.

Q63 Lord Tyler: Professor Hazell, the draft Bill, and obviously the White Paper, and before that the Green Paper are all part of the process in the Governance of Britain agenda. What is your overall impression of the Government’s approach to constitutional reform? You suggest in your paper that you have kindly given us at 3.1 that the Bill might have been better called, “The Strengthening of Parliament (Miscellaneous Provisions) Bill”, and you say it contains a small number of relatively modest reforms, all worthwhile but none of them justifying the ambition of the Bill’s title. Should we take it from that that the Bill and the White Paper, for you, are not really sufficient to deal with the wider agenda that the Government has set its hand to, and is it, therefore, your view that we are trying to address too many seemingly disparate issues in this one draft Bill?

Professor Hazell: No, I think it is perfectly proper to address these different issues in this one draft Bill and I would not want any of them to be separated out, but I do think the rather grand title of the Bill is perhaps something of a misnomer. Briefly to set it in context, one has to recognise it is nothing like as big as the constitutional reforms of this Labour Government’s first term between 1997 and 2001, nor probably in the second term between 2001 and 2005, but you should not conclude from that that Prime Minister Gordon Brown is not himself committed to constitutional reform; I think as an individual and as a politician, he is much more committed than his predecessor, and, indeed, there are bigger reforms to come. We are promised in the next couple of months the Government’s proposal for a British Bill of Rights and for the next steps towards an elected House of Lords. There are also other big reforms which have been set in train which are not in the Bill because they do not require any kind of statutory authorisation, and I have in mind there things like the introduction of parliamentary scrutiny of a large number of senior public appointments. Some 70 or 80 public appointments under the Government’s proposals, which, as you know, have been discussed with the Liaison Committee, it is proposed in future will be subject to parliamentary scrutiny. Those are other very big constitutional changes, but in terms of the Bill what it leaves is a set of rather disparate items whose main theme, if one can find an overarching theme for them, is the one that I suggested and that you quoted from my paper.

Q64 Lord Tyler: Given that we are only allowed in this committee to consider the Bill, is it your view that it could achieve the Government’s aim of rebalancing power between Parliament and the Executive and giving Parliament more ability to hold the Executive to account?

Professor Hazell: Yes, I am in no doubt that the Bill, broadly, does achieve both those things. It consists of a series of steps all in the right direction.

Q65 Martin Linton: You will be glad to know that many members of the committee would love to be discussing the Green Paper rather than the White Paper, but, as you say, there are a lot of smaller but, nevertheless, important issues in the White Paper. Probably the smallest of them is the one I am going to ask you about now, which is demonstrations in Parliament Square. I wonder if you have any strong opinions about the clauses that have been in operation in the last three years as part of the Serious and Organised Crime Act and whether you have any views about what the best way of regulating this should be. Either the old sessional orders, which are still passed in the House of Lords, or what has been in place for the last three years, or nothing at all.

Professor Hazell: Please forgive me. If I may, I am going largely to duck that question because I do not have sufficient knowledge of how the recent statutory changes have operated in practice, I do not know the views of the police, although I used to know a lot about this subject 20 years ago when I was a civil
servant in the Home Office, as it happens, in charge of public order, in the police department. Forgive me, it is not something I have followed since.

**Q66 Martin Linton:** Was it ever a problem 20 years ago?

**Professor Hazell:** Oh yes. Public order is always potentially a serious problem and 20 years ago there were sessional orders and the Metropolitan Police had special responsibilities under those orders, in particular to maintain public order and to maintain free passage around Parliament, and those principles must surely still apply. What I do not know, and this is why I am ducking, is why it was thought necessary to add to those powers under the 2005 Act, but I am assuming that the Government has weighed up the pros and cons and feels it is perfectly safe to remove the statutory powers so recently granted.

**Q67 Chairman:** Do you have the view that there is a special case for Parliament at least beyond the general law?

**Professor Hazell:** Yes, I think there is a special case, and I think this is the general thrust behind the Sesssional Order, for Parliament and parliamentarians in their going to and from Parliament not to be subject to undue or improper pressure.

**Chairman:** We want to ask you some questions about the Attorney General and prosecutions.

**Q68 Fiona Mactaggart:** Professor Hazell, this is an issue which, unlike the issue of demonstrations in Parliament Square, which in your very helpful paper you made clear that you thought was probably the least important of the matters that are dealt with in this Bill, you accord very high importance in your list of priorities. Thank you for that paper because I think you have given an account of the positions which have been put about this issue, and I am very struck that people who agree strongly about other things actually disagree quite strongly about the issue of the role of the Attorney General. I wondered whether you thought the Bill has got this right or what you think would be a better approach than that which the Bill takes if you do not think it has got it right.

**Professor Hazell:** I do think the Bill has got it right. As you know, in the Government’s consultation paper launched last year it proposed potentially some much more radical changes, and those have been considered both by the Justice Committee, as it now is, in the Commons and the Constitution Committee in the Lords and the Government has considered all the responses received, as well as the reports of those two Select Committees, and in effect it now proposes very little major change to the role, other than slightly greater accountability, in particular through the requirement to produce an annual report. I support the Government’s conclusion. I would have been very surprised if the Government, having considered all the responses and thought hard about it, had come to any other conclusion. In fact, when the consultation was first launched I privately forecast that it would come to a pretty status quo conclusion but I strongly defend that conclusion. If you want to know why, it is because I think the law officers have to be accountable, they have to be accountable to Parliament, and the best way for them to be directly accountable to Parliament is for them to be Members of Parliament, of either House.

**Q69 Fiona Mactaggart:** Part of the debate and changes that will be happening to some extent is a certain distancing of the law officers from, for example, consent to prosecutions and so on, which will be handed over to the Director of Public Prosecutions. This is a model which has happened elsewhere in the constitution in government, and I am wondering if you would tell this Committee whether you think that, when that passing to independent bodies like, for example, the Director of Public Prosecutions from a Minister occurs, the accountability follows it or the Minister remains accountable for the decision but not able to make it. **Professor Hazell:** I think that is a very good question. The Minister ultimately does remain accountable for the system but cannot be held accountable for an individual decision that she has not made. If the DPP makes an individual decision to prosecute or not to prosecute, and he is no longer under any direct supervision from the Attorney General in that regard, then strictly, the DPP is accountable for the individual decision and the Attorney is accountable only for the overall system under which the DPP operates. She can give an explanation to Parliament if Parliament asks for one but it will be an explanation provided to her by the DPP.

**Q70 Fiona Mactaggart:** Finally, you used the word “strictly” there very carefully and I wonder if you think that that is actually what happens in practice?

**Professor Hazell:** I do not know how many conversations take place in the law officers’ department of an informal kind over very difficult decisions like this. In other parts of government, of course, we know they do, but I think, going back to your earlier question, a lot of the thrust of the Government’s reforms is to erect more Chinese walls, even within government departments, between these different decision-makers—and I think on the whole that is a desirable thing—while always wanting to maintain ultimately a line of accountability. Everyone has to be accountable in our system.
Lord Maclellan of Rogart: Professor Hazell, not all public servants are accountable in the way that Ministers are accountable but that does not mean there is no accountability. Do you not see some tension between being a political minister, accountable for policy, and the role of the Attorney in providing legal advice which is seen, and seen by the public, as objective and advice to be relied upon because it is not necessarily political advice but because it is an appraisal of what is legal? You mentioned three examples of why the issue had come to the fore in the time of Attorney General Lord Goldsmith—there were others before him, of course, like the Scott Inquiry. Do you think that what is proposed in the current Bill will deal with the matters to which you drew attention, the problems to which you drew attention? If the law had been as in the Bill, would we still have had public anxiety about the legality of the invasion of Iraq, about the withdrawal of the prosecution in the BAe case?

Chairman: I do apologise but we must be very careful about the BAe case.

Q71 Lord Maclellan of Rogart: I beg your pardon. Do not answer that question. These are issues which you have put before us as having created significant problems. I submit that what is contained in the Bill does nothing to address those problems and I would like your view on that.

Professor Hazell: I think there will always be difficult, highly controversial, political issues which require legal advice, and the legal advice will be controversial whatever it comes from. As you will know, as a former lawyer, like me, legal advice is rarely black and white; there are difficult and conflicting considerations to be weighed up, and the case of the Iraq war is a prominent example of that. If you are inviting me to follow the more radical model that the Attorney should not be a Member of either House of Parliament, should be a more detached and more independent legal adviser to the Government, I think there would be just as much controversy about the advice coming from a more detached figure as there is from the Attorney as currently constituted.

Q72 Lord Morgan: I am just wondering, Professor Hazell, why there should be a different principle enacted for the Lord Chancellor, where the separation of powers has been taken very clearly as segregating the judicial from the executive function but apparently this principle not being applied to the Attorney General.

Professor Hazell: Are they so different? The Lord Chancellor, I know, no longer has judicial functions and I, and I think most people, strongly support the changes that were made in 2005 to remove the Lord Chancellor’s other hats but the Attorney does not, unless I have misunderstood something, have judicial functions.

Q73 Lord Morgan: Legal functions.

Professor Hazell: Yes, but he is the legal adviser to the Government.

Q74 Lord Morgan: He is in the Government.

Professor Hazell: He is in the Government but it is not a judicial function to be a legal adviser. Perhaps I am being too literal about this but, for me, a judicial function connotes holding judicial office and making judicial decisions, which the Lord Chancellor formerly was able to do and did do by sitting as a member of the Appellate Committee of the House of Lords. Giving legal advice is a function as a legal adviser to part of the executive.

Q75 Lord Armstrong of Illminster: I was intrigued by the suggestion in your note that there was a growing convention that the Attorney General sits in the House of Lords and the Solicitor General in the House of Commons. Do you really think that that is a growing convention or do you think it is the accident of what has happened in the last three or four cases?

Professor Hazell: You are right to challenge me on that. If it is a convention at all, it is very recent. It is what I observe as a growing custom and I think it is likely to continue for this reason, that there are fewer lawyers, in particular barristers, in the House of Commons and it is much more difficult now to combine a career at the bar and a career in politics—there are a few shining exceptions still in the Commons but they are very few—and I do think it is very important for the Government when appointing an Attorney General to be able to recruit the most distinguished and talented lawyers available, and it is one of the great advantages of the House of Lords, so long as it is an appointed House, that they can, as they have recently, reach out beyond the ranks of the House of Commons to find very talented lawyers and put them in the Lords in order to maintain a line of parliamentary accountability.

Chairman: Lord Hart is going to ask you questions about judicial appointments.

Q76 Lord Hart of Chilton: Professor Hazell, when in 2003 the then Prime Minister sprang upon an unsuspecting world the constitutional changes of getting rid of the Lord Chancellor, beginning a change of tackling the subject of separation of powers, there then came about a huge debate, which went on for a very long time, which led to the Constitutional Reform Act 2005, which constituted a settlement. My first question is, do you think that it is too early to start tinkering with the provisions of 2005 when actually the proposals have not yet had
time to bed down? My second question is in relation to your proposal that there should be more parliamentary involvement in the approval of high judicial office holders, and I would like you to explain in a little more detail what you think that scrutiny would involve. Would it, for example, suppose the approach of the Supreme Court in the United States looking at the confirmation of Supreme Court justices? Thirdly, you seem to approve of the possibility of a Minister of the Crown to issue directions to the Judicial Appointments Commission. Do you not see that there might be some dangers in the issue of directions of that sort when one of the objectives, which was that the Judicial Appointments Commission should seek to increase the minority representation in the judiciary and the role of women in the judiciary, that the sense of issuing directions might be seen to be an interference in judicial independence, when actually the prime objective at that time, in 2005, was to achieve merit at all times, quality at all times, and not to interfere with positive discrimination?

Professor Hazell: On your first question whether it is too early only three years after the 2005 Act to start tinkering with it, I do not think so. If there are issues that have emerged in the first three years of experience which people think need adjustment, and a legislative vehicle is available, then it seems to me right to take advantage of that opportunity, which the Bill does. I predicted when the concordat was first announced between the then Lord Chancellor and the then Lord Chief Justice that it would not be the last word on the subject and they were almost certain to revisit it at some point, and they indeed have, and minor adjustments are proposed in the balance of functions between the head of the judiciary, as the Lord Chief Justice now is, and the Lord Chancellor, and I support all of those. There are also minor adjustments proposed in relation to the operation of the Judicial Appointments Commission, and if I could come to your last question in connection with the Judicial Appointments Commission, yes, I recognise that there are indeed potential dangers in giving the Lord Chancellor power to give it directions but, again, it comes to the question of accountability: to whom is the Judicial Appointments Commission accountable? The Lord Chancellor is still responsible for the overall system of judicial appointments, although he has delegated a lot of his former power—almost all of his former power—to the Commission. Given that he is responsible for the overall system, I think it is justifiable for him to seek to take a power to give directions to the Commission but I would balance that by very close scrutiny by parliamentary committees. There are two parliamentary committees potentially with a close interest: one is the Justice Committee in the Commons, the other is the Constitution Committee in the Lords, and I would want the Judicial Appointments Commission, if it ever felt that it was being given directions by the Lord Chancellor that it felt uncomfortable with or it was being subjected to undue pressure, it should have the power to issue a special report and in effect that would be waving a yellow or red flag to the parliamentary committees, and I would expect the committees very quickly to invite the Commission in for a special session to hear their concerns. That is how I would balance giving that extra set of powers to the Lord Chancellor. Lastly, you asked me about my proposals for parliamentary scrutiny of judicial appointments. I do not want to detain the Committee too much over this because I recognise I am in a very small minority in proposing this and there is no appetite in Parliament for scrutinising senior judicial appointments. I would only say in brief that I had in mind nothing like the model for Senate confirmation hearings of the Supreme Court justices in the United States. I deeply regret that, whenever this proposal is raised in this country, people immediately mention the American model as if that were in point. Forgive me, it is not. The American constitution is completely different from ours. It involves built-in conflict between the President and Congress. Supreme Court appointments in the United States are not on merit; they are blatantly partisan, in a manner which is quite foreign to our own experience, and the Senate in their system does have the power to veto appointments whereas in our system parliamentary committees can only scrutinise. In the recent proposals for pre-appointment scrutiny hearings everyone accepts Parliament could not veto any appointment proposed by the executive. It is a completely different proposal which I am trying to make but I am putting down a marker that I hope one day Parliament might take an interest in very senior judicial appointments.

Chairman: We were hoping to ask you questions on three other areas, namely the Civil Service, treaties, and war powers but we are conscious that time is flying. Perhaps we can turn to the Civil Service, which Lord Armstrong has some questions about.

Q77 Lord Armstrong of Ilminster: The first question—and I do not quite find the answer to this in your memorandum—is do you support the proposal that the Civil Service should be put on a statutory footing?

Professor Hazell: Yes, I do.

Q78 Lord Armstrong of Ilminster: What would be the reason for that?

Professor Hazell: As you will know, it was always proposed, even going back to Northcote-Trevelyan, that it should be, and I think it is potentially dangerous that the Civil Service is subject to regulation only by Orders in Council, which can be readily changed by the government of the day. By
putting the Civil Service on a statutory footing and making the regulations under which the Civil Service operates founded in statute, it gives the Civil Service a greater degree of protection against arbitrary change in its regulatory framework.

Q79 Lord Armstrong of Ilminster: Are you content with the proposal in the draft Bill that the codes which are to be provided for the Civil Service and the Diplomatic Service and the Special Advisers should be laid before Parliament but not be subject to any kind of parliamentary procedure?

Professor Hazell: No, I am not. I think they should be made subject to parliamentary approval and I would add to the codes that you have just mentioned also the Ministerial Code, which I think should also be subject to parliamentary approval. It is not sufficient, in my view, just to lay it before Parliament.

Q80 Lord Armstrong of Ilminster: So you feel the statutory model proposed in the Bill is appropriate, subject to that point. Are you equally content with the proposal to put the Civil Service Commission on a statutory footing?

Professor Hazell: Yes. There is a much wider point, which time may not allow us to go into any detail but, as I mention in my paper, the Civil Service Commissioners are one of only half a dozen constitutional watchdogs which come under the Cabinet Office, and I think it is anomalous to select only the Civil Service Commissioners and give them a statutory foundation and to leave on one side the other bodies mentioned in my paper, who are the Commissioner for Public Appointments, the House of Lords Appointments Commission, the Committee on Standards in Public life, the Advisory Committee on Business Appointments, and now the Independent Adviser on Ministers’ Interests. Those watchdogs are all, like the Civil Service Commissioners, currently appointed, financed, housed and staffed by the Cabinet Office and there is a recent report by the Public Administration Committee of the House of Commons of last year which recommended that all those bodies should be put on a proper statutory footing, and I agree with that recommendation. I should declare an interest: I was one of three Special Advisers to that Committee. I think it does leave the other five bodies continuing to deal with matters of very importance as to how they would operate. I would like them to have greater protection both to their independence and, in particular, in relation to both their appointment and their possible dismissal. I would like to make that subject to a resolution by both Houses of Parliament, which is not currently in the Bill. I would like the Civil Service Commissioners to

Q81 Lord Armstrong of Ilminster: The last point I would like to ask about is your views on the proposals on Special Advisers in the draft Bill. They are excused the need for impartiality, for totally understandable reasons. They are required to preserve the principles of integrity and honesty. There is no restriction on their numbers in the Bill. Are you content with that?

Professor Hazell: No, I am not. I think there should be a statutory cap on the number of Special Advisers, just as there is on the number of Ministers of the Crown. Again, the draft Bill, which was published four years ago now by the Public Administration Committee, did propose a cap on numbers to be approved by a resolution of each House and I support that proposal. The numbers of Special Advisers, as is generally known, doubled under the Blair Government and in Number 10 they trebled. That significant increase I think led to a very significant increase in their influence in Whitehall. They became a kind of alternative network to the Civil Service networks. They are important controllers of access to Ministers and I think it is desirable that Parliament should be able to express a view about the maximum number of Special Advisers through that being approved by a resolution in each House.

Q82 Lord Armstrong of Ilminster: The Ministers of the Crown Act restricts or prescribes the number of Ministers to whom salaries may be paid, and you can exceed the numbers if you do not pay them a salary. Would you apply the same principle to Special Advisers?

Professor Hazell: I believe there have been a very few special advisers, of whom I think Lord Birt might have been one example, who did not receive a salary, but I do not think myself it is normally likely to be a problem. There are few people of such independent means that they can afford to serve the government without wanting a salary.

Q83 Lord Maclennan of Rogart: Professor Hazell, the powers and functions of the Civil Service Commission set out in the draft Bill proposed—do you see any significant change from the status quo in this? Are there any powers or functions of the Civil Service Commission which you think ought to be included that are not?

Professor Hazell: There is not that much change in terms of who the Civil Service Commissioners are and how they would operate. I would like them to have greater protection both to their independence and, in particular, in relation to both their appointment and their possible dismissal. I would like to make that subject to a resolution by both Houses of Parliament, which is not currently in the Bill. I would like the Civil Service Commissioners to
have the power to undertake inquiries on their own initiative. That is something that has been recommended in recent years by the Public Administration Committee, by the Committee on Standards in Public Life, and by the Commissioners themselves. The draft Bill does provide for such inquiries but only with the agreement of the Government and the Head of the Civil Service. I think the Government should not be able to block an inquiry if the Commissioners believe that one is justified. In practice, I would expect the Commissioners of course to notify the Head of the Civil Service if they had it in mind to conduct a special inquiry but he should not be able to prevent them from doing so.

Q84 Lord Maclennan of Rogart: Per contra, on the powers of the Minister for the Civil Service, taking account of what you have said about the Commissioners, that would have some implications for the powers of the Minister but otherwise do you think that the powers and responsibilities of the Minister are appropriate as set out in the Bill?

Professor Hazell: Broadly speaking, yes. It is difficult territory because the model that the Cabinet Office has taken in effect is the classic model for a non-departmental public body and I would like the Civil Service Commissioners to have more independence than is normally granted to a non-departmental public body, and if you ask me in what ways they should be more independent, I go back to my earlier answer.

Q85 Lord Tyler: Very briefly, and to follow up Lord Armstrong and Lord Maclennan, in your paper at 4.6 you say “No one should expect Part 5 of the Bill to transform the standing of the Civil Service, or halt the gradual erosion of its power and influence” and you have touched on some of the ways in which you think that might be remedied. I wonder whether it is your intention to put in any written evidence to the Committee, because I think it would be very helpful, you have obviously given a great deal of thought to this part of the Bill, we have certainly got to try and make sure we get it as best we can because we will not get, as you were implying yourself, another chance for perhaps another 100 years.

Professor Hazell: Perhaps I can emphasise something which I said in answer earlier to Lord Armstrong, and that is that in terms of the codes which come under the Bill, it is not just the Civil Service Code or the Code for Special Advisers, I think is very important that the Ministerial Code should also come under the Bill in the sense that there should be a requirement in the Bill that that code as well is laid before Parliament and made subject to parliamentary approval. That will give Parliament the opportunity to propose changes to the Ministerial Code if Parliament thinks that through the Ministerial Code one can try to improve Ministers’ behaviour. The Ministerial Code offers the main levers available to try to signal strongly to Ministers proper behaviour, including in their conduct vis-à-vis civil servants.

Chairman: We have kept you beyond your promise and I apologise for that. If colleagues could just manage five more minutes, and you could too, we would be able to have Lord Williamson’s question on treaties.

Q87 Lord Williamson of Horton: You have indicated in your paper in a couple of paragraphs your view on the question of treaties, and what the Government is doing is putting the Ponsonby rules into statutory form. I do not think that raises great problems but you do not comment on it and I think there are some problems which I would just draw to your attention, and perhaps you would like to comment on, and that is, once again, the definition of a treaty. We do know that there are quite a number of memoranda of understanding which are probably much more important than treaties, for example, the memorandum of understanding which dealt with the siting of Trident missiles in this country, and a few other places, I daresay. I think it is quite important—
I do not know if you have looked at the point—that we get a definition which does not just carry over the Ponsonby definition but is more long-lasting.

Professor Hazell: Forgive me, I am not very expert on this subject area and I have not looked at that point but, since I am being asked about parliamentary scrutiny of treaties, could I make a general point to all of you, and that is that I think the challenge now is for Parliament to improve its own practice and procedures in terms of scrutiny of treaties. The executive in the last ten years has significantly improved the information made available, first through the explanatory memoranda about ten years ago, and then about eight years ago through adopting the practice of notifying the relevant Select Committees of a treaty in their subject area. The Select Committees have not on the whole risen to the challenge, with one shining exception: the Joint Committee on Human Rights. That Committee has shown that, if a Committee wants to, it can include amongst its core tasks scrutiny of treaties, and it has done so. That Committee has also tried to draw to the wider attention of Parliament the big gap in saying, if I may quote from a report of theirs of 2004, “In practice, however, there is no mechanism for reliably scrutinising treaties to establish whether they raise issues which merit debate or reconsideration before they are ratified.” It is a proposition which has been around for the last ten years or so that one or other House should consider establishing a committee to sift treaties, rather like the new Lords Committee on the Merits of Statutory Instruments. If I may, I would encourage very strongly the Members of this Committee to take that message back. I have greater hopes of the House of Lords. It seems to me it would be a classic kind of Lords function, following the example of the Committee on the Merits of Statutory Instruments. Your Lordships are very good at that kind of detailed scrutiny work.

Chairman: Thank you very much indeed for spending your time here today, Professor Hazell. If there are any questions that have arisen out of what has been said, perhaps the Clerk can write to you accordingly. We are very grateful. Just before we conclude the session, perhaps I should have said at the beginning that Members have declared interests relevant to this inquiry and they are available both on the Committee’s website and in the documents already lodged. I mention that now simply for the record. Thank you very much indeed.
INTRODUCTION

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

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

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

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

5. In particular, on publication in July last year of the Government’s Green Paper, *The Governance of Britain*, the Bar Council established three working groups in order to provide meaningful and considered consultation responses to the Government’s initial proposals. One working group was to address constitutional issues, the second to consider citizenship issues and the third to examine the role of the Attorney General. Distinguished barristers representing a full range of experience and different practices and including Silks and Juniors and academics (as well as a former Solicitor General) agreed to serve on the three working groups. The working groups were then charged with investigating and researching the key issues. The Bar Council’s evidence below therefore builds upon extensive external consultation and considerations. It is founded on an engagement with, and a serious treatment of, the Government’s proposals.

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

7. In the natural way of things, we are perhaps more expansive where we have additional comments or points of principle or difference of view to explain than where we agree with the White Paper; but that should not be taken as suggesting our disagreements are any stronger than our agreements or that in either case we could not elaborate greatly. Where we have not been able to say as much as we could, we remain very happy to provide further evidence if that would be of assistance.
8. We do not, however, give evidence below on the following matters (although they are canvassed to some extent in the White Paper): Flag Flying, Reform of the Intelligence and Security Committee, Wider Review of the Royal Prerogative, Passports, the National Audit Office or Public and Church of England Appointments. We do not address these, in part because we note that the Joint Committee’s Call for Evidence does not specifically seek evidence on those subjects, in part because the Government’s own consideration of them remains in several cases at an early stage and in part because a number of them are in any event not areas on which the Bar Council would seek to offer a particular view. Having said that, we do also note that the Government envisages (in paragraph 246 of the White Paper) that the Joint Committee should be able in due course to contribute to the consultation process on the Wider Review of the Prerogative.

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

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

MANAGING PROTEST AROUND PARLIAMENT

11. In relation to this heading and the first part of the White Paper, the Bar Council would emphasise that the right to peaceful protest is a fundamental one and an essential principle. The Bar Council agrees with the Government’s policy to repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005.

ATTORNEY GENERAL

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

Chief legal adviser

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

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

Oath

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

**Accountability**

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

**Cabinet**

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

**Disclosure of legal advice**

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

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

**Supervision of prosecuting authorities**

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

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Individual prosecutions

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

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

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

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

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

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

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

Consents to prosecute

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

Other matters

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

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

Judicial Appointments

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

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

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

34. We can see advantages to the proposal in paragraph 116 for the inclusion in legislation of key principles for judicial appointment but only if they enshrine the principle of merit above all else as the essential bedrock of the judiciary and a free and fair society.
35. The Bar Council supports the earlier and quicker carrying out of medical checks in the judicial appointments process (proposed in paragraph 117). The streamlining of this aspect of the process would, we believe, be very welcome including to potential applicants.

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

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

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

39. The proposal in its widest form is not justifiable and could lead to the weakening of the quality of the judiciary. As soon as the appointment system is known or perceived not to be based on merit, the judiciary will be significantly weaker in its quality and in the respect it commands. Thus, the Government’s fears, expressed in paragraph 127 of the White Paper, are well-founded and require greater weight than currently accorded by the Government. We do not accept that the undesirability and danger inherent in the Government’s proposal can be sufficiently ameliorated by consultation with the Lord Chief Justice or by being general rather than specific to any individual appointment. Beyond setting the principles for appointment in legislation, the Lord Chancellor must not in principle exert direct influence in the way that is mooted and the potential aggregation of power back to the Lord Chancellor cannot be dressed as a means of upholding the independence of the judiciary when it would undermine it.

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

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

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

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

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

45. We are not entirely clear what the Government has in mind in relation to the reappointment of JAC Commissioners (paragraph 139) and so do not comment on this for now.
46. We would accept the Government’s recommendation in paragraph 140 of the White Paper on providing confidential information from the appointments process to the police for the purposes of investigating crime.

Treaties

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

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

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

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

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

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

Civil Service

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

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

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

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

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

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

THE LAW COMMISSION

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

ORAL EVIDENCE

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

May 2008

Memorandum by the Law Society of England and Wales (Ev 42)

BACKGROUND

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

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

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

Clause 20: Salary Protection for Members of Tribunals

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

Clause 19: Judicial Appointments Etc and Schedule 3

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

Part 1: Selection of Supreme Court Judges

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

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

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

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

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

Part 2: Basic Provisions about Judicial Appointments etc

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

Law Society View

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

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

14. Such powers clearly infringe the independence of the Judicial Appointments Commission and, in the view of the Law Society, are likely to lead to discrimination against those who are already under-represented among the judiciary—solicitors, women, BMEs. As the Explanatory Notes to the draft Bill suggest, one example of a requirement that could be specified under the new provisions could be that candidates for some senior tribunal positions are required to be existing holders of senior judicial office, for example High Court judge, or Circuit judge. The criteria for a judicial appointment should be framed by the Commission in the light of the details of the request for a competition exercise to be undertaken and should not thereafter be changed.
15. The Law Society supports the revision of the duties on those who have responsibilities in relation to judicial appointment procedures and the extension of those duties to other participants in that process. The Society does believe that there need to be new duties to ensure that the selection processes are fair, transparent, efficient, flexible, proportionate and effective and supports the insertion of those principles into the statutory framework for the judicial appointments system.

**Part 3: Panel to Represent Potential Candidates for Appointment etc**

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

*Law Society View*

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

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

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

*Law Society View*

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

**Part 5: Removal of Some of the Lord Chancellor’s Functions in Relation to Selections**

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

*Law Society View*

21. The Society would wish to see the remaining powers of the Lord Chancellor in relation to the judicial appointments process removed completely in order to secure the complete separation of the Judicial Appointments Commission from the executive and completely independent decisions on appointments by the Commission. To the extent that these provisions remove the scope for the Lord Chancellor to second guess the recommendations of the Commission for all appointments below the High Court the Law Society supports the proposals. However the Society sees no justification for distinguishing between judicial offices below and above the High Court. The role of the Lord Chancellor should be removed from approving all appointments to judicial office.
22. The provisions in Part 5 would enable the Lord Chancellor to interfere in an appointments process being undertaken by the Commission for the High Court and above. He would be able to require the Judicial Appointments Commission to reconsider a decision that no candidate of sufficient merit had been identified by a particular selection process. He would be able to refuse an appointment on medical grounds. The Lord Chancellor would not be required to make an appointment recommended by the Commission if the person selected declines it or does not accept within the time specified or is not available for the appointment within a reasonable time. He would be able to modify or withdraw a request for a competition to make an appointment to a vacant senior judicial post if the Lord Chief Justice agrees or if he considers that the process for identifying candidates by the Commission or the selection panel had not conducted an exercise satisfactorily. He would not be required to proceed with an appointment where there has been a change in the business need since the request was sent.

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

**PART 6: MEDICAL ASSESSMENTS**

24. These provisions amend sections 96 and 97 of the Constitutional Reform Act 2005 in relation to medical assessments of those who have been selected for appointment to salaried posts. At present the Judicial Appointments Commission requests successful applicants to undergo a medical check up with a GP. In future when the Ministry of Justice writes to a successful applicant offering a judicial appointment, the letter will be accompanied by a form detailing the candidate’s medical health for completion and return to the Ministry. On receipt of the completed form the Ministry will send it to its medical assessor and it is only if the assessor identifies a possible health condition or problem that the candidate will be asked to visit their GP for a detailed examination. If a candidate does not comply with the request to provide information or to undergo a medical assessment, or if the medical report is unsatisfactory, the Lord Chancellor will be able, after consultation with the Lord Chief Justice, to notify the Judicial Appointments Commission that he is not proceeding with that appointment.

_Law Society View_

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

**PART 7: POWERS OF LORD CHANCELLOR IN RELATION TO INFORMATION**

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

_Law Society View_

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

**PART 8: DEPLOYMENT, AUTHORISATIONS, NOMINATIONS ETC**

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

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

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

Additional Issues

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

Funding

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

Targets


Guidance

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

Eligibility criteria

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

Transparent appointments process

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

Length of appointments process

37. While the length of the appointments process is an operational rather than statutory issue, the Law Society remains concerned about the performance of the Judicial Appointments Commission. There can be an interval of up to two years between the initial advertisement and the successful candidate taking a place on the bench. It is unreasonable to expect an individual to put their professional career on hold for that length of time and it may be a factor in deterring some lawyers from applying for judicial office. The Law Society is therefore strongly supportive of the efforts of the Commission to expedite the selection process. Better forecasting of impending vacancies and a rolling programme of recruitment have been implemented by the Commission and should produce an improvement.
38. If that reduction in the length of the appointment process can be achieved, then there are two legislative amendments which the Law Society would request. Firstly section 94 lists. Section 94 of the 2005 Act enables the Lord Chancellor to request the Judicial Appointments Commission to provide a list of suitable candidates for appointment to a particular level of judicial office, for example Recorder. The Commission undertakes the selection process, the successful candidates are notified, but they do not proceed to immediate appointment. Instead their names are placed on a list to await appointment as and when an appropriate vacancy occurs in the area in which they have specified that they would wish to sit. An individual can remain on the list for in excess of 18 months. There would be no need for section 94 lists if the selection process was more responsive to the needs of the Courts Service.

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

May 2008

Examination of Witnesses

Witnesses: Mr Timothy Dutton QC, Chairman, Bar Council and Mr Andrew Holroyd OBE, President, Law Society, gave evidence.

Chairman: Mr Dutton and Mr Holroyd, may we thank you very much for joining us this afternoon to answer the Committee’s questions on issues relating to judicial appointments. Before we start can I make a note for the record that Members have declared interests relevant to this inquiry and they are available today and on the Committee’s website. I believe there may be at least one other declaration of interest.

Lord Hart of Chilton: Not only am I a solicitor, my wife is a solicitor and she is also a recorder.

Q88 Chairman: That is noted. Thank you very much. I wonder if I can ask you both if you could give an opinion as to whether we should be looking at this at all just three years after the judicial appointments process was re-born by the 2005 Act. Would you like to start, Mr Dutton?

Mr Dutton: First of all, can I say thank you very much for the invitation given to us. I am here with, behind me, Ingrid Simler QC who is Chair of our Equality and Diversity Committee and she has done a lot of work on judicial appointments within that committee. We are cautious about a process of change to the Judicial Appointments Commission so soon after the Constitutional Reform Act 2005. There can indeed be changes made to the processes of application so as to ensure that one has talent coming from a diverse pool, satisfying the merit test in the Act itself, and ensuring that the pool of potential applicants is sufficiently diverse, but we do not think wholesale reform of the process is required. We welcome an independent appointments process and we want to work with the JAC and with the Ministry to ensure that that process works well.

Mr Holroyd: Thank you very much indeed for the invitation. So far as the Law Society is concerned, we argued long and hard for the setting up of the Judicial Appointments Commission and we are very pleased that it has been established. Nevertheless, even though it has only been in existence for two years, we do actually feel that there are some criticisms of the constitutional setup; in particular, the fact that the process is still not independent from government influence and intervention. We feel that what is proposed in this Bill does take us a long way down that road and, therefore, it is important from a constitutional point of view but also from the point of view of ensuring the judicial process is independent and is seen to be independent from government intervention.

Q89 Lord Williamson of Horton: I wanted to ask a slightly leading question to which I am sure you are accustomed in your professional role. I want to ask specifically about whether the role of the Prime Minister and the Lord Chancellor should be changed and how the appointments process should be held to account. Is there a case for giving the Lord Chancellor power to set targets or issue directions through the Judicial Appointments Commission? The leading element is the indication that these proposals were not in the original consultation document.

Mr Dutton: We agree that the Prime Minister’s role in appointing to what would be the Supreme Court should go. It was largely a simply confirming role. The second and third parts of your question are really driving at the meat of the topic. We think the power to set targets is something which needs to be approached with caution. What is important is that
there should not be the setting of quotas for judicial appointments. Performance targets can indeed be set for a body, for example, a target to complete an appointments process, the circuit judge competitions, within so many months, but the setting up of a target, if it were to be adopted, must never actually interfere with the process of appointment, nor must it be perceived to be doing so. We think that a perception of any form of interference in an appointments process through the use of targets would indeed be a serious problem in just the same way as any form of the use of quotas would be. As to directions, that is subject more or less to the same answer. Again, one can use directions in order to ensure that processes are appropriate. Can I give you a simple example? There is a concern as to whether or not the pool of applicants for the judiciary is drawn from a sufficient cross-section of society, ie whether there are any black, minority or ethnic applications or enough women applications. It is possible to ask the JAC to have targets, so as to create a diverse pool of applicants. Having said all of that, we believe that the JAC is attempting to do this and that providing it is doing so and it is held suitably accountable there would be no need to go down the target-setting process about which we are cautious.

Mr Holroyd: I think it follows from my answer to do with the separation of powers that you know where the Law Society is coming from on this issue. We welcome the removal of the Prime Minister from the process. We would say that an independent Judicial Appointments Commission has been set up and that Commission should be left to get on with its work. It should not be subject to second-guessing by Government, neither the Prime Minister nor the Lord Chancellor. We believe that the JAC has been set up to be independent and should be seen to be independent. If any targets are set externally or criteria are set externally other than those which are of a very broad nature then we believe you start to interfere with that independence and we should be very cautious about doing so. If the pool of candidates is not sufficient then that is clearly a matter for the Judicial Appointments Commission itself, to ensure they make every effort so that anybody who is eligible to apply does apply for the post and that those who wish to apply are not artificially excluded in some way.

Q90 Chairman: Does Government not have a responsibility, one way or another, to ensure that it happens?

Mr Holroyd: There are a number of checks and balances proposed. Firstly, we have the proposed stakeholder panel which will be there to make points of that sort. Secondly, there has to be an annual report to Parliament. Thirdly, we would be in favour of some parliamentary scrutiny of the processes of the Judicial Appointments Commission and would see the Ministry of Justice having precisely that role, to have scrutiny of the process issues and the kind of problems that we have been discussing.

Q91 Lord Armstrong of Ilminster: Both of the witnesses said that they welcomed the removal of the Prime Minister from the appointments process. I cannot remember any occasion when the Prime Minister sought to overrule the Lord Chancellor, but I can remember cases where the Prime Minister queried or asked what he thought to be appropriate—not for frivolous reasons but for good reasons—questions about an appointment. Are you sure that we should do without that additional filter? Mr Dutton: We feel there is no need for that additional filter, the prime ministerial filter, given the Judicial Appointments Commission setup, and given the setup which would apply for Supreme Court appointments, which is really what we are talking about. We did not feel it necessary to have prime ministerial involvement.

Mr Holroyd: The circumstances that you are talking about were prior to the setting up of the Judicial Appointments Commission. The process that we have set up there should be robust enough to ensure that the kind of problems that might have been there under the old system do not occur in future.

Q92 Lord Armstrong of Ilminster: In the White Paper the Government floats the idea that Parliament should be given a greater role in scrutinising the appointments process. They talk about an annual joint meeting of the Commons Justice Committee and the Lords Constitution Committee while ruling out the possibility of confirmation hearings for individual judges. What are your views about this idea for increased parliamentary scrutiny of the process?

Mr Dutton: First of all, we welcome there not being confirmation hearings. I know that on an earlier occasion we have met and I have given that view of the Bar Council. We thought confirmation hearings would be problematic, to put it mildly. We consider, as the Chairman indicated in an earlier question, that scrutiny is appropriate, but we would not see it as inappropriate if there was scrutiny through a parliamentary committee twice a year. The second limb of the question asked about a Judicial Appointments and Conduct Ombudsman, which again we would not see as inappropriate.

Mr Holroyd: I think we would broadly agree with that line. We would certainly not want any risk of political influence entering into the process and confirmation hearings in our view would lead us down that route and would be very undesirable indeed. As I have indicated already, we would see parliamentary scrutiny as the appropriate form of scrutiny of
process rather than scrutiny by a government minister.

Q93 Lord Hart of Chilton: You will have seen that the draft Bill gives the Lord Chancellor a range of new powers in addition to the directions that we have been talking about. Two of the powers are the setting of non-statutory eligibility criteria and being able to remove judicial officers from the Schedule 14 list, subject to certain checks. What are your views on those?

Mr Holroyd: You probably will be able to guess my views from what I have already said, my Lord. The Law Society thinks it is undesirable that the Lord Chancellor should have any influence. We would say that if you have set up a Judicial Appointments Commission then one must have confidence in that process. If there were circumstances in which certain appointments could be bypassed from the Judicial Appointments Commission we would find that very worrying indeed. Already there have been some concerns about the appointment of Deputy High Court judges, for example. An extension of those kinds of informal arrangements, which would somehow bypass the Commission that Parliament has set up, we would find wholly undesirable. We also think it is for the Judicial Appointments Commission to set the criteria in accordance with the 2005 Act. We think that that is sufficient. If extra statutory criteria are applied, for example, such that nobody should be appointed without paid judicial experience that would provide an artificial barrier for many. I am thinking, for example, of senior partners of our major City firms who might be retiring in their early 50s, who might seek a career in the judiciary following that, but who would clearly have had major roles in their firm and have found it very difficult to make time for a part-time appointment prior to retirement. We would see such additional statutory requirements perhaps as setting barriers to the precise wide pool that we were talking about before.

Q94 Lord Hart of Chilton: So you think they would erode confidence in the Judicial Appointments Commission as well as being wrong in principle?

Mr Holroyd: Indeed.

Mr Dutton: Our answer differs slightly from that. On the Schedule 14 criteria, we would not see a problem with that removal. So far as the Lord Chancellor setting eligibility criteria, we would have said yes to paragraph 138 of the White Paper, which I think sets out the point there. Can I give two examples of problems which eligibility criteria might overcome, albeit they do not have to be set by the Lord Chancellor? Within the CPS, for example, there are people working from a diverse pool who would wish to have a career in a Judicial Office and within the Government’s legal advice likewise. Our answer is qualified in this way. If there were a power to set criteria, it must not ever be seen to be interfering with the independence of the Judicial Appointments Commission. That is the qualification which we would place on it.

Q95 Ian Lucas: Mr Holroyd, I should mention first of all that I am a solicitor. Are you content with the current proportion of solicitors who are appointed to the judiciary of the applications that are made?

Mr Holroyd: It would have been good if there had been more. I think we have to recognise that the judicial appointments process set up by the Judicial Appointments Commission is, as we have said, quite young; it has only been going for a short period of time. What we have had in the last recorder round, for example, which is still in process, is a large number of solicitors applying to be recorders. We have had an objective aptitude test. We would hope that going forward we would see the percentage of solicitors appointed increase as a result of the clear and transparent processes now put in place by the Judicial Appointments Commission.

Q96 Ian Lucas: I asked the question because I was very struck by the table I have in front of me, which is the aggregate table for selections for the period 1 April 2007 to 31 March 2008, which shows that 50 per cent of applicants were solicitors. Of the applicants who were short-listed, that figure immediately went down to 40 per cent and selections made went down to 32 per cent and despite there only being 30 per cent of applicants who were solicitors. Of the applicants who were short-listed, 39 per cent of the appointments made to the judiciary were barristers again. Have you any explanation for that?

Mr Holroyd: I do not have any explanation for it. What we would hope is that we will see those figures change moving forward and we would see a higher percentage of solicitors being appointed. This clearly is something that we will need to keep a very close eye on going forward and it is something that I would see the stakeholder panel seeking clear assurances on to ensure there are no unwitting bias elements in the process of selection.

Q97 Ian Lucas: Should you not be accountable to ensure that, for example, more solicitors are appointed to the judiciary in due course?

Mr Holroyd: I think diversity of the judiciary should be an issue in relation to a proper balance between the different elements of the profession who apply, assuming they are of the same experience and background.

Lord Campbell of Alloway: Diversity is all very well as long as it safeguards quality. Of the two, the quality is far more important than the diversity. You have got to get your Orders right on this. I think where we have gone wrong is we have got our Orders upside
down. Of course, I am an old silk, I have been out of practice for a long time, but having been at the Bar and served in all courts, from the Coroner’s Court to the appellate court here, you realise that not all judges are really totally suitable to sit because just now and then you find somebody has slipped through the net who really should not be there at all, but this is going to happen in any system. You will get far more fish through that net if you allow the public, who have no concept of what the qualities of judicial efforts are—It is not just a question of intelligence. I will not mention any names, but there are some highly intelligent judges that I have appeared before who were extremely bad judges because they made up their minds before they came into court and they would not listen. I do not think this goes on as much today as it did in my early days but it still goes on. How on earth are the members of the public, who have no experience at all to as to the type of qualities that are demanded of the judiciary, to have an influence of power as to appointment? How and why? Is it a vote winner? Is it a political gesture? Is it equality to everybody at all times everywhere? I do not know. If it is any of those, it will not do to retain the quality of our judiciary. Would you agree that there is a distinction between, in any event, the initial appointment of a judge and the elevation of office because the elevation of office can only be supported by those who know about his performance in court, not by targets?

Q98 Chairman: I think perhaps we should administer a caution before you answer that! Please do so if you wish.

Mr Dutton: The statutory criterion in the Constitutional Reform Act is merit and merit is the single criterion, having regard to diversity. It is a common misconception that having a diversity requirement in some way dilutes merit. It is a misconception which must be dispelled. The point about having a diverse pool merely means that you have an abundance of talent, no matter where it comes from, from which you can choose. It is very important that we dispel the view that a requirement that the judiciary be diverse in any way dilutes merit. A proper appointments process having regard to diversity never dilutes merit, in fact it increases it. The second point I wish to make is the one about how the public can have confidence. It is essential in a democracy which abides by the rule of law that the public has confidence in the judicial process and that is in judicial decision-making, that it has confidence in the decisions which come from courts or juries directed by judges. The measure of success of the Judicial Appointments Commission and of those involved in the process will come from the quality of judicial decision-making in the years to come. At the Bar we have every reason to believe that if we encourage all of our members, from a wide diverse background, to pursue their careers vigorously they will become, along with our colleagues from the solicitors’ side of the profession, the strong judges of the future. That maintains confidence in the system. It is ultimately much more than a vote winner. If you do not have a strong independent judicial system I am afraid society as a whole suffers immeasurably. The third point I want to make, which was the tail end of the question, relates to elevation to judicial office. The answer is that experience can no doubt form part of the competency criteria for anybody seeking elevation, for example, from the High Court to the Court of Appeal or from the County Court to the High Court. There is no reason at all to suppose that those qualities will not be taken into account under the processes going forward.

Mr Holroyd: I have very little to add to that except to say that merit is to do with the ability of being a good judge. That includes a lot of qualities now which are not merely to do with advocacy, they are to do with issues to do with case management and other qualities which are required of judges today and those are elements of experience that can be gained in any part of the legal profession. Elevation also, from district judge level onwards, which perhaps is something surprising, you would have expected to have been more of a career route than perhaps it has been.

Q99 Lord Plant of Highfield: I would like to ask you about the key principles that are supposed to guide the appointments process. Do you think that the draft Bill has identified the most appropriate key principles since there are these others that have emerged through the consultation? Do they have the right kind of standing in the draft legislation or should the key principles of the process be made statutory?

Mr Holroyd: We believe that those principles are about right and we would not wish them to become statutory.

Q100 Lord Plant of Highfield: Could you just say why not?

Mr Holroyd: I think it is the reason that I have stated before, that these criteria are set out and they are a matter for the Judicial Appointments Commission. Again, if they are statutory then they could skew the process in the way that I was saying before.
Mr Dutton: We would not argue with the point that the process should be, fair, transparent, proportionate, effective, because that is looking at the process of appointment. The other issues which have come up in consultation, such as security of tenure and independence, are requirements of an independent judiciary and are a sine qua non of an independent judiciary and we would agree with them. As we understand it, these principles are statutory principles for process and cannot in any way detract from the other two I have picked on, security of tenure and independence, which are given for judicial appointments.

Mr Holroyd: Indeed. I would adopt that.

Q101 Chairman: We were going to ask about the Judicial Appointments Commission panel and whether it replaces the need for two professional commissioners. Do you have a view about that?

Mr Dutton: We would not want to see the two commissioners being replaced. We think that the constitution of the JAC with its 15 members is appropriate and, therefore, having a Judicial Appointments Commission panel as a replacement for the two commissioners we think would be inappropriate. That said, can I add to the answer because there are—I am not sure if the Committee is aware—groups working with the JAC. There is a liaison group with the professions, there is a diversity forum on which the professions are represented, in our case by Rabinder Singh QC, and there is a steering research group which works with the JAC looking at research and statistics. I would like to make sure that you and your colleagues know that those arrangements are already in place with the JAC.

Mr Holroyd: As far as the Law Society is concerned, we think that the composition of the Commission is right, it should be left as it is and unchanged going forward. There are these internal groups, but the difference we see for the Judicial Appointments Commission panel is that it is an additional check from the stakeholder point of view of the performance of the Judicial Appointments Commission. We would say that that is appropriate having regard to our view on the separation of powers that I mentioned at the beginning.

Q102 Chairman: The draft Bill suggests that there is a purpose in reducing bureaucracy within the appointments process. Do you think it is travelling in the right direction or is there a case for allowing the Lord Chancellor to delegate any of his functions to improve efficiency?

Mr Holroyd: We would say no. Obviously the Judicial Appointments Commission is early in its day. There were some criticisms initially about the length of the process. That was partly to do with the extent to which the Lord Chancellor’s Department had some of the issues to be looked at on their desk. Having the involvement of the Lord Chancellor is inevitably going to take additional time in the process. As to the issue of how long appointments take and how efficient the judicial appointments are in their operations, we would like to see some improvements there, but we do believe that they should be given time to move on with that. It is not for the Lord to Chancellor to be able to delegate because that again implies his involvement in the process.

Mr Dutton: Medical inquiries will now be handed over to the MoJ, which is welcomed by both of us because it will improve the process. The problem with the process has been one of delay. Steps are being made to improve that. We doubt that removing the Lord Chancellor’s current check on appointments would in fact make much difference in terms of delay. It may slightly improve the process of appointment after you have been told that you have an appointment but it is unlikely to alter things. So far as bureaucracy is concerned, we consider that the critical feature of this is for potential applicants for judicial appointments to know that once they have made an application it will be dealt with quickly, fairly and efficiently and that when an appointment is made it is made at a defined point in time. There have been problems in this process and as a result it is possible that some meritorious applicants have not applied for judicial appointments because they are concerned about inefficiencies in the process and whatever happens—and we do not believe this is a legislative point, we think it is a process point—those inefficiencies need to be removed. We do not think it is part of the legislative process, we think it is a functional process.

Q103 Lord Hart of Chilton: Are there any specific problems with the appointments process that are not resolved by the draft Bill? What lacuna have you spotted?

Mr Dutton: There are problems on the ground which we are receiving at the Bar Council with some of the competitions going on. For example, there are circuit competitions going on at the moment where applications are dealt with in confidence for obvious reasons but the exam is held in a room of 25 people. The result of that is that the profession at large may hear of applications and confidentiality is lost. We have heard of problems on the recorder competitions in the examination process in the north and north-east, which are problems of the managing of the process. They are very significant because the effect of such process problems can be, as I have said already, not to promote the talented (the Recorder Problem) or to discourage talented people from applying for fear that confidentiality is lost if they do not get the
post. Or, indeed if they do, pending the application going through, and that these can be discouragements for people of talent to apply. None of the points I have just made or any other examples that come through the process are to do with legislation, they are to do with the managing of the process and the need for efficiency and fairness within it.

Mr Holroyd: I do not think I have very much to add except that I think I have got much less complaint about the recorder process than Mr Dutton did from his members. I am not sure whether that indicates anything.

Q104 Chairman: Does that simply mean you have fewer applicants there to complain?

Mr Holroyd: No, I think there were more solicitor applicants, but it was fairly evenly balanced.

Q105 Lord Tyler: Can I ask Mr Dutton whether he feels those very important practical difficulties are being properly addressed by the present regime and if there are ways in which they might be improved by the way in which the draft Bill is now intending to deal with these issues?

Mr Dutton: We are addressing them with the present regime, yes. It is too early to say -because the circuit competition I have just mentioned is an ongoing one—whether they have been resolved but I certainly hope they will. The professions speak with the JAC on a regular basis. On the second part of your question, this goes back to the giving of directions and targets, one can be sceptical of the use of targets and directions, particularly when one wants to make sure an appointments process is independent, but there is something to be said for ensuring, whether it be by means of a Lord Chancellor’s direction or whether it is simply by means of better conduct of the process, that competitions are conducted swiftly and fairly. It is absolutely critical for success of the system, and we do have concerns about this at the moment.

Mr Holroyd: I would very much echo that response. To be fair to the JAC, they have responded to issues at speed of appointment and have set much tighter timetables for the latest rounds than they had at the beginning, which has been very much welcomed. As we have said, it is a body which has only been set up relatively recently. There are issues that arise, but I think we would say we have found the JAC generally responsive to the concerns that the profession has raised and, therefore, we see this as work in progress and not something that needs to be tackled by changes in the legislation.

Q106 Chairman: Thank you very much indeed for joining us this afternoon. Before you leave, it is always an advantage when we have experts such as you to ask if you have any specific drafting changes that you feel should be made to Part 2 of Schedule 3 or indeed the Bill more generally. If you have, we would be most grateful if you could send us those suggestions. It helps do our homework for us and it also enables us to be more precise about the changes you think would be helpful.

Mr Dutton: Thank you very much. I think we would welcome the opportunity to write to you.

Mr Holroyd: We will do the same.

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**Examination of Witnesses**

Witnesses: Ms Frances Gibb, Legal Editor, *The Times* and Mr Joshua Rozenberg, Legal Editor, *Daily Telegraph*, gave evidence.

Q107 Chairman: May I thank you for coming this afternoon to give evidence to the Committee. It is a bit like having a look at the exam paper before coming into the room having you sitting listening to our previous witnesses because I suspect much of what we will ask will be the same sort of issues but obviously from your perspective. Do you feel that it is just too early to reform the judicial appointments process so shortly after the Constitutional Reform Act 2005?

Mr Rozenberg: I personally do not think it is too early. I take Tim Dutton’s point that Parliament should not be looking for a wholesale reform of the structure of judicial appointments, but I think there was a general acceptance that the system was over-engineered. It clearly ran into various procedural problems, some the Commission say they have managed to deal with administratively, although possibly by bending the provisions of the statute, but it seems entirely sensible to take the parliamentary opportunity provided the Government does not use that opportunity to put in things which are not desirable.

Ms Gibb: I agree. I do not think there should be a wholesale change at all. I think it is far too soon to look at the work of the Commission and decide that change is needed. It has not been given a chance to bed down. If there are changes to be made, and I think there are some changes, they do not need legislation. Based on everything I have heard, they are procedural matters, bureaucratic points that do not require Parliament to intervene.

Q108 Chairman: Are there specific changes? You say procedural matters. Do you have any that you want to highlight?
Mr Rozenberg: Yes. The Commission has recognised that the system that applied to the first competition for High Court judges was structurally unsound, that was to create a pool of people who were eligible for appointment and then appoint them as vacancies became available. The problem there was that the careers were blighted of those who were kept waiting and who have not been appointed at all. They have managed to find ways, using the existing legislation, to conduct the current High Court competition for the right number of posts and that means that, although people will still have to wait for an appointment for up to a year, they do know that within that year the appointment will come.

Ms Gibb: I would make a similar point, it is just the time factor, the fact it takes up to nine months on average. There is a very lengthy process of consultation at the beginning and then a long delay once the names have gone to the minister. They are looking at all those points and they can address them without legislation.

Q109 Lord Williamson of Horton: I am on the specific point about whether the role of the Prime Minister and the Lord Chancellor should be changed and how the process should be held to account. I have one specific question which I think you heard me say earlier is a rather leading question. Is there a case for giving the Lord Chancellor power to set targets or issue directions to the Judicial Appointments Commission? I am particularly conscious of the fact that this was not covered in the original consultation document. It sprung into life in the White Paper and has now sprung to life again over the questioning of it. Would you like to comment on this question of targets or directions?

Ms Gibb: I did not hear the previous speakers. On targets, I think you have to distinguish between targets that are to do with the performance as a commission and procedures and timeliness, that kind of thing, and targets that are to do with quotas of women or ethnic minority judges. While the former may have some merit in making sure that the commission performs well and is timely, as in any other body in the public sector, I think that targets would be dangerous as far as any group of judges is concerned. You would then get the Commission being judged a failure if it did not meet its targets and if it did fulfil its targets you would get an even worse suggestion, which is that people had been appointed just to meet targets.

Mr Rozenberg: I agree entirely with that. Perhaps I could talk about requirements, which may be slightly different from targets and that may or may not be your question or it may be a related question. It is one thing to set the requirement, for example, that a judge sitting in north Wales should be able to speak Welsh, that is obviously fine, but there seems to be some feeling that it should no longer be a requirement that in order to sit full time as a High Court judge one should no longer have to sit part time. There is a suggestion both from the Judicial Appointments Commission, from the Lord Chancellor and from the “Governance of Britain” paper that that requirement of at least two years fee paid experience may not be necessary. I personally think that that experience is necessary. I disagree with Andrew Holroyd. I can see why he argues that somebody who has been the senior partner in a firm of solicitors and has not had the opportunity to sit part time should not be held to have to sit part time for two years in order to become a judge, but I would say that that is an important requirement and I think that that solicitor should either find the time to sit part time or should have to wait a couple of years during which he or she sits part time. If the proposal is to dispense with some requirements that I would regard as quite important then I would not want to give the Lord Chancellor that power to dispense with those requirements.

Q110 Lord Armstrong of Ilminster: The White Paper floats the idea that Parliament should be given a greater role in scrutinising the appointments process through an annual joint meeting of the Commons Justice Committee and the Lords Constitution Committee for instance and the Judicial Appointments and Conduct Ombudsman has stated that his office is well placed to scrutinise the appointments process. Do you think there should be greater scrutiny by Parliament of the appointments process?

Mr Rozenberg: I think that you in Parliament have the advantage over us as journalists in that you can ask questions and be pretty sure of getting the answers. When we have spoken to the Judicial Appointments Commission we have not necessarily got the information that we have requested and yet we have found that when you ask for it as a Select Committee then you have received it. I think there is some merit to this. I think it should not go too far. It should not in any way detract from the independence of the Commission, but, yes, I would have thought the opportunity to take evidence from the Commission once a year would be desirable.

Ms Gibb: I agree. I think the Commission should be accountable through the Justice Secretary to Parliament but chiefly in respect of its procedures and overall policies rather than individual appointments, numbers appointed, that kind of thing. I think there has to be a distinction made.

Q111 Lord Armstrong of Ilminster: You would not like to see confirmation hearings in Parliament?

Ms Gibb: Absolutely not. As far as I understand it there has been almost universal opposition to that. Even post-appointment hearings, I cannot really see...
the merit of them at all. I think both of those proposals raise the spectre of politicising the judiciary, which would be undesirable.

Mr Rozenberg: As a journalist I would love to see them but I think they would be entirely undesirable!

Q112 Chairman: Is it not better that they question then rather than after they have made their decisions? Parliament frequently feels constrained at commenting on judgments by judges all over the place. Would it not be better to know they have got the right people in the first place?

Mr Rozenberg: What if you found they had not? They have got security of tenure. It is perfectly all right for people to say that a particular judge should resign. I have said that myself, but I am not entirely sure that a Select Committee should be calling for the resignation of a judge.

Ms Gibb: I remember Lord Bingham’s comment on this very point and he said, “What questions would be asked of the appointed judge? They can’t be asked about their politics or their views on any issue that they may have to judge. What are we going to be asked, do they like pussycats or something like that?”

Q113 Lord Armstrong of Ilminster: The US Senate conducts such confirmation hearings. Why should it be that that is appropriate there and not here?

Mr Rozenberg: Because the judges, particularly of the Supreme Court in the United States, have greater powers than it is intended that the judges of our Supreme Court and the other courts will have.

Q114 Lord Armstrong of Ilminster: It is not because there is a largely political element in the appointment of members of the Supreme Court in Washington?

Ms Gibb: That is right, there is, but that is for the reason that Joshua said, that they have the power to strike down statutes, which our judges will not have even in the new Supreme Court.

Q115 Lord Campbell of Alloway: Could I ask if targets are to be set? I am not quite sure what targets means in this context. Suppose one of the targets for a parking attendant is the number of cars you put your tickets on. I find it a very difficult concept to apply, the appointment of a judge. I am old and perhaps out-of-date but I find it very difficult. The trouble is, we have not got a Lord Chancellor. Do not pretend because there is a name called Lord Chancellor that he is a Lord Chancellor or has the competence or the experience or the authority to do what he did in the past, which is to appoint the judiciary? What are you going to do? You have got somebody called the Lord Chancellor who has not got the experience or the means at his disposal. How are we going to help him in this new order? Would either of you consider that he should have the assistance of either the Lord Chief Justice, who does know what is going on in the courts, or one of the Appeal Court judges appointed by him, or a High Court judge, or somebody who lives in the profession and knows something about what goes on? What is your reaction to this? Do you think this is a worrying situation, as it appears to me, or is it all perfectly straightforward?

Ms Gibb: My personal view is that the logic of having set up the Judicial Appointments Commission is that the Lord Chancellor should have a very, very limited role in appointments. I do not think he should have a role at all, but if he is going to have any role, say with the senior appointments, I think it should just be consultative and that the job should be done by the Judicial Appointments Commission in conjunction with the senior judiciary in the way that is set up under the Act. It makes no sense for the Lord Chancellor to continue to have a proactive role which is not in line with the greater separation of powers that the Act was designed to achieve.

Mr Rozenberg: I agree with that. There probably does need to be some check and balance on the Judicial Appointments Commission if, for example, it adopts approaches and policies that the public might disagree with. I can see some residual role for the Lord Chancellor, but the whole structure that has been set up since the Lord Chancellor ceased to be head of the judiciary has required him to work very closely with the Lord Chief Justice and concur on many matters. To take the broader point that you raise, my Lord, it all depends on who the Lord Chancellor is. We have a Lord Chancellor who is legally qualified, who is senior in terms of service in the Cabinet and whom the judges respect and work with, but under the new system there is no guarantee that the next Lord Chancellor, from whichever political party, will not be a young politician with several career moves ahead of him/her who might take a different approach.

Q116 Lord Campbell of Alloway: And not a lawyer.

Mr Rozenberg: And not a lawyer.

Q117 Lord Campbell of Alloway: I quite agree with your reaction. Checks and balances only come into place on elevation, not on the original appointment. What I am concerned with is the original appointment where there is no room for checks and balances other than what existed in the past and what you and I are discussing is the future. Is that right?

Mr Rozenberg: I think you are right to draw attention to some of the structural problems. To take one practical example, the most recent appointments to the High Court Bench were delegated to a panel of three members of the Judicial Appointments Commission, two of whom were lay people and one of whom was a judge. Lady Prashar, who chairs the
Commission, sat on the panel, together with a lay person, a woman, and Lord Justice Auld. The current arrangements for selecting this year’s crop of High Court judges are in the hands of five people. Lady Prashar is not one of them. All of them have links with the law to the extent that one is a lay magistrate and the others of legal backgrounds or legal qualifications. There must be some reason why the Commission has changed the panel that it has appointed. Maybe it thought that having a panel with a lay majority and only one judge was not best placed to judge the judicial skills to which you allude.

Q118 Chairman: Can I come back to Frances Gibb. You mentioned that you would prefer the Lord Chancellor should be out of the equation altogether in terms of judicial appointments, which is somewhat further than the Government is currently proposing, although I think you have the Law Society on side on that. What makes you say that? What is it that inhibits, you think, the Lord Chancellor to have any role in this?
Ms Gibb: I cannot see the logic of keeping the Executive involved in the appointment of, say, the small number of the most powerful senior judiciary, particularly when you think that those judges are the ones that are going to be ruling on cases involving government, or are likely to be, and I think that the way things are going and the way that we are trying to separate out the Executive and the judiciary more clearly is an argument in favour of reducing the role of the Lord Chancellor so far as possible. If it is felt that, because of his responsibilities overall for the justice system, and so on, that he should have some role, I would keep it that he is responsible for the Judicial Appointments Commission’s processes, and so on, at most a consultative role on the senior judiciary in the way that the Lord Chief Justice, conversely, is consulted on the appointment of the Chief Executive of the Legal Services Board, the regulator for the legal profession, so that they have a role in that sense, they have a say, but not a veto. I think more power should be devolved there or handed over to the Lord Chief Justice. He should be the check and the balance, I think, ultimately, on the senior appointments.

Q119 Chairman: You are saying that the appointment process should be delegated to the Lord Chief Justice.
Ms Gibb: I think it chiefly should be, in conjunction with the Judicial Appointments Commission.

Q120 Chairman: Do either of you know any jurisdiction where there has been this separation of the Executive from the judiciary to such a degree that almost anarchy reigns in that the parliamentary process has no part?

Mr Rozenberg: No.
Ms Gibb: No—but—

Q121 Chairman: So we would be moving beyond—Ms Gibb: I do not think it is unprecedented. In one of judicial appointments documents there is a table at the back showing what different countries do, and it is not unheard of. Italy, Sweden and places do not have any executive involvement. As I say, I am not saying completely eliminate the Executive, but make the role consultative, make it an over-arching accountability role for the way that the Judicial Appointments Commission runs and for policy.

Q122 Lord Campbell of Alloway: Do you know any other jurisdiction which has an unwritten constitution anything akin to ours?
Mr Rozenberg: Israel, I think, to some extent.

Q123 Lord Campbell of Alloway: Israel?
Mr Rozenberg: Yes.

Q124 Lord Norton of Louth: Israel and New Zealand.
Mr Rozenberg: Lord Norton says New Zealand.
Lord Campbell of Alloway: Thank you very much.

Q125 Ian Lucas: With the introduction of the Human Rights Act, although judges now cannot declare laws on the constitution, they have a more political role because of the passing of that Act. It is interesting that you are now proposing less political control. Are those two issues related in your mind? Does the passing of the Human Rights Act influence your decision that the Government should have less of a role in appointments?
Ms Gibb: I think to the extent that the Act prompted more socially sensitive, politically sensitive issues to come before the judiciary, yes, I think it is all the more important, and this is partly behind, I think as well, the setting up of the Supreme Court; that there is that separation.
Mr Rozenberg: I think the two do not necessarily go together. It was the Government’s idea to put judicial appointments on to an independent footing. I suppose it was inevitable. The fact that we are talking about it now and there are proposals to amend it shows that it was not entirely successful, but, as the Lord Chancellor says, it is too late to go back now. I agree with Frances, the more discretion, the more socially sensitive issues to come before the judiciary, yes, I think it is all the more important, and this is partly behind, I think as well, the setting up of the Supreme Court; that there is that separation.

Q126 Ian Lucas: But what is interesting is that that is the complete opposite of the United States’ system, where they do have explicit authority to overrule laws and they are politically appointed.
Mr Rozenberg: Yes. The question is which is desirable? I will happily give you my views on that, but that is perhaps not what you are asking.

Q127 Lord Hart of Chilton: I want to ask you two questions, but one very small one, because you touched on it really. If the Lord Chancellor were to move himself away from some of the appointments, do you think it is appropriate to strike the balance to say that he only has connection with the most senior appointments and has nothing to do with the junior appointments. Is that the appropriate balance?
Ms Gibb: Yes.

Q128 Lord Hart of Chilton: You are tending to go that way, Frances, are you?
Ms Gibb: I think so. I think you can make a case for that, that if he is to have any involvement at all, I think the level has been set High Court and above for the reasons I have mentioned before; that the numbers are smaller; that the cases are likely to be most significant in some respects—touching on government I mean—so, yes.
Mr Rozenberg: Yes, that is right, and also because High Court judges and above have greater security of tenure than the lower judges. You could say that the Lord Chancellor need have a say only in the most senior judges, by which I am thinking of the Lord Chief Justice and somebody who might become Lord Chief Justice next time round or the time after that, because the Lord Chancellor has to work very closely with the Lord Chief Justice under our system and it is arguable that the system is not going to work if the two individuals do not get on properly.

Q129 Fiona Mactaggart: I think, if I have read you right, both of you have said that the Judicial Appointments Commission should be given some time to fix any mistakes it might have made. I am summarising rather brutally, I suspect. What do you think are the mistakes it has made?
Mr Rozenberg: It was set up too quickly; it started work too quickly; as I said earlier, it was over engineered—this is not the Commission but the structure with which it had to operate—and it made the structural mistake of appointing a pool of people to the most senior appointments, thus blighting the careers of those who were selected and not selected. I am repeating myself. Those were fundamental problems. There were the other practical problems about medical appointments which led to delays of two months, we were told, in appointments being made, and so on. So there were some structural problems which they seem to be working through.
Ms Gibb: I would like to add that I think the Judicial Appointments Commission is in an impossible situation. It has come under fire from all quarters from those who had great expectations that diversity would be improved overnight, and then, of course, anxiety and suspicion, if you like, from more traditional quarters who do not see the point of it and who think that it is going to let diversity get in the way of merit. So it has had a very, very difficult tightrope to walk, and I think the problems Joshua has outlined—the structural problems, the bureaucracy and one thing and another—have not helped at all. Now, if they get that sorted out, I think it should be given a bit of a chance to see if it can be made to work.

Q130 Fiona Mactaggart: My impression is that, not only that diversity has not been proved over night, it seems to have gone backwards.
Mr Rozenberg: The figures do suggest that, yes, in terms of the number of women and people from the ethnic minorities. The question you then have to ask is whether that was the aim of the Commission, whether that was what the Commission was told to do and whether it, therefore, failed in that aim. I do not think that was what the Commission was told to do. As Tim Dutton made clear just now, the aim was to select on merit. They had to have regard to the need to encourage diversity in the pool available for appointment, and they have done various outreach activities to try to achieve that, but I do not think that you can say that they have failed purely because the number of people from the ethnic minorities and women has apparently gone down in the year that they have been operating.
Ms Gibb: I think it is right, as Tim Dutton said, that people will have been quite substantially put off by the delays and the fact they were kept waiting—your career is on hold for a year and the original problem by
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Q131 Fiona Mactaggart: The issue does not seem to be applications. One of the good things about the Judicial Appointments Commission is that we now have numbers for the number of people who apply and the number of people who are appointed, not something that has ever existed before, so there is much more transparency than previously. My colleague, Ian Lucas, highlighted earlier the fact that there seemed to be a bias towards barristers within the system, who were only 30 per cent of initial
applicants but ended up being 39 per cent of those appointed, and that, combined with the lack of progress, let us put it that way, in terms of ethnic minorities, women and so on, suggests that the Judicial Appointments Commission is still replicating the "people like us" phenomenon that has caused quite a bit of anxiety about whether our judiciary works if it just represents the people like us who have always been there.

**Mr Rozenberg:** You could say that, or you could say they are just appointing the best people for the job as they see it. If the best people for the job happen to be white, middle-class men who are barristers, then that is no reason for not appointing them.

**Q132 Fiona Mactaggart:** I am not saying that there should be an institutionalised bias against such a character, what I am suggesting is that there seems to be an institutionalised bias in favour of them and that the existence of the Judicial Appointments Commission, which many people thought would begin to overcome that, does not seem to have done that. Is there anything additional that we could do in order to overcome that if we believe, in the words of Baroness Hale, that a more diverse judiciary matters not only to the administration of justice but also to the public perception of the justice system?

**Ms Gibb:** I just caught the end of Andrew Holroyd, and I do not think he seemed unhappy about the number of solicitor applications, particularly at the lower levels. I think one of the points they touched on also, as did Joshua at the beginning, was the requirement for doing part-time work. I think that does actually present a big barrier to solicitors being able to take those jobs. I think they need to look beyond the selection procedures to the requirements, the eligibility criteria. Maybe it is right, or may be it is not, to have part-time work as a stepping stone, but it is a barrier.

**Mr Rozenberg:** The other thing that they are looking at is appointing judges from within the CPS. The CPS is a very large employer of lawyers, with a very good proportion of women and ethnic minorities, but if you are going to say that people who are going to become criminal judges, either circuit judges or High Court judges, need to sit part-time, as I think you should, then you run into difficulties because it is considered that prosecutors should not sit part-time as judges. The Judicial Appointments Commission wants to change that; I personally have misgivings about that; but once you make it easier for people who are not mainstream white, middle-class, male barristers to apply for judicial appointments, then you run into these practical problems. I am all for diversity, I am all for reaching out, I am all for helping people to understand that these jobs are available to them, and so on, provided we keep to the principle in the statute, which is that merit should be the only test.

**Q133 Fiona Mactaggart:** Do you think that that on its own is going to produce a more representative judiciary?

**Mr Rozenberg:** Merit on its own being the only test is not going to, and it is right that the Judicial Appointments Commission is looking at other versions of what I keep referring to as outreach and looking to encourage people to apply in the way that I understand it is. It, above all, is very conscious of this, but, as Lady Justice Hallett says, you have got to fish in the available pool.

**Q134 Fiona Mactaggart:** So you would oppose any part of this Bill at which we are looking at the moment creating a duty, or responsibility, or a target, or anything which was designed to produce a more diverse judiciary?

**Ms Gibb:** Yes, I would oppose that in principle. I do not think, in any case, that should be part of legislation. If the Justice Secretary wants to set that as an aspirational policy, that is one thing, but I personally do not think it is right. In any event, he has set the overall policy and the duty to promote diversity and I think that is probably as far as it should go. I do not think you should be looking at targets, numbers or anything like that.

**Mr Rozenberg:** I agree. Any perception in the public’s eye that people are being appointed because they tick a box or because they are in a minority is demeaning to them, it is damaging to people who have made it in the past without such targets or assistance, or whatever it may be, and it is damaging the public confidence in the judiciary.

**Fiona Mactaggart:** I think the history of targets and quotas in Parliament suggests that that is actually not the case. I bet there are very few people who could name those members of Parliament who were selected from women-only shortlists, but thank you.

**Q135 Lord Norton of Louth:** On the point about the Lord Chancellor and the powers that the Bill proposes to confer, they include stipulating eligibility criteria on a statutory basis, but also the power to remove appointments under Schedule 14. Do you have views on that? The previous witness did not seem to see that as a problem, but the Lords’ Constitution Committee is warning it is a Henry VIII provision to be able to do that. Do you have any views on that?

**Ms Gibb:** Simply, I think, on the eligibility criteria, it really should be a matter for the Judicial Appointments Commission and the Lord Chief Justice to decide between them. It should be a joint effort. That is my view on that. The removing of jobs...
out of the appointments process so that you can fast-track the filling of jobs seems to me to undermine the whole purpose of setting up the Judicial Appointments Commission. If you are going to do that, I think it would be undermining to public confidence in the Commission and defeat the whole object of the exercise.

Mr Rozenberg: I can see a certain advantage in the Lord Chief Justice being able to move people sideways without the need for it to go through the Judicial Appointments Commission process. We know perfectly well that the system of a tap on the shoulder encouraged people to apply and in some way embarrassed people to accept appointments and that these people are not applying now and not taking it now and not becoming judges, but that system has gone and if that is what is proposed I would be against it.

Q136 Chairman: One of the purposes of the Bill is to reduce bureaucracy. Do you think the draft Bill goes far enough from the appointments point of view, particularly the decision such as Lord Chancellor being entitled to delegate some of his responsibilities to others?

Mr Rozenberg: I think there has been a problem in the past over the bureaucratic structures in the system. I could not point to chapter and verse, but particularly the business about medical appointments, papers going back and forth between the Commission and the Ministry, and so on. I am not aware that the Lord Chancellor has complained that he has had too much work to do and that he cannot delegate it to officials. Certainly the Lord Chief Justice is required to do a very great deal, and if he could not delegate it, it would be quite worrying. It would be desirable if it was entirely clear which decisions should be taken by the Lord Chancellor or the Lord Chief Justice personally and which can be delegated to more junior ministers and more junior judges respectively. In terms of the bureaucracy, I see that the Government has taken the opportunity to put certain things into the Bill which, it says, are implicit and it wants to see on the face of the Bill, for example, a new section 89(a) in paragraph 24 of Schedule 3: reconsideration of the decision not to select. The Lord Chancellor may require the Commission to reconsider a decision that the selection process has not identified candidates of sufficient merit for it to make a selection. It says in the notes to that that this is the situation anyway. Then one asks, well why are they putting it in the face of the legislation? There must be some reason. Is this because they want to pressurise the Commission to accept a second-best candidate? I think one has to look quite closely at all the detail in this Bill and ask how much of it is necessary and whether there is any ulterior motive that may not be entirely obvious from the face of the Bill and the explanatory notes.

Q137 Chairman: Are you actually saying that, because of the lack of formality, the transparency disappears and, in consequence, we may get the wrong decisions?

Mr Rozenberg: I would not go that far. I am in favour of transparency, I am in favour of things being spelled out, but I just wonder whether in spelling things out the opportunity is being taken to make a subtle change to the existing situation.

Ms Gibb: I think if the Lord Chancellor was to retain a role, which I personally think should just be a formal approval role, on the appointments, he should actually do that himself and it should not be devolved to officials or junior ministers, because he has the statutory responsibility to ensure the independence of the judiciary, and so on. I just think it should rest with him. As Joshua said, I have not heard that it is an onerous requirement.

Q138 Lord Campbell of Alloway: I want to ask a short question, if I may, on the question of application. Surely the detail matters and you have to draw a line. You cannot apply, even today, to be a member of the appellate committee of the appellate court of the High Court. I do not know whether today you can apply to be a county court judge or a district judge—in my day you could apply to be a county court judge—but there has to be a line drawn and you cannot, because you believe we are in a new transparent society, accept the position that people can just apply to become a judge and, because they apply, their application has to be entertained. You have to draw a line. Do you agree with this or do you think that anybody can apply to be a member of the appellate committee of, not this House, the House of Lords?

Ms Gibb: When the job is advertised the requirements for the job are set out, and I think anybody who fulfils those requirements in terms of judicial experience, if for example, for a Court of Appeal judge, why should they not apply? It does not mean their application will be entertained—of course not—but why should they not apply?

Mr Rozenberg: I think the way it works for the higher appointments is that everybody who is eligible is deemed to have applied unless they say they do not want their name to be considered. Obviously, when you get to appointments to the Court of Appeal, they tend to be drawn from the High Court and, as far as I know, every High Court judge, except those who express their intention to retire, is assumed to apply, and even more so when you get to the House of Lords. I do not think that is a problem, but in answer
to your question, yes, if people meet the statutory criteria for judicial appointment, then they should be entitled to apply.

**Q139 Lord Plant of Highfield:** I wonder if I could take you back for a moment to some of the responses to Fiona Mactaggart’s questions, because I have been puzzling about this. I wonder if you could say a bit more about what you mean by merit; that merit should be the ultimate criterion? What is merit in a judicial sort of context? If you took a rather different but not wholly dissimilar kind of situation, if you were sitting on an appointments panel in a hospital to appoint a consultant, you might be faced with someone who is demonstrably the best clinical scientist, as it were, but lacks almost all skills in terms of communication, empathy, bedside manner, call it what you will, and yet those skills are absolutely essential to being a good doctor, and a lot of those skills have to be exercised in relation to people from different backgrounds, different circumstances, ethnic minorities, different genders, and so forth, that you are dealing with. If you are a man and you are dealing with female medical conditions, or the other way round, there is a whole lot of sensitivities to do with communication, with the effective exercise of your vocation as a doctor that brings these other aspects of the skill range into play along with the clinical science, as it were. Does any of this have a role to play in determining the merit of a judge and, if so, can we really draw the rather sharp distinction I thought you both wanted to draw between merit must out, as it were, and be sharply distinguished from issues about diversity and targets and so forth? **Mr Rozenberg:** Yes, the Judicial Appointments Commission drew up as one of its first tasks, I recall, criteria for judicial appointment and how it was going to judge merit. I cannot summarise it from memory, but my recollection is that it seemed entirely sound and sensible, and I have not heard any suggestion that it needs to be changed. If you want my view as to the most important criterion, it is good judgment, but all the other attributes to which you implicitly referred I think are included in the Commission’s criteria, and nothing I said is intended to detract from that. When I say “merit”, I mean what the Commission regards as merit.

**Ms Gibb:** That is right. There are several points. I have not got them in front of me, but they did spend some time defining it and reach a yardstick that they are going to use. All I would like to say is that I do not think it is quite right to say that we are saying merit trumps diversity, although it may do. I completely endorse what Tim Dutton said; that diversity does not mean a dilution of merit; it can mean a strengthening of it. There is merit in diversity and a diverse judiciary does not mean a less high standard one. **Mr Rozenberg:** I agree.

**Q140 Lord Hart of Chilton:** Do you think that there are any specific issues that you want to draw our attention to that have been missed altogether—I am sure, in your case, Joshua, there must be—things that have been overlooked by the Bill? **Mr Rozenberg:** None immediately spring to mind, but I might take the invitation the Chairman gave to the previous witnesses to write in or write publicly if I spot any. **Ms Gibb:** No, not really. I have covered it. It is not really for the Bill. It was just to bear in mind the wider picture and perhaps barriers and disincentives in some of the jobs themselves and the lifestyle that they involve.

**Mr Rozenberg:** I am worried that in the past the Commission have not attracted enough good candidates, particularly for jobs in the Commercial Court. I think they have more or less accepted that that is a problem, but by a certain amount of nifty footwork they have now got some quite good people, and have appointed them recently, and we are told that they have got good applicants under the present system. So long as they are getting the people and so long as they are reasonably open with you, the parliamentarians, and us, the press, on behalf of the public, then we should give them a fair wind.

**Chairman:** Thank you very much indeed, and thank you very much for coming to give evidence. Of course, if there is anything that comes to your mind afterwards, please do write in. We would be grateful for that. Before we finish the public session, I failed to mention at the beginning of this particular session that members have declared interests relevant to the inquiry, including an additional declaration from Lord Hart earlier in the session. They are available today and on the Committee’s website. Thank you very much for coming.
INTRODUCTION

The way a country interacts with other key actors in the world has become an issue reaching far beyond the traditional interpretation of foreign policy, including the established and difficult issues associated with the use of force and formal agreement with other states through their governments. It involves a whole range of relationships with multiple actors, different levels and on different thematic sectors in ways that have made drawing boundaries between domestic and external policy very difficult, and some may argue irrelevant. The long established prerogative of the executive branch of government over external relationships therefore has lost much of its original raison d’être.

The current draft Constitutional Renewal Bill, following the Government Green Paper The Governance of Britain (Cm 7170), and several consultation papers on the question of war powers and international treaties are a clear outcome of a noticeable shift in thinking about roles and responsibilities in the exercise of policy and decision making power in the foreign policy domain. This memorandum provides some key recommendations based on the One World Trust’s research to support the pre-legislative scrutiny process of the draft Bill.

Yet the draft Bill is not the only area in which the above mentioned change is and needs to be reflected. For instance the Government’s National Security Strategy of the United Kingdom (Cm 7291) does not only highlight the joint responsibilities of Government and Parliament for matters of national security, but also proposes key ways to improve the accountability in this domain through a more systematic reporting on implementation of the strategy, and a potential joint Parliamentary National Security Committee that, if appropriately reformed, could help to match the often integrated and cross-departmental work by Government on highly interdependent issues in this domain with a joined-up and proactive Parliamentary oversight capacity. Both, the improvement of joined-up reporting from the side of Government, and the strengthening of dedicated cross departmental parliamentary oversight capacity, are key recommendations put forward in our latest report A World of Difference: Parliamentary Oversight of British Foreign Policy, published jointly with Democratic Audit and Federal Trust at the end of 2007.

In order to engage with the integrated challenges of global governance in an accountable manner, also national institutional processes and their underlying principles need to be reformed so that the UK can live up to her responsibilities to protect and enable people in and outside the country to live in a secure, stable, just and prosperous world. This task is recognised in various documents at strategic level. It is useful to consider this broader context, not only to gauge the actual strength of the professed shift in strategic thinking, but also to understand the operational implications of constitutional renewal, as it is moved forward through the current draft Bill, and the need for depth when driving change through political and administrative practice in a whole range of policy and legislative areas.
KEY RECOMMENDATIONS

The draft Constitutional Renewal Bill is the result of a broader challenge to the sustainability of the Royal Prerogative over key policy areas, including foreign policy and defence, in a changing global political environment. At present, both the formal rules and the culture of parliamentary oversight in key areas which are protected by the Royal Prerogative do not match the often extensive good practice of parliamentary oversight that can be observed on traditional domestic policy issues.

One reason for the weakness of parliamentary oversight in key fields of global governance is the lack of statutory instruments to govern foreign policy questions, with the exception of some areas in EU affairs. Yet as the impact of external affairs on citizens is increasing, reforms are necessary that give Parliament a greater and formal say in the development of foreign policy, and powers to meaningfully oversee its development and implementation, not only with the benefit of hindsight but proactively ahead and during the often difficult process of navigating towards decision.

Key recommendations resulting from our research on systems and practice of parliamentary oversight in the domain of external affairs therefore include the following points, grouped by areas:

Parliamentary oversight of international treaties

— Parliament, the House of Commons, should be given the statutory right to decide over the ratification of international treaties, with a sufficient period available for review, written and oral query of Government over their detail and impact. In view of the often long term effects of such treaties, drawing on the substantive expertise of the House of Lords before a formal House of Commons vote to ratify the Treaty appears advisable, yet different forms for the provision of such advice including debate and committee recommendations could be imagined. While not on all issues a formal consent of the House of Lords to a Treaty may be required, it may be useful to draw up a list of thematic areas in which concurrent agreement from the House of Lords would be necessary in formal terms to complete ratification.

The present arrangements under the Ponsonby Rule essentially work on the basis of “non-opposition” of a treaty text for 21 days (during which Parliament sits) before the same instance that signs the treaty, namely government, proceeds to ratification. For practical reasons the 21 days “non opposition” practice can be viable and enables Parliament and Government to cope with the large number of treaties and agreements, especially if combined with the “soft mandating” practice proposed below. Yet in our view it should be in all cases be Parliament, not Government, that formally ratifies a treaty.

The continuation of the current tacit understanding that a request for a debate through the “usual channels” would be granted by government should therefore be replaced by a formal requirement for a either debate or a vote to be held if so requested, before ratification occurs by Parliament. As today, a meaningful process to assert this desire could involve a broadly supported request from a concerned House of Commons or House of Lords select committee, the Liaison committee, or a broadly supported Early Day Motion. Moving the actual act of ratification in formal terms from Government to Parliament would enhance the legitimacy of the decision.

— Parliament, by means of its relevant committees, should be involved in the negotiation and formulation process of international treaties, through a process of “soft mandating”. This “soft mandating” process would involve provision of information about and opportunity to input into the setting of negotiation goals, and recurrent reporting about progress and achievements, such as draft treaties or agreements. We agree that a full and constant public reporting and potential mandates on negotiation tactics could be counterproductive, yet to gauge the quality of outcomes of a negotiation process, the initial aims and parameters ought to be subject to reporting and parliamentary oversight.

In our view “soft mandating” would work well with a continued practice of 21 day laying period for treaties ahead of ratification by Parliament. The latter would then in effect become a last step in a longer process of engagement of Parliament with the issue at hand, including relevant detail in formulation of the treaty. In case that a “soft mandating” practice is not adopted, it may be useful to keep an option open for an extended laying period of 40 days, to be decided by Parliament.
**War powers**

Parliament should have the statutory right to decide over the use of armed force abroad ahead of deployment and action through an Act of Parliament, except in a limited number and narrowly described circumstances. These exceptions could meaningfully include the deployment of certain types of forces, or a protection of national capacity for rapid reaction. From a point of view of accountability, however, the solution to be found needs to be clear about what these exceptions are, and define them as narrowly as possible. This also applies to the question of terminology. The currently proposed term of “conflict decision” may be too broad to ensure proper accountability. In our view it would be advisable to be as specific as possible, and specifically include also the deployment of troops in any final phrasing.

We believe Parliament should have a right of substantive and budget review also on the decisions that for exceptional reasons are taken without initial statutory approval by Parliament. It may be advisable to fix an initial base interval for any such review of no longer than 60 days, but would recommend that Parliament obtains the right to set any subsequent intervals as it sees fit. We are convinced that, provided with sufficient information, Parliament would exercise such a right of review with sensitivity and take into account the interests of the operation and the safety of the armed forces. Any new information that may become relevant for a decision at the time of review should equally be made available to Parliament. Comparative experience from other countries, including within NATO suggests that also under rules that involve Parliament in the decision making and review no detrimental impact is to be expected on the ability of the UK to protect its citizens and interests, yet democratic accountability of one of the most important issues in political decision making would be greatly improved.

Above and beyond the failure to provide statutory powers for Parliament on the question of the use of force abroad, the proposed solution by means of the draft war powers resolution has several weaknesses, including the strong element of prime ministerial discretion on the issue of when (if at all) to seek approval, what information to make available, and with whom to share information.

— Government should be required to provide to Parliament full evidence supporting any proposals to deploy troops and use armed force abroad ahead of debate and vote. The information basis and capacity of Parliamentarians asked to decide on deployment of troops and use of armed force abroad are crucial for the legitimacy of the decision both at home and in the view of partners. Parliament’s ability to take these decisions would be further strengthened by additional resources and means to obtain and use independent legal advice on these questions.

While it is conceivable that there may be cases in which it is not advisable to fully publish the totality of evidence at a given point in time, Parliament should not be excluded for access to this information as it directly impacts on its ability to make an informed decision. From our point of view it would be advisable, and possible, to establish procedures, including allocating responsibilities to a committee, by which such elements of information are still shared with Parliament, even if only “in camera”. It is not acceptable for such information to be held only by the executive as it undermines the legitimacy of both Parliament and Government.

**Parliamentary oversight of responses to armed conflict**

— Parliament should institute a new or joint parliamentary committee focusing on the oversight of the implementation of Government responses to armed conflict from a strategic and where required cross departmental perspective. While in some exceptional cases solutions may need to be found to address issues “in camera”, this committee would need to perform the majority of its work under the general rules for the work valid for any other committee. Given the current absence of strategic and cross departmental reporting to Parliament on issues of national security and UK engagement in responses to armed conflict worldwide, we do not agree with the Government’s view expressed in the Draft Constitutional Renewal Bill that a new committee would not be necessary.

The proposition of government for a joint committee to oversee the implementation of the National Security Strategy would in our view be a good starting point for establishing and broadening this body into a full parliamentary accountability mechanism. To perform this function the current Intelligence and Security Committee will have to undergo however significant reform, including in

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1 The German case of very strong parliamentary control, informed by its history, may not be an ideal model, yet the increasing number of foreign deployments of troops and a by now fairly streamlined decision making process shows that relevant flexibility and rapidity can be safeguarded. In the USA, Congress retains a strong recurrent budget control power over funding of the armed forces.


terms of its composition, remit, reporting lines, appointments processes, and rules of transparency. It is in our view not appropriate for a proper parliamentary committee to report to the Prime Minister, nor should it face general restrictions on what it makes public, and be dependent in its related decision making on Government.

— Government should keep Parliament informed about the UK’s responses to armed conflict (both bi- and multilateral), and the implementation of relevant security strategies and policy commitments, such as set out in Public Service Agreements. The development of a regular, preferably annual reporting tool comparable to the annual human rights report, which such a new report would very meaningfully complement, is in our view the best way forward.

As the government rightly sets out the need for an integrated perspective on security issues, reporting should be equally integrated, and strategic in its focus. At present, the fragmented nature of departmental reporting fails to address the challenge and disempowers Parliament, and crucially also the people who should be enabled to make conscious and informed choices about their government.

— Parliament should have the power to determine the need for its recall through its Speaker in periods when it is not sitting, upon request of a significant minority of Parliamentarians. For practical reasons the threshold for triggering a recall should be lower than half of all MPs, for reasons of legitimacy of the recall it should not be lower than one third. Experience on a range of policy issues suggests that Parliament, if properly resourced, is a body perfectly capable of making sound decisions, including on matters of timing. We therefore believe that the right to determine its recall and engagement with decisions also on war and peace should be vested in Parliament.

THE ONE WORLD TRUST

Founded in 1951 the One World Trust is an independent grant funded research organisation with a current staff of eight. Key projects focus on the accountability of global organisations, parliamentary oversight of foreign policy, and the Responsibility to Protect. Our mission is to promote education and research into changes required in global governance to achieve the eradication of poverty, injustice, environmental degradation and war. To do this we develop recommendations on practical ways to make powerful organisations more accountable to the people they affect now and in the future, and how the rule of law can be applied to all. The key audience for the findings of our research are political leaders, decision makers and opinion-formers. Our vision is a world where all people are able to live in sustainable peace and security, and have equal access to opportunity and participation.

27 May 2008

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Examination of Witnesses

Witnesses: Mr Sebastian Payne, Kent Law School, University of Kent, Mr Peter Facey, Director, Unlock Democracy and Michael Hammer, Executive Director, One World Trust, gave examined.

Q141 Chairman: Can we welcome you very much to the committee and thank you for offering your time this afternoon to answer our questions on this inquiry. You need me to tell you—it is a formality—that members of the committee who have interests have declared those interests and a record of that is available also on the website. I do need to ask members if there is anything beyond that that they wish to declare. If not, welcome again and thank you for coming. I wonder whether I can start by asking what your opinion of the Government’s proposals are for the resolution setting out the procedure for the parliamentary approval of the deployment of troops and, in particular, how could the Government draft detailed Commons resolutions, or—the suggestion that they make—how could that be improved, if at all, and, indeed, your view generally on that particular part of the proposal? Who would like to start?

Mr Payne: I am happy to start. I am Sebastian Payne. I would like, if I may, to answer that and make a couple of introductory remarks, because the questions that you pose, and some of the questions that you have asked in previous sessions, have attempted to go at least into the fine detail of the drafting of the resolution, and I think some of the broader point of view gets lost; so I would like to say just a couple of words. I certainly welcome the Government’s impetus to constitutional reform, and that welcome has been evident in all the debates in the Commons and the Lords, but with regard to the draft resolution on war powers, it gives the Prime Minister so much discretion it is far from obvious that it changes the current position greatly. I think that is where the joint committee’s over-arching question which you published is so important. Do the proposals rebalance the power between Parliament and the Government? My answer to that is, no, they do not. The reason for that answer goes to fundamental constitutional issues. You are asking us to discuss the detail of the resolution, but you are also concerned with whether this delivers a rebalancing of the relations between Parliament and government, and I think the reasons for that failure to rebalance power can be summarised very succinctly. First, the Government controls the numbers in the House of Commons and the legislative programme—which, of course, everyone is familiar with but it has a fundamental impact on that balance—and, secondly, the legal form of the Government’s power, namely the Crown and the Royal Prerogative, place the Executive’s authority, in effect, beyond the control of Parliament and, in effect, beyond the control of the courts and, also, those powers lack legitimacy. So I think the legal form of these arrangements, set large in terms of the Executive’s powers in general under the Crown and specifically in the case of war powers, in fact, means that the legal form determines the outcome that Parliament has less control than it might otherwise have.

Q142 Chairman: Before going on to your colleagues, if you say that the objective is not met, whatever the resolution says, what is your solution to the objective?

Mr Payne: The over-arching objective is this, and it is not something that would come out from any fine detailed examination of the resolution. I think the legal form of government needs to be changed. In essence, the idea of the Crown as the legal entity and all the powers wrapped up in the Royal Prerogative are unworkable and, fundamentally, has to go. Quite frankly, I think the only possible way of doing that is through a written constitution, because it is such a fundamental change that no statute is going to deliver that.

Q143 Chairman: I am sorry to press this.

Mr Payne: Please do.

Q144 Chairman: That is a rather grand solution.

Mr Payne: It is, of course, a grand solution. You are saying, “We want to respond quickly to the Government by mid-July”, but if you want an answer to what the problem is, then that is my answer; that in fact this sort of change is merely tinkering and it does not rebalance the power. I know Lord Norton in a previous session said there were three alternatives: to do nothing, (the status quo) resolution or a statute, but those, of course, are not the only options. There is the option of fundamental constitutional change, and, although I am happy, of course, to discuss all the pressing details, if you want an answer of what is the ultimate solution as far as I am concerned, there is a fundamental problem with the legal form of government, and I would add to that, not just the legal form, but also the political dynamics that flow from that, which is the institutional arrangements within Parliament between the Executive and the members of Parliament.

Chairman: We are going to come to your colleagues in a moment, but Lord Maclennan wants to come in.

Q145 Lord Maclennan: I want it to be quite clear that, although the task of getting a written constitution is a very major one, do you believe then that the only way to go for it is a big bang or are you prepared to see an incremental approach which could be by statute? Some aspects of the prerogative could
be brought within a code or abolished in respect of certain powers at present?

Mr Payne: There are two aspects. Will the incremental approach deliver what I think is needed? The answer is, no. This is endemic to discussions throughout academia, Parliament and the press, this talk about “evolutionary change”. But what in essence is wrong is so fundamental that I do not see how evolutionary change can deliver that.

Q146 Lord Maclennan: We are talking just about war powers.

Mr Payne: Then I come on to your second point: since the unstated part is “we are not going to get a written constitution, what can we do about it now”— which I take to be the gist of your second point. I am actually against a statute. I know from your previous comments that perhaps you believe it is appropriate, but my concern about a statute is the impact of drawing the courts into adjudicating on these issues. That may seem contradictory, but it is actually not contradictory because we would expect the Executive to have high powers of discretion in war, and a written constitution can actually deliver to the Executive appropriate discretionary powers. So there are two angles: one is how is the power encoded, and, secondly, what is the appropriate level of discretion for the Executive, and I think that a statute, under the current arrangements, is, in fact, undesirable. I know it may seem contradictory, but it is not contradictory, because the courts will be drawn in and, as the members of this committee may well be aware, the case of Gentle, decided by the House of Lord only a few weeks ago, shows all too clearly the scope for the Appellate Committee to be drawn into these matters.

Chairman: I am going to bring in Andrew Tyrie and then I promise that the other witnesses will come in, but I do so want to finish this point.

Q147 Mr Tyrie: You have answered three-quarters of what I was going to ask, I think. You have said the only meaningful way of doing this is with a written constitution. If we do not have a written constitution you do not favour a statutory approach but you would prefer to go down the road of a convention. Do you think that that confers any additional benefit beyond window-dressing?

Mr Payne: I think that it does confer a benefit in that it crystallises attention on these issues. It reverses the underlying assumption, which is the expectation under these proposals that Parliament will be consulted. Then, of course, the problem is in the detail, which is what is going to happen in practice if this resolution is put into effect? So, yes, I do think it confers an additional benefit, but it does not rebalance the constitution. By the way, I am not here to knock the Brown Government’s proposals, I welcome any stimulus to constitutional reform, but I do not think it is extensive enough.

Q148 Chairman: Peter or Michael.

Mr Facey: We do not believe that the Government’s proposals go far enough. I would agree that the ultimate solution would be a written constitution, but, as a democrat, the only way to do that would be probably a constitutional convention, and I do not think that is within the power of this committee or us at the moment to deliver. Therefore, we would have preferred legislation rather than a resolution, but I think I recognise where we are and the likelihood of legislation is slight. We were involved in two attempts at private members bills to get legislation into the statute books, and they ultimately failed, but we do have some real policy differences between ourselves and the Government position. We do think there should be retrospective authorisation, we do think there should be regular reporting back and it should not just be Parliament authorising action-decisions, we think there needs to be scrutiny of the decision-making process, not just authorisation of a decision, and we also believe that ultimately there should be a case for a joint committee to scrutinise the whole area, modelled on the German Defence Committee, which would be a committee of both Houses.

Mr Hammer: May I preface what I am saying. At the One World Trust what we are looking at is not necessarily a specific political situation or the viability of specific political decisions, but we are looking at what is being proposed from the angle of the accountability of the governance systems. That where we have, through our research, to developed our expertise. I think from that perspective our starting point would be very similar to that of Sebastian Payne, in the sense that in terms of the overall balance, in terms of the sharing of power on these decisions, the proposed war powers resolution does not really achieve a change of the balance. Our conclusion is probably, in the very, very long-term view, similar to Sebastian Payne’s in saying that a written constitution is certainly desirable, but I think, in the meantime, I would be very happy to settle for a statutory solution in the sense that Parliament has the power to approve the deployment of troops and the use of force abroad through an Act of Parliament and should also have the right to review those decisions and have the power of reapproval. We have looked at comparative solutions in other countries, and even though several models may not be directly appropriate to the United Kingdom, such as very strong parliamentary control models that we have, for instance, in Germany or very strong budgetary control systems like in the United States, the overall impression that we get is that a statute-based solution does actually not prevent a government from taking swift action and to protect the interests of troops. So
the arguments which have led to the proposition of a large degree of discretion for the Prime Minister in the war powers resolution as currently proposed do not really seem to be substantive enough for us to actually say this is the right way forward. We would suggest that a statute-based solution is adopted, and it may in the long run pave the way for a written constitution, but that is certainly, I think, out of the question for this current process. The other point that I think I would like to briefly address in terms of the element of discretion is about the provision of information. We believe very strongly that for Parliament to play a role-making a decision it needs to be very well informed. That does not necessarily mean that all of the information that Parliament receives is necessarily put into the public domain at the moment when it is actually passed on, but I think it does mean that if we are expecting parliamentarians to play the role that they are mandated to play by the people, they ought to be properly informed. Currently the war powers resolution currently has a huge degree of discretion for the Prime Minister to control the timing of when information is being passed on but also how much information is being passed on and also, crucially, to whom. We feel that that situation needs to be addressed, and maybe that is where I can pick up your comment about the role of a committee to oversee these things. For us it was interesting to see that in the National Security Strategy the Government is very much saying that there ought to be a committee that is overseeing the implementation of the National Security Strategy. We suppose that the use of force abroad is part of the National Security Strategy and that, therefore, a committee that is not appointed by, and not reporting to, the Prime Minister but is a full parliamentary committee to oversee this, could very well be a useful tool to actually enable Parliament to perform its role, that it is incidentally performing very well on many other domestic policy issues. So, if we are looking at the rebalancing of power, then maybe there is a possibility for Parliament to learn from the very positive and good practice in the monitoring and oversight of domestic policy issues and apply those also to the areas that are currently protected under the Royal Prerogative.

Q149 Chairman: Two of you have said that you prefer the statutory-based solution rather than simply a resolution. There seems to be some reluctance by government, in part because of the possible legal liabilities that may, in consequence, appear for soldiers and other personnel. Do you have a view about that at all?

Mr Facey: I do not actually think, by having a statutory basis rather than simply a resolution, that you are opening up our troops to legal challenge to themselves. I think if the Government carries out the due process, I do not think it is possible for that to actually happen. I think, by doing it the way the Government proposes, you are creating more ambivalence and more wriggle room, which ultimately, I think, will actually serve our troops worse than having something which is clear and concise and where people actually know what is the case; whereas in what the government is proposing there is too much room to wriggle around; it becomes very difficult.

Q150 Chairman: Do you share that view, Mr Hammer?

Mr Hammer: I think I would take it from a different side of things. What is the fear of somebody who, on behalf of the state, in the United Kingdom or in another country that has a democratic oversight process over its decision-making, takes a decision that takes armed forces into conflict? If members of the Armed Forces commit war crimes, crimes against humanity or genocide, there are very clear rules under international law how to deal with that. Currently the established assumptions about state immunity protects, of course, the United Kingdom as a state from prosecution as such, and so if the concern was that the Prime Minister was being taken to court for taking a country into an armed conflict situation that was later one considered to be the wrong decision, then it is the due process by Parliament that can best protect the office holder from being accused of having taken a wrong decision. However, if the due process is seriously flawed because the people who were supposed to provide the balancing view do not have the right information, not the complete information, and there is no reporting on these issues, then, of course, further problems could arise. But I would not share the big concerns that seems to be there; that by not going for a statute-based or by going for a resolution-based solution there would be greater or lesser protection. I think it is the due process involving Parliament that will actually protect the office holder, because the decision is being considered to be legitimate, and that is, I think, what we need to achieve. At the end of the day, there is probably not going to be any Parliament which is going to vote unanimously to take the action.

1 Note added by Mr Hammer: “or political office holders”. This is to clarify that it is not only the members of the Armed forces that may bear responsibility for the gravest crimes.

2 Note added by Mr Hammer: “separately and in addition to the question of individual responsibility for the gravest crimes as defined in international law”. This is to clarify that the interest of establishing due process to provide legitimacy for an important decision that involves the use of force is, while connected, separate from the issue individual criminal responsibility for war crimes, crimes against humanity, and genocide that could arise from acts taken in result of the political decision itself.

3 Note added by Mr Hammer: “against accusation of arbitrariness”. This is to clarify the role of due process in legitimising the decision, not in protecting office holders in legal terms on all counts.
country into a situation of armed conflict; you will always have a division on these issues; and so the question cannot be whether you can please everybody with a decision but whether the due process is supporting those who make the decision in the best possibly way.

Mr Payne: I would like to come in on that. I do not know the full extent of Peter Facey’s assumption that there is no risk, but I know that on 13 May you were told, in no uncertain terms, by one of the witnesses that it was simply untrue, the fact that soldiers could face risk of prosecution. I think that that suggestion that you were given is just not accurate. In fact, I would like to draw the committee’s attention to the judgment of the House of Lords in Gentle v The Prime Minister, in particular paragraphs 22 and 23 of Lord Hoffman’s judgment, where he indicates that the International Criminal Court Act 2001 gave effect in domestic law to the Rome Statute of the International Criminal Court, and he elaborates. Obviously, I am not going to read it out, but he says it is of the utmost importance for soldiers to know that their actions are lawful and that the definitions of war crime, both in the Rome Statute of the International Criminal Court and in the International Criminal Court Act 2001, are drafted very widely. That is why Lord Holme and his committee were concerned about the legal effect of a statute. Indeed, it indicates the scope of the problem. Why was Lord Boyce so insistent on clarifying the legal position? Why did we have the whole scenario with the Attorney General? Lord Boyce insisted on legal advice for exactly that reason. So I think it does no service to this committee to downplay that risk, and that is why, in answer to Lord Maclellan’s earlier question, I am against a statutory ground.

Q151 Baroness Gibson of Market Rasen: I think it would be helpful for the committee to know what your view is about the proposed definitions, in paragraph one of the draft resolution, of conflict decision and UK forces?

Mr Payne: Yes, I think this is quite a revealing issue. My advice to the committee, if they ask for my opinion, is that they should compare the draft resolution with the convention suggested by the House of Lords Constitution Committee, and you should see what has been taken out and the difference that it makes. For instance, in the proposed convention suggested by the House of Lords Constitution Committee, rather than focusing on conflict, instead of talking about conflict decisions and UK Forces, they talk about deployment, into actual or potential armed conflict. I know when you had the former chiefs of defence staff in front of you the other day they could not provide a definition of “conflict decision”, and one of the members, I forget who, said this is like a theological debate between faith and belief. I think the problem with these definitions is you are being asked to resolve a problem that the Government has created by using this terminology. I think this is a case of the tail wagging the dog. It is not, “How can we explain away this theological complication which the chiefs of the defence staff cannot answer”, the question is, “What do you want in the resolution and, therefore, how should it be worded?” It seems to me a good starting point is to turn to the convention proposed by the House of Lords Committee. The second thing is, I think Parliament should hand this problem back to the Government and say, “Okay, you define it and say what is excluded.” Why should they suggest something that nobody can define. Make them say, “The armed forces consists of all these things but X, Y and Z are to be excluded”? Let them defend that in debate. Why are they excluding certain things? I think that is a far more practical way to deal with this. You cannot answer this definitional problem, it is evident, nor can any of the witnesses, so why go down that route at all?

Q152 Chairman: Does anyone share or disagree with that?

Mr Facey: I would agree with that totally.

Mr Hammer: I think, maybe as a comparative example, it is useful to look at what good practice in accountability systems reveals about what a good policy is for organisations generally. People usually tend to say, if you want to have a good policy of accountability, then be very clear about what you want to report on and what you want to decide, but also (and this comes back to this question of what the exclusions are) define the exclusions. First of all, use a very limited list, and secondly define them as narrowly as possible. That, I think, is the problem or the concern that I would have around a term like “conflict decision”. It is very unclear actually what the decision is supposed to be about, and the exclusions later on, as proposed later on, are, again, very much up to the discretion of those who take the decisions. I think that if there was any advice on the drafting, it was to go back and to say: be very clear about what you actually want to achieve with that decision and draft a list of exclusions which is, first of all, limited and secondly very, very precise in terms of what it actually excludes.

Lord Armstrong: What was your opinion of the Government’s proposed definition of “conflict decision” and “UK forces” as set out in paragraph one of the draft resolution?

Q153 Chairman: I think you have in part dealt with that. I wonder if we can move on to the area of the Prime Ministerial powers. I do not know if that is an area that you or perhaps Lord Williamson may want to pick up on.
Mr Payne: Could I add a rider which might be useful to Lord Armstrong’s point? I would like to draw the committee’s attention to Professor Peter Rowe’s very helpful memorandum which is in the House of Lords Constitution Committee’s report, where he sets out in considerable and scholarly detail what is meant by deployment. If one is focusing on deployment rather than conflict decisions, you might get a different result.

Chairman: Can we move on to Martin Linton.

Q154 Martin Linton: Following up on exceptional circumstances procedure. I wanted to ask you about various scenarios that one could imagine which would leave Parliament with no say about armed conflict. Shall we say some African country takes over St Helena, a battleship is sent off from Plymouth but without any announcement because of the need for secrecy. It becomes known when it is halfway there, and there is a parliamentary debate, but Parliament cannot take a decision because the exceptional procedures clause has been invoked. I wonder what your views are about whether it is possible, having promised Parliament a say in armed conflict, to have this very wide catch-all phrase of “exceptional” or “secret”—and I can imagine lots of other circumstances, “special forces” as well—to take it out of parliamentary accountability?

Mr Facey: I think overall the definition is too broad. It is not just the example you gave it. It is also the simple example that, if Parliament was in recess, that would be regarded as an exceptional circumstance, there would not be time to debate it and, therefore, effectively, you would only get Parliament being informed after the facts. There needs to be very tight definitions of “exceptional circumstances”, there also needs to be retrospective approval. This is why an Act is so important. It is not just about having a situation where, if, for exceptional reasons, you cannot actually get parliamentary approval, you then simply need to report to Parliament. There needs to be a process whereby, if that is the case, and it should be limited to circumstance, then afterwards, giving your example, there should be an ability to have a vote to actually do it so that you can retrospectively approve that decision. The Government itself has said that would be demoralising to British Armed Forces. The reality is that in the circumstance you describe there would be a debate going on, it would just happen to be on News Night, the Today Programme or in The Sun, and I would think that would be more demoralising to British forces than actually having the debate in Parliament and then having a vote in Parliament which, ultimately, is most likely, in those circumstances, to support the Government action. In which case, as to the morale of British troops, they would know they were going into conflict with the full support of the British Parliament. I think you have to be very careful about the definitions and make sure that the words “exceptional circumstances” are as narrowly defined as possible and, please, remove things like Parliament being in recess. There needs to be a way for Parliament to be able to recall itself.

Mr Payne: The first wave of this debate, I think, not in this committee but immediately after the Iraq War, was partly motivated by the desire to limit the possibility of war. Clearly, after the House of Lords Constitution Committee’s report, the debate moved on to trying to resolve the problem about the military being effective. Nobody, as far as I am aware, wants an ineffective military, not able to be deployed appropriately. To answer your question, the problem is the interconnection of all the elements of discretion in the hands of the Prime Minister. Of course you would expect the Prime Minister or the Cabinet—the present Government is rather ambiguous about who takes this decision, it says in its Consultation Paper “or Cabinet”—but, anyway, you would expect the military to be able to respond at the instructions of the Government in the case of emergency, but it is then the question of: under the proposed Resolution it is the Prime Minister who decides whether to bring to it Parliament, it is the Prime Minister who decides whether the security conditions or emergency conditions prevail. If you take the sum of all the discretions, of course what I take to be your concern, which is effectively a loop-hole, could occur, but, of course, the Constitution Committee suggested that if there was an emergency the Government should provide information within seven days. That seems to me eminently sensible in that it imposes a discipline which is useable in a real emergency but not exploitable.

Mr Hammer: Just to add another element of complication, in 2007 the Government committed, in one of its public service agreements, to promote the Responsibility to Protect doctrine. The implementation or the promotion of that doctrine is part of the National Security Strategy. From this arises for me the question that in the future there may very well be cases where under that doctrine United Kingdom military personnel might be, under authorisation from the United Nations, using force abroad, and the question is whether the current formulations cover those potential cases as well, particularly also, coming back to this question of individual liability: because the United Kingdom, whether we like it or not, contributes actually a relatively limited number of people under United Nations peace-keeping operations, any acts of use of force could therefore come down very clearly to very small groups of people. And so the more precise any legal checks can be, whether it is by way of the (proposed war powers) resolution or whether it is on a statute base, the better it is. As the range of issues
that might arise in terms of use of force abroad widens, unclear formulations would just lend themselves to create more confusion. Therefore a very clear definition of what the text (of the proposed war powers resolution or an Act of Parliament) is actually supposed to address will be of benefit.

Q155 Lord Williamson of Horton: I would like to direct my question to all the witnesses, but I think that Mr Payne has already carried his logic right through to a constitution—of course I appreciate that as an honorary doctor of his own university—and Mr Hammer has commented usefully on a number of these points, but I would like to ask, more specifically, about the discretionary power of the Prime Minister under the draft resolution. Leave aside for a moment whether we should not have a resolution, what we have got here, under the draft resolution do you think (and I think Mr Facey might like to comment particularly on it) the Prime Minister should have the final say over such issues as the information given to Parliament—we all know the Iraq case, and it is not the same, but it was much disputed and the public knows a lot about it—and the exact timing of the vote and the decision whether exceptional circumstances do apply? At the moment we are confronted with a huge amount of discretion. I do not know if you would like to comment on that.

Mr Facey: I happen to think that the Prime Minister is given too much discretion in this proposal. For accountability to be meaningful, Parliament not only has to have the ability to take the decision but it has to be an informed decision. If you go back to the Iraq conflict, a lot of the concern was whether Parliament was sufficiently informed to take the decision it did. We have proposed the creation of a joint committee which would have the ability to take evidence, to scrutinise, to meet in secret, to be able to get information and then to give its opinion to Parliament as well as the opinion of the Prime Minister of the day so that Parliament would effectively have, yes, what the Prime Minister proposed, but would actually have a check on itself to enable it to take the final decision. We are talking here about whether or not British troops go into a situation where lives would be lost, either theirs or others, and that should not just be on the basis that the Prime Minister says, “These are the circumstances; please trust me”, whoever that Prime Minister is, and we need to build a system which is robust enough. I think there are plenty of international examples where you can have a parliamentary committee which can take that role, which can be trusted sufficiently to take security information and, if necessary, meet in secret but can have the role of then advising Parliament in those circumstances.

Q156 Lord Tyler: Directly to follow up the point that has just been made, the vicious circle that the Executive, with the Royal Prerogative and the Prime Minister, can determine what information is provided and, therefore, the appropriate timing for giving that information, and can then perhaps also insist that there is an exceptional situation, seems to me very precisely where we are. I wonder whether the other two witnesses feel that the solution proposed by Mr Facey of a joint committee meeting in private would get over that particular problem, given that it is likely, at least, to have the constraint of a government majority on it, but at least it will have to have some very careful checks and balances to ensure that it is receiving the information that can provide an opportunity to take a decision?

Mr Payne: If I can respond to that, I share Peter Facey’s concern about information. In fact, Lord Norton, in one of the debates, said information is the key to this and, of course, it is the key to this because there was, in fact, as we all know, a vote in the Iraq War and look at the outcome. So the vote can only be a tiny part, a very important part, but only a part of the equation, because if the vote was all, then there would have been no debate now about this. As to whether a joint committee is the absolute answer, I think it would be rash to say one can invent one committee that will solve all the problems. I think there is a larger pattern that has to be revisited about the way in which Parliament receives information. A joint committee may be helpful, but, certainly, however both Houses think they should order their affairs, there is clearly a need for more information and a chance to feed into the policy cycle. I think this is one of the crucial things. It is not just information. At what point is Parliament going to influence events? That takes me to what I think is a key point, which is that this barrier between the Executive and Parliament in policy has to be revisited. We should not just repeat the mantra of the Executive and Legislature and imagine that they are forever divided. That is where the legal form matters. It might seem fanciful to talk about a written constitution and abolishing the Crown, but the legal form is one of the things that perpetuates this distinction; so internal changes within Parliament and a change to the legal form so that the Government cannot come round, as they did, for instance, in the Maastricht Treaty. They sent the Attorney General, Nicholas Lyell, and said, “We might not consult you at all.” That was ridiculous.

Q157 Martin Linton: What is meant by the legal form?

Mr Payne: The legal form is the Crown, and the Crown is the form in which the Government exercises power and the Royal Prerogative, and there are two flanks to that. There is the fact that the powers of the
Crown, as you know, are outwith Parliament, they are not granted by Parliament, there are special requirements to exclude discussions that are linked to the prerogative. As you also know, if members wish to bring a bill that touch on the royal prerogative—you know this better than I do—they have to seek the permission through the Home Secretary of the Monarch. There are all sorts of seemingly fanciful things that, in practice, limit oversight within Parliament, and then, of course, there is the judicial flank of this as well. Of course, that is the reason I am suggesting a written constitution, because I do not think that it is a good idea for these sorts of issues to be dragged through the courts, but there are other issues of the Government’s powers where it is all too appropriate for it to be subject to suitable limitations. To answer the question about a new committee, yes, better information is needed. A joint committee: I think that is a very complicated question to answer. Mr Hammer: I think that a committee, preferably joint because it would draw in a lot of advisory expertise from the House of Lords, could also be a very useful forum to revisit decisions that may have been taken under the exceptional circumstances. Currently I cannot see any contingency measure to deal with such situations under the proposed draft resolution, and I think it is very important to have a validation loop and mechanism in place in order to make any decisions taken under the exceptional circumstances clause accountable as well. A second reason for a committee is also that the committees, from my observation of how the system seems to work, provide an excellent learning ground for how a strategy can be developed. If such a committee could then also be a cross departmental committee that is particularly responding to the use of armed force abroad, receives reports that are integrated, and really reviews the development of the National Security Strategy and how the United Kingdom responds to armed conflict, then I think that would be a very useful tool to have indeed. Currently what we see is that the departmental select committee system is reviewing how the Foreign and Commonwealth Office reports on the issue of the use of armed force abroad, how the Ministry of Defence is reporting on it, how DFID is involved in it. A cross departmental joint committee would provide a very useful learning tool and I think that would be a very strong argument for one to have one. On top of that, of course, it would play an important role in revisiting decisions in each case and they could be bound by rules of confidentiality and secrecy as and when necessary. I must say that the reason behind the assumption that seems to shine through the draft (war powers) resolution that Parliament is an uncertain partner in making decisions that affect the security of operations or the safety of the troops, is not clear to me. I am sure that if Parliament is able to take a very well grounded decision potentially on issues as complex as for instance human fertilisation and embryo research, then I am sure that Parliament will be very much able to protect the interests of the troops when they are abroad. The assumption that Parliament should be left out on that area because it cannot be trusted, in a way, I think, is extraordinary.

Q158 Mr Tyrie: You have all said that you feel that the Prime Minister is granted too much discretion under the proposals. What we are groping towards is something that can limit that discretion to give the public greater confidence that the Prime Minister is doing those things that he says he is doing; he is acting on the basis of information that he says he is acting on. It has always seemed to me that in these exceptional cases it is ex post scrutiny rather than ex ante scrutiny that is going to be more important, particularly where the Prime Minister feels the need to act quickly or on the basis of information that is largely secret in order to defend the country. Do any of you have worked out proposals for how we can strengthen ex post scrutiny, in particular to granting of a committee, whether or not it is a joint committee, to have much significantly greater powers than a select committee has, more akin to those that we see on Congressional Hill, to call for any papers that they want to see, albeit perhaps in camera, and to see all witnesses that they feel appropriate, including the individual rather than his superior who may decide to substitute for him? Would this not be the strongest constraint on a Prime Minister that if he did misbehave, that if he did over egg the case prior to war, he knew very well that it would all come out in the wash if we had a powerful ex post scrutiny system? Mr Payne: Your question actually answers itself. You say, “what would you have: something more powerful?” Yes. Your question is, in effect, a statement of what is possible and, therefore, I would adopt that observation of yours, a select committee with significantly stronger powers.

Q159 Martin Linton: The Stanley/Hutton inquiry! Mr Payne: No, we are talking about congressional committees—that was Mr Tyrie’s point—and, of course, there needs to be something more powerful. There are a number of interconnected factors which makes this present committee working in a rather strange light. The consultation paper talks about a scoping exercise as to all the prerogatives; so that is one dimension that is uncertain. You are keeping the legal form of the prerogative but having a resolution, while simultaneously the Government is thinking about what to do about the whole class of prerogatives. Simultaneously they have put forward proposals on changing the Intelligence and Security Committee. Of course, what the Intelligence and
Security Committee does is absolutely vital as well: hence the whole business of the Iraq War. Mr Facey, I think, wants to come in.

**Mr Facey:** When we responded to the Government’s consultation and actually to the consultation which the House of Lords Committee ran, we proposed such a committee, but it should also have the ability to act as a committee of inquiry and be able to subpoena witnesses and papers, that the chair of the committee would sit on the Intelligence Committee and it would have to be a very powerful body. It would, therefore, have to have constraints on it, and it would sometimes have to actually meet, therefore, in secret, but it is perfectly possible for Parliament to have a committee which was a trusted partner to the Executive which could, when things go wrong, act as an inquiry but also be there as things develop. It is not just about having scrutiny of the final decision, but it is scrutiny of the decision-making process. I think my biggest complaint about the Government’s proposals is that the Government’s proposals are effectively for information and approval for Parliament, not about Parliament actually scrutinising the whole of the decision-making process, and our suggestion for the committee, whether it is a joint committee or not, is a body which can enable Parliament to scrutinise the Executive and the decision-making process as well as being there at the final end of the process when it comes to approving a decision or not.

**Q160 Lord Norton of Louth:** How do we get from here to there, particularly if you take the Government’s proposal in terms of a bill? There are certain things some say you cannot legislate for, and Mr Payne has mentioned the centrality of information, but another point I mention is political will. If you have not got that, you are not going to achieve anything anyway. There is only a certain amount you can put in legislation, there is a certain amount you can embody in a resolution, but much of what you have just been talking about to some extent is a matter for Parliament itself. You cannot actually legislate for that. You can set up a committee now, a statutory joint committee. So what are the steps and how far can you actually put something in legislation that acts as a peg or a spur to delivering the rest of what you want to achieve?

**Mr Payne:** Could I respond to that. I take the point about political will. Indeed, Professor Vernon Bogdanor said that the question of war powers in his idea was a non-question. I do not agree with that, and I was thinking earlier, what can an outsider bring to this joint committee of parliamentarians who understand the process of how Parliament works much better than any outsider? The thing I thought was that, in fact, you are all rushing around making decisions, you are all doing too many things, and I think the fault-line is the impact of institutional structures on what you do. So, yes, the political will matters, but maybe you are limited by institutional structures. There is the argument about treaties. I think you were told off by Professor Hazell for failing to rise to the challenge of scrutinising treaties. Why does that happen? Presumably because the institutional structure makes it very difficult when there is a negative resolution for you to get on and do something. So political will, of course, is important, but then also the institutional structure, not just for parliamentarians but supremely importantly for parliamentarians, limits the way you act. I think it is not just a question of political will, although of course it is that too. They are not either/or; they both go hand in hand.

**Mr Facey:** I think you can put certain things into legislation which would move you forward. Having to actually have retrospective approval, having to actually, in an on-going conflict situation, not just have an approval once and then, five years later, have a committee of inquiry to see if we did it well, but actually having the Executive being forced to come back and to report to Parliament and be held to account. You can do, those things you can actually put into statute, and they would go a significant way to strengthen Parliament in its role of holding the Government and the Executive to account. Those things could be done and they would actually help. I think that would help move you in the direction you are talking about.

**Q161 Lord Norton of Louth:** But if it is in statute rather than resolution, presumably this would become a justiciable matter?

**Mr Payne:** It would. You are being asked to respond quickly to a proposal for a resolution, so there is no offer of a statute, and one of the things that seems to be vanishing in the discussions is the Government’s original suggestion: “should it be a resolution or a standing order?” I know when you tackled Lord Boyce on that he declined to enter into the arcane details of resolution or standing order, but I have had some discussions with experts on Parliamentary procedure and it seems to me that you should be pushing for a standing order, because from what I was told at least it makes it easier for you to hold the Government to account on a point of order. Presumably there is the assumption that a standing order will give parliamentarians more strength. I know there is always a “notwithstanding”, phrase to discard a Standing Order, but you have got to react quickly and a standing order is presumably better then a resolution.

**Mr Hammer:** I think in the majority I have said what I wanted to say earlier about the positive impact that a committee, preferably a joint departmental committee, would have in terms of also providing a reporting focus and a learning ground to move on. I
do not really see the issue of a statute being an issue of timeliness, because if the time argument applies I am sure that is an issue that could come under the exceptional circumstances. What is important is that there is a body that can revisit the decision, and I actually believe that if the troops abroad feel that Parliament is actually interested in what they are doing, they will feel comforted rather than feeling left alone if it were just the Government that stood behind them. So I think that there are a number of distinct advantages to a statute based approach. Whether or not the powers of a committee need to be improved compared to what other select committees would have, I think it is an important question. To me the most important thing is that it is the committee itself and Parliament that sets the rules for this committee, rather than the Government saying what it can publish and what it cannot publish and at what time it can do so. I am sure that the composition of the committee will actually provide a very sound basis of responsible treatment of all of the issues involved.

Chairman: I am going to apologise to everyone, because time is rushing by. What I am going to do now is to call on Lord Armstrong—he has a brief question—and then Lord Maclean on this area. We did have lots of questions on treaties, but if you will forgive us what we would like to do is to send you those in writing and maybe you could respond. We know what you look like; so when we read the answers we will be able to take better regard. First of all, Lord Armstrong.

Q162 Lord Armstrong: The thing that is troubling my mind is the situation you have where the Government says, “We intend to go to war”, and then there is a long pause while these procedures are gone through, there is a resolution, or statute, there is a joint committee in Parliament, and in the meantime the people whom you are intending to go to war with are sitting there wondering what is going to happen and what the decision is going to be. Is that a tenable position to be in?

Mr Payne: Lord Bramall made the distinction we are all familiar with between wars of choice and wars of necessity, and, clearly, the Iraq War was planned a year before; so there was no problem with frightening the enemy by discussing it; it was discussed worldwide. Obviously, if there is an emergency, the troops respond.

Mr Facey: The fact is in most cases we do not go to war, we do not actually have wars in the old-fashioned sense and, in most cases, in the conflicts I can think of in my lifetime have not been ones which have blown up overnight, but if they are, then the Government responds and there needs to be a process for doing that and everybody has accepted that. In most cases, whether it is the Gulf War the first time round, or the Iraq War, or the Falklands, or wherever else, they are things which actually have quite long burn times. We are not in a situation where our opponents, or the enemies of the country, have got no information; they have got Al Jazeera, CNN, even the BBC World Service. The fact is, the rest of the country will be debating it on 24-hour news. It just seems to be very strange that the one place which is supposed to hold the Government to account is the one place which does not actually hold those discussions and those debates and be the focus of that rather than effectively having MPs appearing on the World Service or BBC News as a way of conducting that debate. I would much prefer it to be strengthened in Parliament.

Q163 Lord Armstrong: It is just the BBC World News, and those people, are not debating it before the decision comes into effect.

Mr Facey: In the case of the Iraq War we were debating it way before.

Q164 Lord Armstrong: I think we ought not to govern ourselves only by the Iraq War?

Mr Facey: No, and everybody has accepted that there needs to be a process whereby, if something actually happens, it happens quickly. The reason I am in favour of retrospective approval is so that you can take those actions and then come to Parliament. There needs to be the ability for the Government to act quickly in those circumstances. I question with you how often those circumstances will arise, but there needs to be a way of dealing with that and, I think, in all the proposals I have seen, everybody has accepted that has to be the case.

Q165 Lord Armstrong: And you accept that?

Mr Facey: Yes, I accept that, which is why I believe in retrospective approval.

Mr Hammer: I think it is important that the media are not the only source of information that contributes to decision-making in Parliament. Therefore, if the time limits allow it, of course more information, and from other sources, should be very much taken in. If we look at the German situation, for instance, where Parliament exercises a very strong control over the use of armed force abroad, it has ever since 1994, since the decision was taken to allow the use of armed uniformed personnel in the Balkans, developed a very streamlined and very fast two-hour procedure to actually deal with a lot of these decisions. What this does is that the general level of awareness about the situation rises to a point where Parliament feels able to make that decision either through a proposal of a committee or in plenary and it also provides the Government with, again, a very, very important support for the decision that it would eventually take. There is executive responsibility for the decision, but,
at the end of the day, the more Parliament can come in, the better it is for the perceived legitimacy of the decision in the country but also amongst partners, for instance, in the North Atlantic Treaty Organisation. This a very important aspect. While we should not bring everything back only to the Iraq War, and I have tried to avoid using it as a point of reference so far, it is nevertheless clear that this war has really split the alliance on a number of issues, and so I think it is quite important to look at the legitimacy of decisions in this field also as an issue of relationships amongst partners too. Parliament can contribute to legitimacy, and it is one of the strengths of the Westminster system to enable very co-operative work between the various branches of government.

Chairman: A final question from Lord Maclennan and if you could be good enough to answer as briefly as possible, that would be great.

Q166 Lord Maclennan: The witnesses have all indicated that there should be continuing scrutiny and oversight through a committee, or joint committee, or whatever, but do you take the view that there should be a formal opportunity provided in advance to Parliament, or any part of Parliament, to reapprove the original decision to commit to armed conflict, bearing in mind the dangers of mission creep and the conflict changing from what was originally approved? The second question is do you go along with this suggestion that the House of Lords should have no vote as part of the approval process?

Mr Payne: I think that Lord Maclennan is absolutely spot-on. With regard to mission creep, if you look at the operations of the last 20 years they have often changed their nature and scale. Indeed even in the Iraq War the Prime Minister comes to the House and says one thing about the scale of it but the military is still there today. So, yes, it is essential—a re-approval process is essential otherwise it makes a nonsense of oversight of any sort. As to the House of Lords, that is another irony, is it not, because the composition of the House of Lords is not fixed. I find it slightly eccentric that the government is trying to fix in advance of their proposals on that matter what the role of the House of Lords is with regards to war powers. They only want an opinion—maybe an opinion—and yet the reforms are not set, and I think it is very difficult until we see what the reforms are and how they will be elected, under what basis, to answer Lord Maclennan’s second question. But I think an Upper House has a very serious role to play in this.

Mr Facey: On the question of re-approval I think it is vital that particularly in ongoing conflicts there is an opportunity, probably every year, to come back and to actually look at the decision because you cannot be in a situation where five years ago you can commit yourself to a conflict situation and then Parliament at that point has no say in the matter again; there has to be a way in which that can be revisited because situations change. Where we are today is completely different than it was before the Iraq War and when the vote was taken in the House of Commons. In terms of the House of Lords, I think as long as the House of Lords is not elected then I think the final decision will have to be with the House of Commons. If we move, as I hope, to a more democratic second chamber then I do not think the same structure as you would have now can apply in those circumstances. I am always in favour of the maximum amount of checks and balances possible and therefore I would like to see a role for the House of Lords. One of the reasons why even under its present composition we suggested a Joint Committee rather than simply a Committee of the House of Lords is because we think there is the right expertise in the House of Lords which could be added to the House of Commons and also it would make the Committee less, in some ways, partisan than the House of Commons could possibly be on its own.

Mr Hammer: On the question of the re-approval it might be useful to look at what timeframe is being considered because I think in the United States the President has a 60-day grace period pretty much to do whatever he likes—he for the moment—and I think it should be up to Parliament to decide what the review period is. The question of evidence is important as well, although I would argue that the evidence that is taken into account when reviewing a decision is the evidence that is available at the time of the review, so that if the mission develops into something that requires a different take on it then hopefully there would be evidence available to support that view as proposed by the government; so that the review would be timely as opposed to just taking a decision on an act taken three months ago or so, because that would not be inappropriate. The last question, on the involvement of the House of Lords, I would in principle agree with what Peter Facey was saying. I think in any bicameral system a consensus on such weighty questions such as going to war is preferable. So anything that could really help to bring in the expertise in the House of Lords in such decisions would be very useful. Maybe it is useful to draft something like a catalogue of issues on which the House of Lords has to be definitely consulted and in what ways that is being done, including on the question of the use of force, and it might exclude smaller missions under the UN aegis and it could include, for instance, bilateral or unilateral action if that is what the United Kingdom wants to take.

Chairman: Thank you very much indeed; we are grateful to you. In fact you can tell that the interest of the Committee is such that we have gone well over
time. It does mean that we have not been able to ask you anything about the treaties aspect, so if it is acceptable to you perhaps we can send those questions to you for your responses.

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**Supplementary memorandum by Unlock Democracy (Ev 58)**

**RATIFICATION OF TREATIES**

**ABOUT UNLOCK DEMOCRACY**

Unlock Democracy (incorporating Charter 88) is the UK’s leading campaign for democracy, rights and freedoms. A grassroots movement, we are owned and run by our members. In particular, we campaign for fair, open and honest elections, stronger parliament and accountable government, and a written constitution. We want to bring power closer to the people and create a culture of informed political interest and responsibility.

**INTRODUCTION**

It is essential in a democracy that power is made accountable and that the processes by which decisions are taken are as open and transparent as possible. We fully support the government’s desire to explore how Royal Prerogative Powers can be transferred to Parliament and made accountable. However it is not enough to simply out existing procedures on a statutory footing and declare that accountability has been achieved. One of the reasons for the current mistrust of politics and politicians is that ordinary people have very little sense of how decisions are taken. There is an opportunity with these reforms to not only make power accountable but also to ensure it seen to be accountable.

Although war powers receive more attention, the decisions to deploy troops are thankfully relatively rare. Treaties are far more likely to impact on the daily lives of people in the UK. So we were delighted when the government announced its intention to increase parliamentary accountability in this area. However we are very disappointed by the mechanism they have chosen and the very limited model of accountability that these proposals embody.

The proposal put forward by the government in the draft Bill would give Parliament the right to object to a treaty, but only if the government decides to provide an opportunity for Parliament to object. Even if time was made available for a debate and vote, the government would have the power to simply overrule the objection. These proposals would not lead to a transfer of power from the executive to Parliament. Accountability must not be an optional extra, nor should there be a get out clause for the government just in case they don’t get the answer they want.

**DO YOU THINK THAT PARLIAMENTARY SCRUTINY OF TREATIES COULD BE IMPROVED? IF SO, HOW?**

Unlock Democracy does not believe that simply putting the Ponsonby rule on a statutory footing is sufficient to ensure scrutiny of treaty ratification. As the government consultation itself states the Ponsonby rule very rarely leads to debate.

We believe that the process of treaty ratification should be made accountable not just the end stage of endorsing ratification. This is not to say that Parliament should not be able to vote on treaty ratification just that it is essentially a reactionary power. Negotiations by definition do not always go to plan; Ministers have to be given some leeway but equally Parliament should be able to express a view on what should and shouldn’t be included in a treaty before it is negotiated. This is already common practice in the Nordic countries.

In Denmark for example, before any negotiations within the European Council or the Council of Ministers, the government receives an oral mandate from the European Affairs Committee of the Folketing (Danish Parliament) before beginning negotiations. The EAC is made up of 17 MPs, in a proportion that reflects the party makeup of the Folketing. The EAC debates the issues to be discussed by the Council of Ministers and the position of the relevant Danish minister on those issues, and if a majority of the EAC does not oppose those positions, the minister is given a mandate to negotiate. It is very rare that the government position is formally rejected by the EAC as in most cases the government will amend its position in line with committee’s
concerns. The EAC also considers bills and proposals dealing with the European Union and submits reports with recommendations to the Folketing.5

In the case of non-EU negotiations, there is no such mandate, but the relevant minister (usually the Prime Minister or Foreign Secretary) is constitutionally obliged to consult with the Folketing’s Foreign Policy Committee on all matters “of major importance to foreign policy” and to keep the FPC informed about more minor matters. The minister makes a presentation and then must remain to respond to any comments or questions the FPC may have. The FPC’s views are not binding on the government, but as they tend to reflect the views of the Folketing in general, the government usually takes them on board in the hopes of getting the Folketing to ratify the finished treaty.6

If the treaty yields a part of Denmark’s sovereignty to a supranational body (including international organisations like the UN or the EU), the treaty must be ratified by 5/6 of the Folketing. If it fails to get the support of 5/6 of the Folketing, then a referendum becomes necessary to ratify the treaty.7

There are similar systems in Sweden, Finland and Norway.

Unlock Democracy believes that a system of pre-ratification scrutiny should be established in the UK. A new treaties select committee should be created which draws its members from the relevant existing committees. These would include, but may not be limited, to the Joint Committee on Human Rights, European Scrutiny Committee and the Foreign Affairs Committee. The usual rules on party balance and select committee membership would apply.

One of the key tasks for the committee would be to agree, with the relevant Minister, what level of scrutiny should apply to a particular treaty. Most European Treaties and key treaties such as the 2003 UK-US Extradition Treaty would go through the procedure outlined below. However treaties that were deemed to have less constitutional significance could go through a less stringent procedure and could continue to be laid before Parliament under the Ponsonby rule. The Committee would report to Parliament on why they have decided on a particular level of scrutiny for a particular treaty.

If a treaty is thought by the committee to merit full scrutiny, Ministers would be obliged to give oral evidence to the Treaties Committee outlining the intended negotiating position. The Committee would have the opportunity to outline any concerns it may have and if a common position cannot be reached to mandate the Minister. We do not envisage that this is how the committee would work in practice, and certainly the evidence from the Nordic countries is that even where the committees have the power to mandate this is rarely used.

Once the Treaty has been negotiated the Treaties Committee would prepare a report on the treaty which would be laid before Parliament with the text of the treaty concerned. This report would include an assessment of the implications of the treaty for the UK and where, if at all, the treaty differs from the agreed position. In order to be ratified the treaty would have to be approved by a 2/3 majority in the House of Commons.

The Treaties Committee would have the power to trigger a debate on the treaty, as would backbench MPs. If 10 per cent of MPs sign an EDM in favour of a debate on a Treaty we believe this should trigger a debate. This guarantees both that if there is substantial public support for a debate on a treaty it can be triggered but also that it is possible for smaller parties to trigger a debate rather than relying on the executive.

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allegations of cronyism or of doing things that might undermine the standing of the judges, but at the same time ensuring that there was proper accountability. The broad conclusion reached was that you would have a selecting commission—the commission selects who should be the judges; they need to be approved by the Lord Chancellor but he or she cannot say, “I want X”, all they can do in very limited circumstances is knock back proposals made, new proposals have to come and they cannot knock them back. So there is a role for the Executive but it is a very limited role and it does not prevent proper independence on the part of the Judicial Appointments Commission in the selection. I am surprised and disappointed that it is now being suggested, after this system has been going for 18 months, that certain changes should be made to it. I can see no rationale behind any of those changes; it is a complete rag-bag of things which appear to have no point. One of them, inadvertently, is quite significant; that is to remove the role of the Lord Chancellor from the appointment of judges below the High Court. I have made enquiries of the Judicial Appointments Commission. In the first year of their operations, from 1 April 2007 to 31 March 2008, they selected 458 people to hold judicial office and 21 of those were in the High Court. So 430 of the selections that they made will no longer be subject to the view of the Lord Chancellor. That is very significant, I think, because it means in the vast majority of judicial appointments there will be no accountability at all. There is a suggestion in the White Paper that the Lord Chancellor be given the power to give directions to the Judicial Appointments Commission. That is not included in the Act because it has neither been consulted upon nor developed. The idea that you remove such a large percentage of judicial appointments from accountability and there is some vague proposal for directions in the future seems to me to be a most unsatisfactory basis upon which to proceed. I believe that this has practical importance. If you had a situation where, for example, there was discrimination—not direct discrimination, I am quite sure that the Judicial Appointments Commission would never directly discriminate—suppose you had indirect discrimination over a long period of time, if you take away the Executive’s power to say not “I want X” but “I am worried about the way that you are doing it”, if you take away their power to do anything about it you remove the partnership element that was so important in relation to it. Speaking for myself—and I have tried as hard as I possibly can be not to be over-defensive of the scheme in which I felt very much involved—I am genuinely disturbed by what seemed to me to be either pointless or damaging proposals in relation to what was a well crafted and well worked out new process for appointing judges.

Examination of Witness

Witness: Rt Hon Lord Falconer of Thoroton QC, a Member of the House of Lords, examined.

Q167 Chairman: Thank you very much and we do apologise for keeping you waiting. In fact every time I have to apologise because we are behind.

Lord Falconer of Thoroton: It was very, very interesting listening so it was not remotely problematic.

Q168 Chairman: We hope you enjoyed it and we hope that you enjoy the next 30 minutes or so. Can I say that we are aware that we did ask you to come until quarter to six and we hope that we will not keep you much beyond that?

Lord Falconer of Thoroton: There is no problem from my point of view.

Chairman: Thank you very much indeed. I have to say to you as well that we must note that Members have declared interests relevant to this inquiry in the Register of Members; they are available today and also on the Committee’s website. May I first of all turn to Lord Hart?

Q169 Lord Hart of Chilton: Lord Falconer, you were the Secretary of State and the Lord Chancellor who was responsible for the carrying forward of the Constitutional Reform Act 2005, one of whose important features was the balancing of judicial independence and democratic accountability. Can you first tell us how significant you think were the changes made by that Act? Secondly, do you think that it is too soon to start making alterations to that settlement that you achieved? And thirdly, has it come to you in terms of thought that there are problems with the current judicial appointments system that you think should be made the subject of alterations and amendment in statute?

Lord Falconer of Thoroton: I think the changes that were made by the constitutional settlement that was reached by the 2005 Act were very significant. They took away from one individual, the Lord Chancellor, the power to appoint judges and placed them in a Judicial Appointments Commission, because I think we had gone way beyond the time where one person could decide who should be judges because judges are an incredibly important part of our constitutional framework. But in giving the power to somebody else you did need to ensure that there was proper parliamentary accountability because I think there should be accountability about how you appoint judges. And there was a quite detailed process that went on, which involved discussions with the judges; it involved a unique Select Committee in the House of Lords; it involved a very prolonged parliamentary process, and we reached a point where I believe we had done well in reaching a sensible constitutional settlement ensuring proper independence in the appointment of judges. There could not be allegations of cronyism or of doing things that might
Q170 Fiona Mactaggart: Why do you think they did it?
Lord Falconer of Thoroton: Looking at the Bill as a whole I believe there is—subject to one point, namely the civil service stuff—next to nothing of significance in this Bill, subject to the civil service thing. And in relation to the judicial appointments stuff it is like filling in the time; it is so pointless. There is a bit in the proposed Bill that says medical checks should be done by the Lord Chancellor’s Department rather than the Judicial Appointments Commission. It is intended that the Legislature in something called the Constitutional Renewal Bill shall deal with something that could, I would have thought, have been dealt with by some agreement between the two bodies. So I cannot offer any explanation apart from that; but I am keen, if I possibly can, to defend the settlement that we reached. It may be that there are problems with it but I am not sure that 18 months after it has been in operation is the time to reach a final conclusion about it.

Q171 Fiona Mactaggart: Have you ever had the experience as a government minister of being held accountable for something over which you have no influence?
Lord Falconer of Thoroton: No, I have not, and that seems to me to get to quite a significant point in relation to the Judicial Appointments Commission because if 430 of the appointments were beyond the reach of the Lord Chancellor what could he or she do if there is some suggestion—for example, as Lord Jack Straw said quite rightly—there are issues about whether or not the Judiciary is sufficiently diverse? If you cannot do anything else about 95 per cent of the appointments you are blowing in the wind at that point.

Q172 Fiona Mactaggart: Do you think it would stop people asking you questions about it if you were in that role?
Lord Falconer of Thoroton: Not the current one, but I suspect it would lead to the minister saying, “I am sorry, there is nothing I can do about it.”

Q173 Lord Tyler: Does it not also follow that if the Lord Chancellor has no role in the lower levels of the Judiciary that the pool from which the higher level can be taken might also be so distorted, by which time of course it is too late? Am I putting that clearly enough?
Lord Falconer of Thoroton: You are. I agree with that entirely. You can appoint direct to the High Court, not appointing from a lower pool, but in addition to the main point about him or her being removed from appointments below the High Court it is also envisaged that he should have no role in relation to moving people from one place to another. So this is all completely reducing it and handing it over to a group of people where the single largest element is the Judiciary. I am not criticising the Judiciary, but it is handing it over to them.

Q174 Lord Maclennan of Rogart: You will remember Lord Falconer, the evidence that was received by the special Committee, to which you referred, on the Constitutional Reform Act of 2005 and the great debate about whether appointments to the Judiciary should be solely on merit.
Lord Falconer of Thoroton: Yes.

Q175 Lord Maclennan of Rogart: And the way that it was resolved was rather to accept that.
Lord Falconer of Thoroton: It was to accept that it should be on merit and I think it has to be on merit because if you want a diverse Judiciary you undermine appointments made of, for example, women or racial groups if you say that they are not on merit. So I think it should be very important it should be on merit, but there was a specific provision put into the Act to say that the Judicial Appointments Commission has to do all that it can to increase the pool from which selection is made. As I made clear throughout, I find it inconceivable that, for example, in relation to women there were not lots and lots of women of merit who could easily be appointed.

Q176 Lord Maclennan of Rogart: Do you think it is acceptable that the Lord Chancellor or the minister responsible should have the power to overrule the judgment of the Commission on that point?
Lord Falconer of Thoroton: I do not think he should overrule—

Q177 Lord Maclennan of Rogart: Or direct.
Lord Falconer of Thoroton: —the Judicial Appointments Commission as to who should be appointed. But having the power to reject particular appointments means that the Judicial Appointments Commission has to come up with appointments where they can explain why they are not producing, for example, more women or more people from ethnic minorities.

Q178 Lord Maclennan of Rogart: Is that not already provided for within the Act?
Lord Falconer of Thoroton: Not that I am aware of.

Q179 Lord Maclennan of Rogart: That the Commission has these guidelines that were set and produces reports on it?
Lord Falconer of Thoroton: The Lord Chancellor can give guidance to the Judicial Appointments Commission; he has not done so, so far. The guidance seems to me to be in a different category
fundamentally from the ability after a period of time has gone by to say to the Judicial Appointments Commission in relation to, for example, where they do things like “bunk appointments” and they say, “Here are 20 Circuit Judges we want to appoint.” If the minister has the power to say, “No, I am not accepting that because I am not satisfied that it is sufficiently inclusive” then that is a real and effective ability to make the Judicial Appointments Commission think again. That is a different power in terms of type to the ability to give them guidance.

Q180 Chairman: You have made it absolutely clear that new legislation is not necessary but do you see any weaknesses in the current judicial appointments scheme already identified that could be dealt with by some procedural changes?

Lord Falconer of Thoroton: Yes. I think there have been some teething difficulties as between the Judicial Appointments Commission and the Ministry of Justice. I think the process can be too slow. I think—and this is my responsibility, not the Judicial Appointments Commission—we were too slow to start with in identifying when vacancies might be coming forward. Once the vacancy arose we should have been much quicker in giving notice to the Judicial Appointments Commission, but I think those are the sorts of things you would expect. The one thing you do not want to do is to blunder in with more legislation. Let those processes be developed; those are precisely the sorts of things, if they are causing difficulty, where, as it were, the government can be put under pressure and proper accountability can apply—but not legislate.

Q181 Lord Williamson of Horton: I wanted to come back to the point about the role of the Prime Minister and the Lord Chancellor. You have partly dealt with this but I want to concentrate on the question which is raised in the documents, but not in the Bill, in rather an unusual fashion, where it says, “The possibility of additional powers for the Lord Chancellor to set performance targets”—and I choose my words carefully, that is what is in the document—and to direct the Judicial Appointments Commission in certain matters . . . ” Then they say that there is a reasonable case for this but they do not go beyond that. Would you like to comment on that point a little more fully? You did comment on the point about directions to the Judicial Appointments Commission but there is a wider point also raised by this document, which is that they set performance targets which are not, I may say, defined very clearly.

Lord Falconer of Thoroton: I think the performance targets they might have in mind is for example once you have received a vacancy notice you have to have made the appointment within three weeks or three months, or something like that. I suspect that is not an appropriate target to set in relation to a body like the Judicial Appointments Commission. They might mean some other sort of performance targets—appoint 15 women Circuit Judges by the end of the year. Again, that does not feel to me like an appropriate performance target. So they have not fleshed out any of this in the White Paper. I cannot imagine what sort of performance targets they have in mind, but any that I can think of I do not like the sound of. I think it is much better to have the power to say, “Look, I do not like the make-up that I am getting over the last six months.” In practice the way it would work is that the minister would say, “I am worried about the pattern of appointments. A point may be reached where I will be forced to knock back an appointment in six months’ time,” and it gives him the power to be involved in a meaningful way in the process without ever getting to the point where he is selecting the individuals who are becoming judges, which is the real iniquity.

Q182 Lord Campbell of Alloway: As regards what worries me—and I have raised it before—is the appointment of the High Court Judges and it is very important, we both know well enough, that they have to be of a certain quality and it is not merely an intellectual quality—it is a quality to be a fair, patient judge. It is very difficult to do that unless you have the advice of somebody who knows about the way they have conducted themselves as a Recorder, if you like, or as an advocate or at the Bar generally. Under the old system, which had disadvantages, one advantage was that there was a very keen knowledge in the Lord Chancellor’s Department as to whether somebody was suitable to appoint or not. That has gone, and certainly I would not have thought for a moment that the present Lord Chancellor was of the quality of judicial experience to know very much. Do you not think that there should be some advice, such as from the Lord Chancellor or from one judge of the High Court, Court of Appeal, or indeed the leader of the man’s circuit? Can you not see that there is something missing now when you try to appoint a High Court Judge?

Lord Falconer of Thoroton: In terms of making enquiries the Judicial Appointments Commission has to determine with whom they make enquiries, and I am absolutely sure—indeed I know—that they make enquiries in particular in seeking to determine from people who would know, for example the head of the division in which the person has sat as a judge, as to what his or her quality as a judge has been, and it is done on a systematic basis. I do not believe that the only way that you discover whether or not somebody is suitable to be a judge is by keeping records of soundings over a long, long period of time, and indeed if the system has been depending upon
one person’s knowledge of the potential pool from whom you select judges then inevitably the longer you are Lord Chancellor the less effective you became at that as you grew to know less and less and less about the Bar.

Q183 Lord Campbell of Alloway: It is not just one person, it is seeking the advice of one person who knows, that is all—or maybe more—but they ought to have access to the type of advice which I have suggested.

Lord Falconer of Thoroton: But the Judicial Appointments Commission is well able to get access to the proper enquiry of people who would know what the individual’s performance, either as a part time judge or as a member of the Bar or as a solicitor or whatever he or she has done was.

Q184 Lord Campbell of Alloway: Yes, but there is no form of obligation.

Lord Falconer of Thoroton: They would not be performing their job as a Judicial Appointments Commission if they were not making proper enquiries.

Q185 Chairman: Is there a sort of template or a job description in a way that can be objectively assessed, because the very nature of appointments is that presumably the subjective view of how you got on with the other guys or your chambers or whatever is important, but that of itself, unless there is objectivity, means that some groups will be left outside.

Lord Falconer of Thoroton: I agree with that entirely.

Q186 Chairman: How does it work?

Lord Falconer of Thoroton: What has happened is that the Judicial Appointments Commission have published the key qualities which they believe are required for the various sorts of judicial appointment, because plainly the key qualities required for the Social Security Commissioner may be different from the qualities required for somebody who is in charge of an Immigration Appeal Tribunal or somebody who is a Circuit Judge doing crime. They published what the key qualities are to perform the particular function of a judge that they are looking for. They are exactly concerned about the point that you have made, which is that it has been done on a pretty subjective basis in the past and you need to be clear about what the qualities are.

Q187 Chairman: Do you think there should be greater parliamentary scrutiny as to how that does operate, that they are keeping to the rules?

Lord Falconer of Thoroton: I think it is a matter entirely for Parliament as to whether or not they do want to scrutinise it. They can scrutinise it through Committees by calling the Judicial Appointments Commission. If they believed there was a problem then it would be open to them to say, I think, to the Lord Chancellor, “These are wholly inappropriate qualities, we want you to do something about it with the Judicial Appointments Commission,” and as long as the minister has some real involvement he or she then is in a position to do something about it.

Q188 Chairman: Could that be done without legislation?

Lord Falconer of Thoroton: That could be done without legislation, yes.

Chairman: One of the other areas we are looking at is the powers of the Attorney General, so we are going to move on to that, if we may, and Lord Tyler has some questions.

Q189 Lord Tyler: I am particularly interested in the question of the powers that the Attorney has to direct prosecutions on national security grounds but I am also interested in your view, as having been closely involved in all this and now as a very distinguished back bencher, whether you believe that in future the relationship of the Attorney to the Houses of Parliament—perhaps under a different government, a different Attorney—should be reviewed. The power that is specifically given to direct prosecutions on national security grounds, should that be one that is reviewed and perhaps in some way constrained in future?

Lord Falconer of Thoroton: When you say “direct prosecutors” are you talking about stopping prosecutions on national security grounds?

Q190 Lord Tyler: Yes.

Lord Falconer of Thoroton: I believe that there will be circumstances in which it is necessary sometimes for prosecutions to be stopped on national security grounds. I think that the Attorney General should have the power to stop prosecutions on national security grounds from time to time; for example, because people might be identified which would be detrimental to national security, or because there may be wider considerations that have an effect on national security. It is pointless for us to speculate on what they might be but there will be circumstances when that is so. So I am in favour of the Attorney General having that power. Times have changed from when the lawyers and the politicians were very closely linked. I think the difficulty is that unless the Attorney General is a wholly independent figure the difficulty of the Attorney General stopping a prosecution on national security grounds, without it appearing it is being done for political reasons, is very, very difficult. So I favour the retention of the power but I would have strongly favoured a much more wide ranging reform of the office of Attorney...
General than is reflected in this particular Bill. But I completely accept that obviously the Committee cannot rewrite the Bill because that is not the role of the Committee, so in a sense it reflects what I was asked about in relation to the judicial changes. There is nothing very much in this Bill which really changes the position of the Attorney General. There are some sensible provisions about changing when consent is required. It makes clear the position that I believe was already the case that the Attorney General could not interfere and stop a prosecution unless it was one of those well recognised grounds because it makes clear that in the superintendence role that he or she cannot just stop the prosecution as part of the superintendence, although he or she can stop it if, for example, there is a good national security ground. So after what started off as a quite optimistic proposal to reform the office of Attorney General it has all sort of sunk into a number of slightly pointless provisions, is my feeling.

**Q191 Lord Tyler:** I think we are very sympathetic to that point of view—some of us anyway—but since you are in a unique position to guide us, since this is pre-legislative scrutiny on a draft Bill, that this provision is there for us to expand, how would you propose to expand it in a way that does make the Attorney more obviously accountable, obviously answerable and could get over the difficulties which you were identifying just now?

**Lord Falconer of Thoroton:** You do need the Attorney to have this power, I believe, because I do believe that from time to time national security will require the stopping of a prosecution. The Attorney General is already accountable in the sense that Parliament can require him to express views in relation to it. I am not sure, however, that accountability is the right way to be looking at this because I think the reason why you need now an independent Attorney General is because he does two things particularly, which I do not think should be susceptible to parliamentary accountability or pressure. One, he gives advice, in particular on international law, which means in relation to armed conflict. That is not a matter where, as it were, political pressure should determine what the advice is, by which I mean what is said to him in Parliament; it is simply a matter of what is his objective view as to what the right advice is. In every other area the person who is accountable is not the person who gives advice but the person who takes and acts on the advice. The second area is prosecutions and prosecutions are something that should be dealt with entirely separately from the political process. It is absolutely critical that in relation to determining whether or not prosecutions start or finish it must be done without reference to politics, and that should include whether you stop a prosecution on a national security ground. I believe the right approach is that the Attorney General should be a trusted, independent figure, broadly doing what he or she is doing at the moment, but appointed irrespective of what the government of the day is, so that he or she has a standing within the government that he or she gives definitive legal advice, gives definitive views on whether or not prosecutions should start or finish, but is not any longer part of the government itself—part of the political government. But that is not what is on offer in this Bill.

**Q192 Lord Tyler:** But it could be.

**Lord Falconer of Thoroton:** Again, I assume your task is, as it were, to scrutinise the Bill rather than rewrite the Bill.

**Q193 Chairman:** Perhaps we can decide on that when we come to consider it!

**Lord Falconer of Thoroton:** Can I say two things? One, nothing I should say should be taken as inferring that I think there was any lack of independence on the part of any Attorney General or Solicitor General when I was in government, and I think every one of them I saw acted on the basis of what they perceived to be an entirely independent view. The reason I hold these views is because of public perception and because I know the atmosphere in which all Law Officers have to operate. The second thing is that it is hard to imagine somebody better equipped than the current Attorney General to make the switch from being appointed initially by a political government to somebody who becomes an independent Attorney General. I am sure there are difficulties but if you look at Scotland the current Lord Advocate was initially appointed as Solicitor General by a Labour Government; she then became Lord Advocate in the Labour Government; and when there was a minority Scottish Nationalist Government they felt able to retain her. She is the Lord Advocate at the will of the First Minister, but my goodness me the sense that the advice will be given independently gives a great boost to that, that it is somebody who can straddle both governments without there being any difficulty.

**Q194 Chairman:** It is always possible to tear up the party card but are you suggesting that that actually makes a difference in public perception?

**Lord Falconer of Thoroton:** I do. I think if you are the Attorney General who is part of a group of politicians making decisions about should we stop a prosecution which the Prime Minister is very keen to stop—and there is no secret about that—I cannot envisage that the public out there do not think that the fact that you are part of that group has an influence on your decision. I would like to make it clear that I am not suggesting at all that that is what has happened, but the idea that the public do not
think that you are—and this is not my word—part of the “gang” must have an impact on public perception.

Q195 Fiona Mactaggart: I am very struck by the difference in your analysis about the appointment of judges and the need for a form of accountability—not in relation to appointing an individual judge but in terms of the whole class of this. Is there not a comparative issue about accountability for the system of prosecution?

Lord Falconer of Thoroton: Yes.

Q196 Fiona Mactaggart: That while one does not want an Attorney General who can prevent an individual prosecution or interfere in that way one does want a kind of accountability about the priority which is given to particular kinds of prosecution and the conduct of the prosecution service. How does that fit in the model you have just described?

Lord Falconer of Thoroton: Because what is being sought here is accountability on the part of the giver of legal advice in respect of the advice; what is being sought is accountability in respect of the decisions about prosecution, and the true analogy with judicial appointments is that you should not be involved in the individual judge being appointed, just as you should not be involved in whether an individual prosecution goes ahead or not; you should not be involved in determining what advice should be given. That has to be a matter which should be separate from politics. I do not think there is any conflict between the two things that I am saying because I am trying to get out of the political process the individual advice and the individual decisions about prosecution. You are absolutely right when you say that there needs to be some accountability for is the Attorney General good enough to do the job, are the prosecutors focussing enough on rape or white collar fraud, or whatever? But that comes from making a different political figure responsible politically for those sorts of issues. There would be no difficulty, I do not think, for example, in having an independent Attorney General responsible for the superintendence of the Crown Prosecution Service, which means making decisions about prosecutions stopping or starting; but on the policy of prosecutions, what the priorities are, the Lord Chancellor could be responsible for those—or another minister, if you wanted.

Q197 Fiona Mactaggart: So you would separate that accountability role?

Lord Falconer of Thoroton: Yes. I have said too that there is a third thing that the Attorney General does, which is nothing to do with politics, which is making decisions “in the public interest”. So where you are dealing with money, for example, that gets lost because it is not quite properly defined the Attorney General has a range of decisions to make in relation to that. It is the case by case aspect or the giving of legal advice, which is an objective issue, which should be pushed offshore from politics; the question of how you run the CPS as a policy matter should be dealt with by somebody else. I think one of the difficulties is that the role of the Attorney General has tended to expand in relation to policy, which makes his or her independent role much more obliterated and confused.

Q198 Lord Macleanman of Rogart: The Attorney General in his or her role currently has to give advice to the government but also is strongly perceived by the public to be acting as the advocate for the government in giving that advice, and therefore there is a problem about whether it is independent or whether it is making a case. Is that really what lies partly behind your view about independence?

Lord Falconer of Thoroton: That is one very strong aspect of it. In relation to—and this is a very important issue—the use of force, the armed conflict stuff, the Attorney General’s advice is effectively definitive because it is never going to come to court as to whether or not the advice on whether force was used was justified. That puts upon the Attorney General an incredible onus to give of his best in relation to what the advice has to be as his genuine view. There he is almost like a judge. There will be other issues where it is quite legitimate for the Attorney General to say, “We are being sued; it is best that the government take these defences, I am not quite sure whether we will win or lose.” Again, he has to think about what is in the best interests of the government, but he has to give objectively his best advice. Whichever it is he has to objectively consider what is the right advice to give, and that is a function that I think is not at all political.

Q199 Lord Macleanman of Rogart: What is the practical way of ensuring by appointment that the individual is independent, because in many cases Law Officers have been plucked out of political obscurity from elevated positions in the profession and then have assumed the political colour?

Lord Falconer of Thoroton: There is one thing and one thing only, which is that by all means the Prime Minister should appoint the Attorney General but he should be appointed for a definitive period of time. So just like the DPP or the Treasury Solicitor is appointed for five or ten years the Prime Minister of the day appoints but only after a process as occurs in relation to these offices, and then he or she is appointed on merit and is irremovable save for cause.
Q200 Lord Maclean of Rogart: And we assume that your view is that that person should not be a Member of either House?
Lord Falconer of Thoroton: It is because Fiona’s view is right—that there needs to be accountability for those things that are currently of a policy nature with the Attorney General, it does; but those policy issues should be transferred to somebody else. On the prosecution, on the advice and on the public interest issues it should be somebody who is not an MP. He or she might be a Peer for other reasons but they should not be appointed because they are a Peer; they should not be accountable in that way to Parliament, just as the DPP is not accountable to Parliament in that way.

Q201 Lord Armstrong of Ilminster: You have made it very clear, Lord Falconer, that you would like to see an independent Attorney General but that of course is not what the Bill suggests.
Lord Falconer of Thoroton: No.

Q202 Lord Armstrong of Ilminster: If one took the view in the Bill that the Attorney General should be a minister, should be a member of the government, do you think that the Attorney General should be a member of the Cabinet? Do you think that he or she should attend every meeting of the Cabinet if he is not a member? Do you have any view on that?
Lord Falconer of Thoroton: I do not think that the Attorney General should attend meetings of the Cabinet. I think the Attorney General should only attend the Cabinet to give the Cabinet legal advice as required, and he should not be a member of the Cabinet, obviously, on that basis. The reason I think that is because you need in relation to the Attorney General giving the advice to the Cabinet to make it clear that he is not part of that group, he is somebody advising that group, because only if he is somebody who is not part of that group can the advice be said to be objective. I think that that very point about whether or not the Attorney General should be a member of the Cabinet or whether he should attend the Cabinet rather demonstrates why the Attorney General should become an independent figure, because he is unquestionably perceived to be a member of the government, the political government. I do not know whether or not the country used armed forces when you were a Cabinet Secretary but in my day when I was in the government the Attorney General was always a member of any inner War Cabinet, and that is what happened in relation to Iraq. So he became part of the group always—and that goes back a long, long way, nothing to do with our government. So you have the Attorney General, even if he is not a formal member of the Cabinet, as part of the group determining the decision in relation to war and peace and the use of armed conflict. If you are part of that group and things have changed to the extent that the Attorney General has to give an independent view about whether or not armed force is legitimate under international law it is quite difficult, understandably, to convince the public that that is a view entirely independent of the group of which you are a part.

Q203 Lord Armstrong of Ilminster: It certainly seems to me that one reason for the position of the Attorney General in these things is that he or she is giving legal advice. A decision may be taken by colleagues that is not in accordance with that advice, or not wholly in accordance with that advice, and the Attorney cannot be a member of the group for that purpose, does not share that collective responsibility. It goes on from that, does this not mean that the Attorney General’s legal advice to ministers has to remain confidential?
Lord Falconer of Thoroton: Speaking for myself, I think it is inconceivable that the advice in relation to the use of force can remain confidential in the current view of the world. I do not know if you have had the military yet to give evidence to you, but they have all said, “The three things we want before we use force is parliamentary support, public support and it is clear that it is in accordance with international law.” That is what everybody wants. The idea that we are not being told the basis on which we are going to war in relation to international law seems to me to be inconceivable now as a matter of basic transparency. In relation to other advice by and large I can see strong reasons for keeping it confidential because a lot of the advice you get is about dealing with other people and you do not want to tell them necessarily, if you are dealing with them for example in relation to litigation, what the strengths and weaknesses of your case are, but in something like the use of force the idea that you do not say the basis on which you are going to war in international law terms seems to be inconceivable. Just picking up your point, formerly it would be a committee of the Cabinet that will be responsible for determining the decisions in relation to how the war is conducted. There was certainly one in relation to the Falklands; there was certainly one in relation to the first Gulf War, there was certainly one in relation to the second Gulf War. I think you will find that the Attorney is always on those committees, quite rightly, but if he is not an independent figure and he has the power to say yea or nay as to whether force is used it is putting him in quite a difficult position.

Q204 Lord Armstrong of Ilminster: I think I am right in saying that in the case of the Falklands, which is the only one of which I have direct experience, that he was invited—it was a he then—to the meeting of the
War Cabinet, as it was called, when there was a legal issue, but not when there was not. Lord Falconer of Thoroton: And it was not just the second Gulf War with us, there were also issues about Kosovo. The Attorney initially was not in 1997 on those things, but then got on to that and then thereafter was always on, and I thought that was on the basis—though you may know better than I—that he or she had always previously been on the pre-1997 position, but I may be wrong about that.

Q205 Lord Armstrong of Ilminster: In the Falklands he was often there because one was talking about rules of deployment of forces and sometimes there was a legal issue in that, but it was only for the legal aspects to which he was invited. Lord Falconer of Thoroton: Things have really changed. The two examples of the change are the well known story that the Law Officers opposed the intervention in Suez, even without knowing about the collusion, and they were just ignored. Reginald Manningham-Buller came and saw Anthony Eden and said, “This is all unlawful, what you have done,” to which Anthony Eden said, “We did not go there because of law, we went there because of policy; please do not mention the law again.” And he and—I think it was Harry Hylton-Foster—the Solicitor General went out with their tails between their legs. It is not just that, it is also the close relationship between lawyers and politicians. I am always struck by the story that in 1918 our most important relationship was with America. Though the Ambassador to America was important who should Lloyd George have? He decided he would have Rufus Isaacs, who is the Lord Chief Justice. So he has Rufus Isaacs in and says, “Would you go and be the Ambassador to the USA?” And he said, “Of course. It does not stop me being Lord Chief Justice, does it?” Of course not! So he goes off and is Lord Chief Justice and Ambassador to America for three years. In 1921 Lloyd George has a problem with India—who is the best man for this? Rufus Isaacs. He summons Rufus Isaacs back from America and says, “Will you be Viceroy of India?” He says, “Yes, I will be. I assume I can continue to be Ambassador to the USA and Lord Chief Justice?” And Lloyd George says, “I think the boats are not quite so good to India,” and so he goes off and is Viceroy of India. Then he comes back and is Foreign Secretary—the law and the politicians completely as one. That is not the nature any more of the relationship between the lawyers and the politicians—things have changed.

Q206 Sir George Young: Straight from the Mikado! Lord Falconer of Thoroton: It is!

Q207 Lord Tyler: That final bit sounded like a job application! I want to go back for a moment to your concept of the more independent role and you suggested that the DPP might be a model.

Lord Falconer of Thoroton: Yes.

Q208 Lord Tyler: But would it not be more appropriate to think in terms of the Comptroller and Auditor General, who has a very special relationship with Parliament, because I think the role that you are describing still does have very significant parliamentary significance and in those circumstances we would have to have some explicit linkage to some part of the body politic. Lord Falconer of Thoroton: The reason I go for the DPP rather than the Comptroller and Auditor General is because although there is a significant role in giving advice to Parliament—and I think the Attorney General as an independent figure should be accessible to Parliament to give advice on particular issues—the main day to day function of the Attorney General in relation to his legal function is to give advice to the Executive. Therefore, I do not think that a figure like the Comptroller and Auditor General would be remotely appropriate as the parallel.

Q209 Martin Linton: Just a very short question. I can absolutely see your distinction between different roles of the Attorney General and that the case by case prosecution decisions should be seen to be independent. But are there not some decisions on prosecutions that actually require somebody with a political mind? Lord Falconer of Thoroton: Most certainly not and I think the moment you get politicians trying to influence those decisions you get into big, big trouble, and that is why I think you should put it offshore. I suspect in relation to the role of the Attorney General although there will be bits of his role that you could say the Lord Chancellor could be responsible for, that the overall role of the Attorney General should be like the Cabinet Secretary. If the Cabinet Secretary behaved inappropriately—which he never would do, I am quite sure—the person who would be responsible in an accountability sense would be the Prime Minister, and it should be like that with the Attorney General, it seems to me.

Q210 Mr Tyrie: As you know, the Justice Select Committee has come out with proposals that are not a long way away from what you have been proposing. They are slightly different but the main thrust is the same and the main problems identified by that Committee are the same as those that you have identified today. But that is not what is on offer, so it appears. Therefore, we are likely to be faced, at least for a while, with struggling on with the current arrangements. I think it might be helpful if you could just elaborate on what you think the consequences are of struggling along, what the risks are of struggling along. I do not want to put words in your
mourn but I do think that there is a problem of credibility with the existing arrangements and I wonder whether you could elaborate on that just a little?

Lord Falconer of Thoroton: I think the problems of struggling are very, very greatly alleviated by the fact that the current Attorney General, Baroness Scotland, is held in very, very high regard by politicians, lawyers, judges and the public alike, so that will have the effect very significantly of reducing the problems. However, the two obvious problems that arise are, first: should there be in the future a question about whether or not there is a questionable international law basis for the use of force in the future? I am doubtful, in the light of what happened on the previous occasion, whether or not the authority—and it is only if it is doubtful because in some cases it will be utterly obvious that it is okay and therefore there will not be a problem—if it is a genuinely difficult question are the current surrounding circumstances such that the Attorney simply saying, “I believe it to be okay in international law,” does that carry enough weight? That is the first identifiable difficulty. The second identifiable difficulty is the national security issue that Lord Tyler raised with me, which I do believe has to be preserved. I do not think it will be possible to stop such a prosecution unless you do it on the basis of seeking outside advice and then probably disclosing the substance of that advice, which might well be very detrimental, unfairly, to the person in respect of whom you are stopping the prosecution. So because of our recent experience, which I do not think is to do with the personalities but I think is to do with the fact that we live in a much more transparent time, the current arrangements are very severely wounded in trying to deal with these most difficult and perhaps most significant parts of what the office of the Attorney General has to do.

Q211 Chairman: A final short question on a very big issue, namely the resolution process for war powers and decisions. Can we just ask you, do you think that this is the way forward—you may have heard some of the evidence from the earlier witnesses about the options of legislation? And most especially could you give us your comment on whether you feel that the reservations of government to go down the legislation route has validity in terms of protection of military personnel?

Lord Falconer of Thoroton: I am strongly against legislation. I believe that the draft detailed War Powers Resolution is pretty dangerous. I was horrified—not in any personal sense—to hear the evidence that was being given to you. This is adding a layer of legality which is unnecessary and problematic. I say it adds a degree of legality because assume that such a resolution is passed, that does not deal at all with the issue of whether or not it is lawful in international law terms. The question of re-approval that you were discussing, reading the resolution, which is set out at page 53 of the White Paper, you will have to get, it seems to me, approval again on the terms of the resolution, if what has been approved in the first place does not cover what then happens. So to take an obvious example, force was used in the invasion of Afghanistan, in effect to depose the government of Mullah Omar. Would you need another resolution to send a larger force to protect the work that was being done in Helmand Province? I assume that you would. But these interesting issues, all being set down in this legalistic way, will lead to people, I would have thought, constantly going to court just to review the Prime Minister. This is an example: it says in paragraph 3(5): “It is for the Prime Minister to determine if the emergency condition or the security condition is met”. Suppose it is argued that no Prime Minister could possibly have concluded that the emergency or security condition was met, having done something the equivalent to a statute why would you not go to court and try and challenge that? This is to meet a problem I believe does not exist. I am strongly of the view that you could not use force now without the consent of Parliament, and indeed looking back at least to the Second World War in practice Parliament has always given its consent. It may not always have passed a resolution—it did not pass a resolution, for example, in relation to the Falklands War because it was absolutely clear that it had the wholehearted consent of Parliament. But why are we putting in a new layer of legalism which, whatever some of the Generals may think, will cause more difficulties for them rather than less, because instead of giving them the security that it is bound to be lawful if a resolution is passed, it just gives lots of people another basis for attacking the legality of what has happened. I think the best solution in this area is some way or another it should be made clear that the Executive cannot use force unless Parliament agrees; how it agrees is a matter to be determined on each occasion, which I think is already in effect the constitutional position, and leave it at that, rather than this over-complex arrangement, which I think just leads to difficulties going forward. Just one final point. You need Parliament’s consent but the people who wage war are not Parliament, it is the Executive; the Executive make the decision about whether we go to war because they have the information, they have the military to give them advice as to what is possible. They are making the decisions about how war is waged. Of course Parliament has to consent but if you adopt a process which gives the impression that Parliament is making the decisions—they have to
approve it, but it is actually making the decisions—you are slightly, I think, dividing the responsibility from the formal power.

Q212 Mr Tyrie: Have you seen the House of Lords report on this proposing a convention?
Lord Falconer of Thoroton: I have.

Q213 Mr Tyrie: Do you think that is a sensible way forward?
Lord Falconer of Thoroton: I think I am not quite even with the House of Lords’ position in relation to this. I am of general acceptance that you need Parliament’s consent to the use of Force and do no more than that.

Q214 Mr Tyrie: Are their convention proposals already a bridge too far?
Lord Falconer of Thoroton: I am too ignorant of the detail of their report to know whether or not they go into the detail of this.

Q215 Mr Tyrie: It would be helpful if you could come back to us on that.
Lord Falconer of Thoroton: Yes.

Q216 Chairman: Can we thank you very much and in saying so can we finally ask you this? Was it a complete waste of a tree? Is there anything in the Bill that you do feel we should look at?
Lord Falconer of Thoroton: As I say, I do not know enough about the civil service proposals. I know that there is widespread support for civil service legislation. What I do not know is whether or not any of these proposals actually make a difference to the current position. I have only commented on the things that I know about; in relation to the things that I know about this is a sort of Constitutional Retreat Bill! To call it a Constitutional Renewal Bill in my view is a little bit over-claiming.
Chairman: Can we thank you for your expert and indeed unambiguous evidence!
OVERVIEW

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

The principal demonstrations were:

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


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


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

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

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

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

The 2005 Serious Organised Crime and Police Act, in respect of Parliament Square has proved ineffective and the Government’s intention to repeal these provisions is welcome. The ban on protest without police authorisation (the right to assembly under the European Convention on Human Rights) is unacceptable in a democracy.
The repeal of these provisions however, should not be used to “harmonise” the differing regimes in respect of marches and static assemblies under the Public Order Act 1986. Such a move would seem inevitably to lead to considerably more control of assemblies across the UK and would place unnecessary limitations on the right to protest. The differences in the existing regimes reflect practical considerations between a moving and static protest.

Harmonisation could result in the police being able to arrest someone simply for handing out leaflets about a local issue on their high street, even if he was law abiding in every other respect. This is clearly unacceptable. A requirement to give notice of protests, in the designated area or elsewhere, is unacceptably bureaucratic and threatens to criminalise spontaneous protest and to make people feel unable or unwilling to participate.

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

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

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

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

**Repealing the Current Law**

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

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

Parliament as the seat of our democracy is rightly the focus of protest. It is imperative that the right to free speech is protected and I am unpersuaded that the area around Parliament should be treated differently than anywhere else in the country. Demonstrations, under the 1986 Public Order Act and other legal provisions give the police ample powers to ensure the security of the public and Parliament and at the present there is no case for additional police powers.

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

**Access**

We agree that the business of Parliament must be allowed to continue unhindered and that the police need appropriate powers to ensure that this takes place. The Sessional Orders, which are renewed each session at the Opening of Parliament, require that the Commissioner of the Metropolitan Police ensures that access to Parliament is kept free. Although the Sessional Orders do not confer any special powers of arrest on the police, they are sufficient when taken together with other police powers, including under the Public Order Act 1986, to deal with all ordinary occurrences.
In considering whether the police actually need additional powers to enforce Sessional Orders, it is important to remember that the Public Order Act 1986 already contains the power for a senior police officer to impose conditions when he or she considers that an assembly may cause "serious disruption of the life of the community". This power would be activated if any serious or prolonged disruption to parliamentarians was reasonably envisaged. Given the variety of access points to the Palace of Westminster and other parliamentary buildings, the obligations on the police under Sessional Orders, when taken together with existing police powers, are more than sufficient to ensure the free movement of parliamentarians and their staff to and from Parliament and to ensure the continued functioning of Parliament during protests. The arguments of the police for additional/specific powers is unfounded in our opinion.

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

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

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

**NOISE**

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

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

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

**PERMANENT PROTESTS AND ENCAMPMENTS**

While unsightly and possibly irritating to some parliamentarians tolerating longer term protests is a small price to pay when what is at stake is a fundamental democratic right. Bylaws already exist in respect of Parliament Square Gardens. It is also against the law to block footpaths and public roads. It would seem that the laws and police powers already exist to prevent permanent encampments on Parliament Square or indeed elsewhere. In respect of permanent protests, such as that mounted by Brian Haw, there appears to be a lack of willingness by the authorities to act not an absence of laws which allow them to do so. Between the Mayor of London’s byelaws, and other legislation the police could remove him. Perhaps the reluctance of the respective authorities to co-ordinate and use their powers is a healthy indication that the right to protest is seen as more important than legal niceties, or the aesthetics of the area around Parliament. The Countryside Alliance throughout the summer of 2002 held a longstanding vigil and a variety of themed protests, all of which were peaceful and admirably tolerated by the authorities although there must be doubt as to whether they were all within the strict letter of the law.
The Government has stated that “we need to ensure that all groups have the opportunity to protest peacefully at the seat of the UK elected Parliament”. Indeed former Prime Minister Tony Blair famously said in a speech at the George Bush Senior Presidential Library on 7 April 2002: “When I pass protestors every day at Downing Street, and believe me, you name it, they protest against it, I may not like what they call me, but I thank God they can. That’s called freedom”.

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

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

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

SECURITY AND PUBLIC SAFETY

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

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

PRIOR AUTHORISATION

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

Marches

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

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

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

1. Serious public disorder.
2. Serious damage to property.
3. Serious disruption to the life of the community.
4. Or, that the purpose of the march is to coerce by intimidation.

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

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

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

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

**Assemblies**

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

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

1. Place.
2. Duration.
3. Number of persons who may assemble.

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

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

**Powers of Arrest**

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

*June 2008*

**Examination of Witnesses**

Witnesses: Mr Gareth Crossman, Director of Policy, Liberty, Mr Mike Schwarz, Partner, Bindmans, Baroness Mallalieu QC, a Member of the House of Lords, President, Countryside Alliance and Mr Milan Rai, examined.

Q217 Chairman: Good afternoon. Can we welcome you to our Draft Constitutional Renewal Bill Committee. We are covering a whole range of issues, as you probably know, but this afternoon we are grateful to you for coming along to answer questions and offer advice on a very niche part of the consideration, namely that relating to demonstrations and particularly those outside Parliament to which the Serious Organised Crime and Police Act 2005 currently applies, as indeed does other legislation as well. Milan Rai, I know that you are famous because of issues that have arisen in consequence of the Act in question. Can you tell us what you think the main problems with sections 132-138 of that Act are? Do you think they should be repealed and, if so, what sort of replacement do you think would be appropriate? Perhaps you can tell us of your personal experience in dealing with that.

Mr Rai: I am very happy to talk about my personal experience. I have been organising protests in and around Parliament for about 20 years and I have organised many vigils and demonstrations opposite Downing Street over that time. In September 2005 I was preparing to organise a small part of an
international ceremony to mark the people who had died in Iraq as the result of the invasion and occupation of Iraq and as part of that two of us, Maya Evans and myself, were going to be ringing a bell and reading the names of Iraqi civilians and British service people who had died in Iraq. I contacted, as usual, the Metropolitan Police and I encountered for the first time the new system. Previously I had contacted the Metropolitan Police and that was useful for me as an organiser also to make sure that I did not clash with someone else’s demonstration, so there was a useful function in my notification for us. On this occasion I was told that new regulations had come in which I knew of but did not know the details of, and I was sent an application form to fill out. At that point I was very much committed to carrying out this remembrance ceremony for people in Iraq and when I first received it I was minded to fill out the form and send it back. However, as I studied it I became more troubled by the issue of principle involved in shifting from a process of prior notification to being required to seek prior authorisation. Having at first been minded to fill it in because completing that ceremony and remembering all the people involved was very important to me and to Maya Evans also, I became unwilling and in conscience unable to complete the form and seek authorisation. I contacted the Metropolitan Police again. I told them that in conscience I was not able to do that. They told me that as the organiser, and I had given my name and address as usual, I could face up to 51 weeks’ imprisonment for that. When we went ahead with the demonstration the two of us were arrested. The police were quite reasonable in their treatment of us. We were non-violent and co-operative, while being unco-operative in the filling out of the form, and subsequently we were prosecuted, fined and in my case I was imprisoned for non-payment of that fine because I could not in conscience pay a fine for something which I did not believe was wrong, so I served a short prison sentence for that. The prison sentence and the prosecution and the arrest all turned on the fact that I felt that a very serious change had happened from a voluntary process of notification to a process where the police had powers to control our demonstrations and that we had to seek the permission of the police simply to remember the dead. In passing I should note that while this did not bear on my decision whatsoever the application form also imposes a much greater burden on the organiser in terms of having to attach advance publicity, having to tell the police when meetings are being held before or after the event and where they are, having to tell the police when the organiser is available for meetings with police, having to deliver this form once completed either by hand or by recorded delivery. All of those are significant changes to the system and the kinds of restrictions that are required now on organisers I believe also serve to give the police the right to effectively neuter political protest, and in the case of the ban on loudspeakers to have a significant impact on public safety and the control of demonstrations as stewards who have loudspeakers are much more likely to be heeded by demonstrators than by police because, in the nature of things, demonstrators tend to not be entirely obedient and sometimes to rebel against instructions given by authority figures such as the police.

Q218 **Chairman:** Was it the nature of the form, the amount of detail, or was it simply the principle of applying for permission that you objected to?

**Mr Rai:** It was the principle that it all turned on for me and these other matters were minor in the making of my decision.

Q219 **Chairman:** Do you have any evidence that the police have ever refused an application?

**Mr Rai:** I do not believe that they have. However, as the Committee will know, the police have the power to relocate demonstrations, to limit the duration of demonstrations and to reallocate the beginning and end of demonstrations within a very large area so that an evening rally of 500 in Parliament Square could turn out to be a breakfast event of half a dozen people under the London Eye under the powers that the police have, which obviously has a significant impact on the political message that you convey.

Q220 **Chairman:** Would you accept that that is somewhat speculation? Again, do you have any evidence that the police have so changed the nature of a demonstration as to make it inoperable or ineffective?

**Mr Rai:** Not at all. I have not come across any evidence that the police have exercised the powers which they now enjoy.

Q221 **Lord Campbell of Alloway:** You were a co-founder of Voices of the Wilderness.

**Mr Rai:** That is correct.

Q222 **Lord Campbell of Alloway:** What is the object of that? Is that to organise demonstrations? What is the purpose of Voices of the Wilderness?

**Mr Rai:** I regret to take up the Committee’s time on disentangling my political allegiances.

Q223 **Lord Campbell of Alloway:** No, it is a straight question. Is it yes or no?
Mr Rai: I did co-found Voices in the Wilderness ten years ago. Five years ago, and therefore pre-dating this particular involvement with the Serious Organised Crime and Police Act—

Q224 Lord Campbell of Alloway: Forgive me, sir. I am not concerned with this involvement at the moment. It is a simple, straightforward question. The answer is yes or no, was it founded so as to organise demonstrations?

Mr Rai: What I was trying to say was that I was not actually involved in Voices in the Wilderness at the time of this demonstration. However, Voices in the Wilderness does carry out demonstrations and that is one of its purposes, yes, but that is not relevant to my involvement in that particular incident.

Mr Crossman: Just turning back to the original question, which I think was relating to what is problematic about SOCPA as well as all the generally well-known concerns that have been raised about the onerous nature of it and the ability to place extremely restrictive conditions on demonstrations, there are a couple of other points that I think are relevant. The first is the gestation of SOCPA itself. I think part of the problem with the broad nature of the restrictions comes from the fact that when the Serious Organised Crime and Police Bill was originally published in the House of Commons it was a very different set of proposals. It was far more specific and, to put it bluntly, it seemed to be just targeted towards Brian Haw and there was a considerable amount of criticism at the time saying that it was ridiculous to have an Act of Parliament which seemed to be targeted on a particular individual, so this was redrafted and the consequence of that was that you had a Bill coming back which was far more broad in terms. It was clearly not just about Brian Haw but now was about everyone else as well, so the fact that this was not the original draft and it was done in response to criticism in the hurly-burly of politics I think is part of the problem. Another brief point I would make is that, of course, the problem with this part of the Act is that it does not exist in a vacuum and generally it has to exist alongside the restrictions that can be imposed either by the Greater London Authority which in themselves can be extremely onerous or, in the case of demonstrations in College Green and elsewhere, within the rules that are set down by the Houses of Parliament themselves, so they can increase and multiply the concerns and difficulties faced by anyone trying to organise demonstrations.

Q225 Chairman: I take it that you think that the present provisions are unreasonable. What would be reasonable provisions to replace what currently exists?

Mr Crossman: I would have to say that I do not think there is any justification for this to continue at all. I think that this part of SOCPA should be done away with. On top of that I would say that the restrictions imposed by the GLA, and I am not sure whether this would be considered a matter for the Committee, in themselves are in our view excessive and disproportionate and can make it extremely difficult for anyone to organise a demonstration. We are actually doing this ourselves at the moment. We are trying, in relation to the Anti-Terrorism Bill which is going through, to organise an event to coincide with the report stage and finding it an absolute headache and we are a bunch of lawyers. Of course there is a need to have a framework to ensure that reasonable and proportionate restrictions can be made but most of those are found within the existing law. We have a considerable amount of public order law that exists but that tends to be targeted towards demonstrations where problems arise. We have a lot of law that can deal with that sort of situation, so I would say that the framework for allowing them to take place needs to be far more relaxed.

Baroness Mallalieu: Can I say on behalf of the Countryside Alliance, of which I am the President, that we have no experience of trying to organise either a demonstration or a march which passes through Parliament Square since this legislation came into force, but we very warmly welcome the Government’s current intention to repeal the relevant sections for what I suppose would be a lay reason, that prosecutions to conviction of people in circumstances such as Milan Rai in our view bring the law into disrepute and make it look as if Parliament, far from encouraging people to engage in the parliamentary process and express their views openly, is trying to place the Houses of Parliament out of bounds to members of the public and to prevent them expressing their views to Members of Parliament who they have elected. That part I strongly support. In our view the existing powers to properly control either a march or a demonstration are already contained in the existing law in the Public Order Act of 1986, in the byelaws relating to Parliament Square and also in the Sessional Orders. Our view is that there is no need for any further supplement to those pieces of legislation which would enable the authorities to deal with all the problems that have arisen and currently arise. We are further concerned if there is any suggestion that there should be what I see is referred to in the consultation document as “harmonisation” in relation to assemblies and marches because that would inevitably result in further restrictions being placed on what is already a difficult business of organising an assembly. Essentially we welcome what the Government is proposing to do but are concerned
that it should not become a cover for in effect making life more difficult for people who want lawfully to demonstrate.

Mr Schwarz: Can I just echo what has been said about the existing law being perfectly adequate? I think there are serious problems about applying it in Parliament but I think it is all there already—the Public Order Act, the Highways Act, the byelaws, aggravated trespass, the Trade Union and Labour Relations Act. It is all there already. I think the key issue here is policing because the trouble with creating a special law which potentially trivialises protest is that it puts the seed in the police’s mind that those people around Parliament who are protesting have fewer rights than tourists, than drivers, than parliamentarians, than other people carrying out non-governmental business here. That I think is the problem. It is the impact on the police. They think, “Parliament has said this about protests. We must enforce the law”, and they assume as a default position that there may be something criminal about protest. My view is that not only is the existing non-SOCPA law sufficient, but so far as policing is concerned the police ought to attach greater weight than they do now and did pre-SOCPA to the right to protest, and you know this better than I do, respectfully. There are different ways of influencing Parliament. There are people who have the “in” on Parliament, who have the ear of MPs. Protest is the key form for people without special access to Parliament to express their views and potentially criminalising ordinary protesters outside Parliament is reducing the civil standing of ordinary citizens.

Q226 Emily Thornberry: Can I ask a question to follow that because I was interested to hear you say that you did not think that we should harmonise the law, that essentially you are saying, “Get rid of SOCPA and everything will be fine”. That is not our position at all. We think that SOCPA adds to the problem that already exists from an excessive and disproportionate restriction placed by the GLA. There is a small L-shaped strip where Brian Haw’s demonstration is which is covered by Westminster Council. The rest of Parliament Square is subject to control by the GLA. For example, when we inquired we were informed—this is the GLA, nothing to do with SOCPA at all—that applications must be five working days in advance, no more than one public meeting allowed on the same day, it cannot last for over three hours, it must be in daylight hours, the real killer—public liability insurance of £5 million required, which for many people would make it impossible to do anything anyway because they are simply not in a position to take out that sort of insurance, and not to attach banners to any part of the square. If you are trying to organise a demonstration and you come up against that as a set of requirements it is going to be very persuasive in making you think that you want to look elsewhere for your demonstration, so SOCPA on its own is not the end of the problem from our perspective.

Mr Schwarz: Can I also respond to your question, which was about whether the existing law itself is a satisfactory status quo. I do not think it is. There are obviously issues about how it is applied generally across the country but so far as Parliament is concerned I think the issue the Committee ought to be considering is the number of people protesting. If, for example, one looks at the rules on assemblies, assemblies are defined as groups of two or more people. I think the concern ought to be about numbers, so if you are looking at existing legislation what sort of numbers would cause a problem—20, 30, 40? It is not going to be one person as under SOCPA, it is not going to be two under assemblies, or 20 which is in the Public Order Act; it has to be significantly higher than that, particularly bearing in mind, as I said, the numbers of coach loads of tourists who come along without needing a licence or passing traffic, all of which could be carrying suicide
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Mr Gareth Crossman, Mr Mike Schwarz, Baroness Mallalieu QC and Mr Milan Rai

bombers, as well as everything else that is going on. Why apply potentially criminal conditions to protesters who appear in that number?

Q228 Emily Thornberry: The question I ought to ask at this stage though is do any of you know about other jurisdictions and what is it that other parliaments do? There must be other parliaments that have demonstrations and laws applying to them, so do any of you have any experience of that or know any lessons that we can learn from elsewhere?

Mr Schwarz: If you look at, say, the European human rights law, and Gareth can also deal with this, and at the way the European Court has examined different jurisdictions’ protests, they say yes, that conditions and prior authority as a condition to protest can be sought but it must be reasonable and proportionate, as you know, proportionate with the aim of allowing protest as well, and that those rights of protest should not be interfered with without a pressing social need. Interestingly, when Westminster Council took Brian Haw to court before SOCPA, the High Court said, “No, we are not going to stop him protesting because there is no pressing social need to interfere with his rights of protest”. I think that is the key question for the UK, for other jurisdictions and obviously for the European Court when this Committee, for example, is looking at the human rights implications of SOCPA or its replacement—is there a pressing social need? I say no.

Q229 Martin Linton: I am going to ask about additional powers but can I first clarify the answer to the first question because it leads on to this? If you are saying that the present Act is impossibly bureaucratic, and I agree with you, would you prefer a return to the old system of Sessional Orders which have not been read for the last two years? If it was a straight choice between SOCPA and Sessional Orders which would you prefer?

Mr Rai: Having been arrested under the Sessional Orders as well in the past, I am not sure I am in a good position to make a choice between the two. Unfortunately, my experience of Sessional Orders is that I have encountered police officers who, in the way that Mike Schwarz has been indicating, have been under the impression that Parliament has asked them basically to stop protests occurring and they have used Sessional Orders as a way of intimidating protesters and occasionally arresting them. I was involved in a case that was won on appeal at Southwark Crown Court which helped to put Sessional Orders into something of disrepute, so if you ask me to choose between the two systems I think that there is a very grave step forward with the demand for compulsory authorisation and that marks the distinction between the two systems. However, if you said would I actively choose one, I would respectfully decline to make a choice.

Q230 Martin Linton: Baroness Mallalieu?

Baroness Mallalieu: I would go back to the Sessional Orders and the status quo as before.

Q231 Martin Linton: Mr Crossman and Mr Schwarz?

Mr Schwarz: I do not know if the Sessional Orders are appropriate. I think existing criminal law applied impartially and independently by the police where appropriate is adequate. I am concerned about Sessional Orders because it is another message from Parliament to the police saying, “We do not like protests around us”.

Q232 Martin Linton: We are not looking at protests or demonstrations in general. We are just looking at the law as it applies or should apply to protests outside Parliament. It is a very specific small point.

Mr Schwarz: But the Sessional Orders are a message to Charing Cross police station, “This is our view of protests around Parliament”. Legislation is the worst. Sessional Orders I think are pretty bad. Why not let the police, applying the primary legislation, form their own views and policies on when it is appropriate to intervene? Obviously, if they get a call at 10.30 at night from Parliament saying, “We have got a bit of a problem outside. There are too many protesters”, they may come along.

Mr Crossman: All I would add is that while the straight answer to that, if there had to be one, would be Sessional Orders rather than SOCPA, the flip side of that is that, for all that I believe that those provisions should be done away with, at least they provide a legislative framework which is easily accessible and where people can see what the parameters of the law are. I do not think the same applies when we are talking about Sessional Orders where they seem to be far more broadly open to interpretation.

Baroness Mallalieu: I wonder if I might just add, if I may be allowed, Chairman, that the thrust of Sessional Orders seems to me to recognise the importance of Members of Parliament being able to get into the building, and indeed the other way, Members of Parliament being able to get out of the building to see their constituents outside. I think that is not necessarily recognised by the other aspects of the law and I think it is a particular feature of Parliament which needs to be in some way preserved.

Q233 Martin Linton: I understood your answer, Mr Crossman. Can I lead you on now to, if we do not have SOCPA and we do not have Sessional Orders, as some of you advocate, would the police still need
Q234 Martin Linton: You do know that several parts of the building are open to the public?

Mr Crossman: Under the common law the police, if they need to open access onto the carriageway for a particular need, they are able to do so. I do not think there is any need for any particular extension of the common law on that.

Q235 Martin Linton: So you do not think there would be any need for the police to have powers to keep Carriage Gates open to access?

Mr Crossman: We are imposing restrictions. We are requiring parliamentarians to access Parliament and leave Parliament during protests.

Q236 Martin Linton: If you can just cast your mind back to before 2005, do you think there were occasions when the police had difficulty maintaining access to Parliament?

Mr Crossman: They do have powers to do it. That is precisely the point of the additional powers under the Public Order Act, that exist as a consequence of the Sessional Orders. The police can make a judgment to say, “We are imposing restrictions. We are requiring people to act or not act in a certain way and if they fail to do that they have committed a criminal offence”. It allows the police to react appropriately to the sort of situation that you are talking about when things look like they might get out of hand.

Q237 Martin Linton: I do not know if any of you were present at the Countryside Alliance demonstration in Parliament Square. I forget when it was but I am sure Baroness Mallalieu would know.

Mr Crossman: Is that not the point of section 14 of the Public Order Act, that in that situation the police can take action, can impose restrictions as they see appropriate?

Mr Schwarz: There is a raft of legislation that applies across the country that can apply there. What you are describing is a policing issue—do the police have resources to deal with this?

Q238 Martin Linton: I was there, not as a demonstrator but I observed what was happening, and there was a very ugly situation that developed with the crowds surging forward and the police having to hold the line, and indeed several people got injured, not I think through any intent by the police but simply because they had to prevent the demonstration from storming Carriage Gates, effectively. I do not think one could prove either way whether the demonstrators intended to rush through Carriage Gates but the point is that if the police line had broken they could have done and there were several of them behaving in a way that looked as though they were trying to break through, and presumably they were not just trying to cross the road peacefully; they were hoping to go further. Was that not a situation where you had a demonstration on Parliament Square pushing at police lines and where you could get a mass invasion of Parliament?

Mr Crossman: I agree. There is a raft of legislation that applies across the country that can apply there. What you are describing is a policing issue—do the police have resources to deal with this?

Q239 Martin Linton: I am asking a specific question, not about the law in general. Outside a legislature is there a case for the police to have additional powers to prevent people from rushing into the legislature?

Mr Crossman: The point of the additional powers under the Public Order Act that exist as a consequence of section 14. The police can make a judgment to say, “We are imposing restrictions. We are requiring people to act or not act in a certain way and if they fail to do that they have committed a criminal offence”. It allows the police to react appropriately to the sort of situation that you are talking about when things look like they might get out of hand.

Q240 Martin Linton: So there is a case for the police saying, “No large demonstrations immediately outside Parliament”? I mean criminal legislation here to criminalise the activity in principle. Answer: without SOCPA, yes. Are there the police powers to enforce that, powers of arrest across the country? Yes. Do the police have the
resources to deal with? Ask Charing Cross, but they can deal with protests anywhere. As far as I am aware Parliament does not pose particular problems, in fact quite the reverse. There are police all over the place, CCTV all over the place, a police station up the road. If anything Parliament is, frankly, one of the most protected areas in the country.

Q241 Martin Linton: Baroness Mallalieu is in a particularly good position here, being both the President of the Countryside Alliance and a parliamentarian herself. Do you accept that there are particular circumstances that apply to Parliament that make large scale demonstrations more of a threat?

Baroness Mallalieu: No, I do not. I think that, properly policed, a demonstration should not present a problem purely based on size. I will, if I may, deal with the particular instance you referred to in a moment, but going to the general question of access to Parliament, which is clearly crucial, my recollection of that particular day when there was a large demonstration taking place outside is that, certainly so far as the House of Lords was concerned, there was no difficulty at all with access or moving outside and the annunciator was giving indications of which gates were open for people to go in and out during that time. That may be an inconvenience but it seems to me that with a demonstration which after all is not going to arise in those sorts of numbers spontaneously; there is going to be some indication that there is to be a demonstration on that particular day, it does enable Parliament to deal with the inconvenience in exactly the way they did then. Certain gates were closed at certain times but Members were made aware by the annunciator of how they could come and go.

Q242 Martin Linton: There were a number of injuries though.

Baroness Mallalieu: There were injuries, unfortunately, on both sides. If I can deal with the specifics of that, it was the first demonstration where there had not been what I would call satisfactory liaison. The liaison officers dealing with those in charge of the demonstration were placed in my view in the wrong place, on the wrong side of the barricade, so they could not be communicated with easily, and about 20 minutes before the incident which you are referring to the stewards of the Alliance became aware that there was about to be an attempt to push through the barriers so that people could sit down outside Parliament. They contacted the liaison officer but no apparent steps were taken and the sensible course at that stage would have been to put the stewards of the Countryside Alliance in front at that spot where they would have told their people to go back. In fact what happened was that the police, in close formation, wearing riot gear and many of them, as the Police Complaints Commission found later, concealing their identities, took up a confrontational stance. That had never happened before save in one instance when access to Parliament was denied. Of course, police in that instance had a duty to ensure that no-one broke into the House. That was key and crucial.

Q243 Chairman: Thank you for that explanation. I think we have probably gone as far as we are going to go on that.

Mr Rai: Could I please add a practical point as an organiser? Can I just say that while frameworks of legislation may or may not be well tuned to those kinds of circumstances, the existence or non-existence of SOCPA or any other legislation is irrelevant in that circumstance where a section of a demonstration has formed the state of mind to create an incident of the kind that you are talking about, so whether or not there is a SOCPA or a super-SOCPA will have no bearing. It will be on the relationship between the organisers, the police and the demonstrators as to how incidents of that kind resolve themselves. Whatever replacement to SOCPA there is, that will not enter into those relationships which will determine a successful or unsuccessful outcome.

Q244 Martin Linton: In my day demonstrations were always in Trafalgar Square and the difference with demonstrations in Parliament Square is that they are only about 20 yards from the gates to Parliament so that if there were a breach it could lead to a security incident whereas a demonstration in Trafalgar Square could not. That is the point I am trying to get to.

Mr Crossman: I would just like to make a very quick point. In the sort of situation you have described, where you have a large demonstration and as a consequence a rushing at gates, the problem with SOCPA is that the temptation is going to be that the next time you are doing it you say, “Okay, we are going to limit it to 500 people because that way it is less likely to happen”, or however many people. If you are the organiser of a demonstration, and I imagine Milan would be more aware of this, how do you go about ensuring a certain number of people turn up? You are just not going to organise it. If I were organising a demonstration I would want as many people as possible to turn up because that is the whole point of organising a demonstration. That is why these limits on numbers and other restrictions are so destructive to the ability to organise a demonstration.
Q245 Lord Tyler: I have a very small supplementary for Lady Mallalieu. The logic of what you said earlier is that there should be a different regime while a House of Parliament is sitting. As I recall as a participant, the first Countryside Alliance march took place on a non sitting day. Is it your view therefore that there should be different controls when there is a problem about Members of either House coming into the building?

Baroness Mallalieu: I do not think so. I would like to know from those at the other end of the building whether there was in fact any practical difficulty that day in getting in. I know there were complaints, from Mr Alan Duncan among others, to the police about police not letting MPs out who wanted to go out and join the demonstration or see their constituents and refusing to accept the Commons pass, and that was the subject of a formal complaint. I was not aware, certainly at my end of the building, of anyone being prevented from coming in or leaving. There was a mention of Trafalgar Square and demonstrations there. Really I think that leads to my having to make the point that this House is the people’s House, this square is Parliament Square, and it may be very convenient for the authorities to say the demonstration should take place down on the South Bank or elsewhere but noise and things that are unsightly or things that are inconvenient or irritating to MPs are things which have to be tolerated in a parliamentary democracy. People are entitled to come to their House and express their views to their MPs and that will on occasions lead to difficulties and to people getting fed up and to inconvenience, but it is a small price to pay in my view for parliamentary democracy and freedom of speech.

Q246 Sir George Young: Can we move on to noise? Baroness Mallalieu. I was very interested to read the memorandum which you sent out but I was slightly surprised by one sentence, “There is no doubt that excessive noise impinges on the work of those working within the parliamentary estate. This however is a small price to pay for free speech...”. I wonder whether on reflection you might like to qualify that. You have got the policemen at the gates of New Palace Yard within feet of these loudspeakers, you have got tourists who are trying to enjoy what is a world heritage site and you have got colleagues who are trying to work in the outbuildings of the parliamentary estate. Given that there are restrictions on noise for health and safety reasons in other areas, do you not think there should be some restraints on the sheer volume of noise that can be generated, much of which makes it impossible to hear what the message is? The message gets lost in the general noise. Do we not need some control?

Baroness Mallalieu: We do have some control but it simply is not exercised at the moment. Under the Public Order Act, under the provisions for the control of Westminster Green, there are provisions in both cases. First of all, unless you have, as I understand it, the permission of the Mayor of London you cannot use your loudspeaker on the gardens themselves but there is no problem about the police, it seems to me, imposing a restriction on the length of time that noise may go on and it would be perfectly proper to say to a demonstrator, “An hour and then that is it”, and the power does currently exist within the present legislation. I understand from those who work in, for example, 1 Parliament Street, that at times it is unbearable. I can only say that so far as the House of Lords is concerned we are slightly further down the line. When there have been major demonstrations the obtrusive noise has been that of an overhead helicopter. Otherwise within the chamber I have certainly not been aware of noise which interferes with the process of Parliament. That may not be the case in the Commons but I would be surprised if the Commons chamber was affected. It is absolutely right that people in working in offices must have some respite from what we have all heard, but it could be done now. The power is there.

Q247 Sir George Young: If the length of time was exceeded or if the noise went over what was acceptable would it be appropriate for the loudspeaker to be confiscated?

Baroness Mallalieu: Under the provisions the police would have power to make the restriction and then no doubt to take such steps as are necessary to ensure that that happens. The powers are there. I was looking just now as I came in at Brian Haw’s present set-up and his fellow demonstrators and they are within the law in every respect in that they seem not to be blocking the pavement, they are not on the gardens, for which they would require the Mayor’s written consent, and they are not making any noise. They are entitled to take out their megaphone and shout until or unless they are subject to a restriction by the authorities on the timing or the duration, and that could be done, but, perhaps because there is a recognition in the authorities that although they have the powers this is something that must be policed sensitively, it has not been done. Going back to the old powers would give the authorities power to do that. There is nothing to stop them.

Q248 Chairman: The power you mentioned about confiscating loudspeaker equipment—

Baroness Mallalieu: I did not mention it. It was a suggestion that was put.
Q249 Chairman: Does anyone know what power that is because we are not quite clear about that? Certainly the Mayor of London is suggesting that such a power should exist so we have made the presumption that it does not exist.
Baroness Mallalieu: I have no knowledge that there is a specific power of confiscation but presumably, as there is a power to limit the duration of noise, steps can then be taken, whether by injunction or whatever means I am not totally clear, I am afraid, to enforce that order.

Q250 Chairman: Would you accept that it would be a reasonable power to give to a local authority or to the police if indeed a nuisance did continue?
Baroness Mallalieu: Persistent noise I think in those circumstances, yes. There is just one thing I would add to the question of microphones if I may and it has already been raised by Milan Rai. When there is a demonstration in Parliament Square microphones, loudspeakers, amplification are crucial in our submission for two reasons. First, without them there can be no proper speech made to a crowd who can hear it, and, secondly, and this comes back to the matter that Mr Linton mentioned earlier, on the occasion when there was trouble in Parliament Square permission had been refused for there to be loudspeakers at each corner in order that the crowd could be contacted. When trouble brewed up the single loudspeaker, which was some distance away from what was happening, was used to give an order to the crowd simply to sit down, and those who could hear it did so, to try to defuse the situation, but there was no means of communicating with those who were in the area where there was conflict and there was a crush. The loudspeakers are important in the case of a demonstration both in order to allow the demonstration to be effective for those who attend but also to maintain some control over a really large crowd.
Mr Schwarz: I do not think any special powers around Parliament to do with loudspeakers is necessary because if someone is doing something with the intention of harassing, alarming or distressing parliamentarians or with the intention of interfering with their lawful activity or their work, the powers are there in the Public Order Act under aggravated trespass and under the Trade Union and Labour Relations Consolidation Act. Those offences exist and if those offences are proved then the courts have the power after conviction to order confiscation.

Q251 Chairman: That is not quite what we were looking at. We are talking about the here and now rather than after a trial. Would it not be reasonable to give the police the power to remove the offending item at the time and then, of course, it would be subject to review subsequently?
Mr Schwarz: When you say “review subsequently”, what you are saying is that the police have a unilateral power, using their own discretion, to take someone else’s property without due process. If the Committee is considering that, that is quite a serious inroad into human rights and protest and the right peacefully to enjoy one’s possessions and to protest. I think that would be a very serious step without some due process to order the confiscation of someone’s property.
Mr Crossman: I refer back to section 14 of the Public Order Act, but it does cover a lot of ground. It allows conditions to be imposed for a number of grounds, including serious disruption to the community. That is one of the specific grounds set out in the Act. If I were a police officer and I decided that use of a loudspeaker was doing so I could place a condition upon you to stop using the loudspeaker. I could not take it off you but I could tell you to stop doing it. If you then continue to do it you have committed an offence under the Public Order Act because you are breaching that, to which I presume not only would you be arrested but that loudspeaker would be taken off you because it is a material piece of evidence that is relevant to the prosecution that you will no doubt be facing. Prior to arrest I do not think you could justify it. Post arrest the power exists.

Q252 Baroness Gibson of Market Rasen: Some of the points I was going to raise, Chairman, have just been answered and thank you very much for that. As someone who has been a protester and organised protests in the past I have a little knowledge of this but, of course, it is past knowledge. I think a lot of what we are discussing in relation to the powers around Parliament does really concentrate on noise. I really do think that noise is something that people get particularly angry about. Can I just say that it is not just the noise from Parliament Square because what seems to be happening at the moment is that if demonstrators come they are sent down to demonstrate around the King George statue and, as someone who has an office overlooking the King George statue, I can assure you it does a crush. The loudspeakers are important in the case of a demonstration both in order to allow the demonstration to be effective for those who attend but also to maintain some control over a really large crowd.

Q253 Mr Crossman: It sounds as if you are talking about the King George statue, Chairman. Why not the George statue? Why is it the King George statue? What is the difference?

Q254 Chairman: That I am not sure, Mr Crossman. I don’t know if the difference is because the King George statue is a national monument and the George statue is not. It may be, perhaps it is because it is a national monument and perhaps there is something more about Parliament Square which is not true of the George statue, but I am not sure. I don’t think the point is just because it is a national monument, Mr Crossman.
you ask people to keep in, keep up and not to go onto pavements and things like that, and when you get to the assembly point and are using it then constantly? I think that is (and Baroness Mallalieu raised this issue) about whether there should be a length of time for it. If there is a length of time at the moment are we able to tease this out in a better fashion than we have done because there do seem to be some genuine feelings that a certain amount of time should be allowed for a very loud loudspeaker if you are addressing a group, or indeed keeping a group in order. If there was a time limit that people knew about would that not make things easier for both the demonstrators and those who are being demonstrated to?

Baroness Mallalieu: Protests take various different forms but I do agree with Baroness Gibson that incessant noise is not fair to anybody. I think it is very difficult to be prescriptive. This is something that presumably is best agreed between the organisers of the march or the demonstration and the police in a proper liaison, and it is one of the factors that should be taken into account. It seems to me these are things that the police have power to agree already. The time and duration of the demonstration are two of the features that the police can specify in relation to an assembly and they can certainly do that and more in relation to a march, so I think the complaints that are quite justified about the noise are ones that could be met under the existing legislation if there was a willingness to do it.

Q253 Emily Thornberry: As somebody whose office is on the second floor of 1 Parliament Street I again have some sympathy with the complaints people are making about noise, but I was interested in the answer you gave, Gareth, about the Public Order Act and about police officers’ powers to be able to confiscate megaphones. How many people need to be around Parliament Square. I do not work there so it is probably easy for me to say that.

Q255 Lord Morgan: I would like to consider a different matter if I may, which is not how many people are on demonstrations or the form they take but their duration. Mr Haw, for example, has been there for many years. One could imagine, for example, people being opposed to Britain having nuclear weapons, and that is an ongoing issue which has lasted almost the whole of my life and no doubt will continue long after I am dead. Do you see any possible justification for saying that there should be some kind of time limit; otherwise we all have consciences which are, of course, eternal?

Mr Schwarz: Can I respond with a question, which is what is wrong with a permanent demonstration about war or nuclear weapons if it is quiet, peaceful and otherwise not committing an offence? That is what I do not understand.

Q256 Lord Morgan: Could I suggest one possible objection, which is that it prevents other people of equally strong consciences on other issues demonstrating. I would support this hypothetical demonstration that you mentioned; I wish Britain never had nuclear weapons, but it does also raise the issue of small minorities allocating to themselves particular positions of conscience and protest which other people have and indeed other people might be in favour of Britain having nuclear weapons and equally campaign for ever.

Mr Schwarz: I think Liberty have made this point in their own representation, which is, and perhaps you are better placed than I am to comment on this, that there appears to be no evidence that there is a conflict in terms of time or space or politics between protesters. I remember the time when the Countryside Alliance were there with their banners and Brian Haw and anti-war campaigners were there, and as far as I am aware they got on pretty well.

Q257 Lord Morgan: The Alliance was not there for weeks on end, was it?

Baroness Mallalieu: Yes, at one stage. It ran from, I think, April to September, a small demonstration. I can only endorse that. They got on extremely well, and on one occasion I think there was a pig also in the corner of the square and that seemed to fit in perfectly well with everybody else protesting.

Q258 Lord Morgan: That almost makes my point because I was not aware that you were there. I suspect the reason why I was not aware was the loudspeaker of Mr Haw which prevented you impinging on my consciousness.
Baroness Mallalieu: Perhaps we did not make our point strongly enough.

Q259 Lord Morgan: But there is surely a point about permanent occupation for the rest of time by any group, whatever it might be.

Mr Crossman: As I said a little while ago, the rather unusual nature of the authorisation process has this very narrow L-shaped strip which is controlled by Westminster Council which is the part of Parliament Square where you do not need to get authorisation from the GLA. Part of our concern is that there is this great big swathe where you do have to jump through a great number of hoops, which is why Mr Haw’s demonstration is where it is and why anyone who wants to compete for space with Mr Haw would find themselves in a very narrow area in which to do so, so I think that says more about the problems arising from the severe restrictions imposed elsewhere than any concern in itself about a demonstration taking place over a long period of time.

Q260 Lord Morgan: That would mean with no limits, forever.

Mr Rai: Can I add something from an organiser’s point of view? I think the same thing could be said about marches, vigils or any other form of protest. It might be that a whole host of people would wish to carry out a protest at the same time or the same place. The fact is, permanent protests occur because there is something which a significant number of people feel is a very great social evil. It is not simply one person; one person cannot sustain a permanent encampment; there has to be a support structure for that and that support structure, inevitably, involves people rotating in and out. The reason why Brian Haw has been able to be there so long is because of a large number of people who have supported him, and the support of a broad movement, in fact, in many ways. It is because it is an issue of major significance to the nation and to a very large proportion of the nation that you have something like a permanent encampment. The question is, if there is such an issue then why should there not be a permanent expression of that concern?

Q261 Lord Morgan: Not necessarily in one particular place or at one particular time. Those of us who are against the Iraq invasion could say that a different form of protest which would be quieter and less rooted in one spot might take place.

Mr Rai: I do not disagree with you at all that there are alternatives, but the reason why it continues and it has the level of support that it does to enable it to continue is because a sufficient number of people feel that the enduring question, not only of the invasion but of the occupation, means that they sustain it. If there were many such issues then it would mean that there were many such issues on which a large number of people in this country felt that they would give their support to someone who was expressing their view to Parliamentarians on a permanent, day-by-day basis, and that is what Brian Haw does for very many people. If there were other people doing it on other issues it would mean that there were other issues which were as important to a large number of people in this country.

Q262 Lord Morgan: We do not know how many people would support him. Would it not be the case, perhaps, whatever the figures were, that Mr Haw would continue there? He has a strong pull of conscience.

Mr Rai: We did see that he did win the Channel 4 award, when he had a number of competitors, for political figure of the year.

Q263 Martin Linton: How many votes did he get?

Mr Schwarz: He got quite a significant number but in the Westminster area it is probably not as big as in other places.

Chairman: I think we had better move on from that. Lord Campbell, did you want to add something to that? I know you had a question on that.

Q264 Lord Campbell of Alloway: First of all, may I say, I wholly accept Lady Mallalieu’s approach to this: the law is about as effective as it can be, and if you start tinkering with it it could probably make worse conditions. Can you not draw a distinction between a demonstration and permanent camping? It seems to me that if you cannot you have got a rather sort of disproportionate approach to the community as a whole, because every man’s right has to be exercised with respect to other people’s rights. It seems to me that a permanent camp outside Parliament, where the people come in and out to keep it going, is not really necessary for a demonstration about anything—about the Countryside Alliance, about Iraq or anything. What do you say to that? Is this absolutely essential and reasonable?

Baroness Mallalieu: Of course, none of it is essential; it is not essential for people to be allowed into Parliament Square at all and cause inconvenience, but I do not think you can draw such an artificial distinction. If people feel strongly enough to come to Parliament and put their views in a lawful way, how they choose to do it and for how long they choose to do it, we say, should be a matter for them.

Q265 Lord Campbell of Alloway: Yes, but I am suggesting that it is not a lawful way to demonstrate to be there as long as they want to be there. There are
Mr Gareth Crossman, Mr Mike Schwarz, Baroness Mallalieu QC and Mr Milan Rai

other interests—the pollution interest and all sorts of other interests.

Baroness Mallalieu: Can I say that so far as the pollution interest is concerned, anybody having a demonstration in Parliament Square does require a considerable back-up of people who come and collect rubbish, people who make sure everything is cleared up and people who are providing food and drink and all that. So there has not, so far as I am aware, been any problem with that sort of difficulty. It is unsightly—the present one that is there at the moment is unsightly—but that is, as I have already said, a small price to pay for people being able to come and put their views directly to their House of Parliament in Parliament Square. I do not see that there is a distinction to be made. In one case you could say: “We can look the other way because it will all be gone next week” but I am not aware that Brian Haw’s presence, or any of the other more permanent demonstrations that have taken place in Parliament Square, have ever caused conflict or prevented anybody who wanted to demonstrate doing so. If I can just go back to the pig, which I think was demonstrating about the state of the pig industry at the time, enormous care was taken to send barrow-loads of dung up to Downing Street for the garden, in order to make sure there was no pollution in the Square. Anybody who was infringing any of the local bylaws would, of course, fall foul of them and be liable to prosecution.

Q266 Lord Campbell of Alloway: Thank you very much. We shall just have to disagree. It would not be the first time.

Baroness Mallalieu: Indeed.

Q267 Chairman: Before we leave this subject entirely, Mike Schwarz, perhaps I could ask you: do you think there is already provision, perhaps under the Highways Act or otherwise, to ban permanent demonstrations? If not, do you think there should be? Is there not in the Highways Act a provision that you cannot stand in one place for any period of time? Is that not already there?

Mr Schwarz: The Highways Act does apply to protests on the pavement. Westminster Council brought civil proceedings against Brian Haw before SOCPA to try to move him on, and Mr Justice Gray said that there was no pressing social need to interfere with his right of protest because he was not significantly disrupting passers-by trying to exercise their right of passage along the pavement. That applied then; it applies now. Unless the pavement is obstructed, there is no need to intervene. If it does become excessive then the police have the power to intervene and people can be prosecuted, but if the site of the protest is not disruptive then there is no offence committed and one’s right to protest under the Human Rights Act should be protected.

Mr Grossman: I will be brief and make two short points. If I was to be asked: “What are the benefits of living in a common law country as opposed to a civil code country?” I would say one of the great things about a common law country is that you are free to do things unless laws are passed which say that you cannot do them. I think that Brian Haw’s case, although laws were passed, is a very good example of the benefits of living in a common law country. The other quick comment I would make is that the framework under the Human Rights Act says that you have a right to assembly. That is a qualified right and it can be restricted, in a manner that is proportionate, in order to ensure compliance with other needs, which include preventing crime and disorder, national security and to protect the rights and interests of others. I do not think that the fact that Mr Haw’s protest might be unsightly or people might not like it particularly falls into one of those legitimate restrictions.

Q268 Chairman: You are aware of the proposals under the World Squares proposals to pedestrianise Parliament Square which would have up to 34 million people using it. If that goes ahead, would that change any of your views as to whether or not permanent demonstrations could fit in with that sort of proposal?

Baroness Mallalieu: I think Parliament Square should be a living place and not a theme park for tourists. The answer is no.

Q269 Sir George Young: Would it not be an obstruction, though?

Baroness Mallalieu: If it is pedestrianised there is even more room for people to walk round Brian Haw and others.

Q270 Lord Plant of Highfield: Under section 134 of SOCPA the police have a power to impose conditions to prevent a security risk or a risk to public safety. If this section were to be repealed those provisions would obviously go, along with the repeal. Do you think the police should continue to have a power to impose conditions to prevent a security risk or a risk to public safety?

Baroness Mallalieu: They do already under the existing Public Order Act and under the existing bylaws.

Mr Crossman: And, I presume, under section 44 of the Terrorism Act as well, which I presume the whole of Westminster is under a rolling authority for.
Mr Crossman: I do not think, with respect, it is an issue. You can consider two types of legal ownership issues. One is the Highways Act—an offence can clearly be committed on the pavement or public road—and the other is aggravated trespass, which can only be committed on land which is not the highway or road. With Parliament Square, as elsewhere, it is either highway or it is private—so either Highways Act obstruction of the highway or it is aggravated trespass. Otherwise, the other public order criminal offences apply wherever the offences take place. I do not think, with respect, it is an issue. Mr Schwarz: I do not think the ownership of the property is relevant except if the offence that is being considered relies on who owns the property. You can imagine two offences: one is the Highways Act—an offence can clearly be committed on the pavement or public road—and the other is aggravated trespass, which can only be committed on land which is not the highway or road. With Parliament Square, as elsewhere, it is either highway or it is private—so either Highways Act obstruction of the highway or it is aggravated trespass. Otherwise, the other public order criminal offences apply wherever the offences take place. I do not think, with respect, it is an issue. Mr Crossman: Can I add to that? I think Lord Plant has gone to the heart of the problem of what happens when you have privately owned public spaces, which is that the people who own private land can place restrictions upon that land which are greater than on publicly owned property, which is why the GLA is able to impose extremely severe restrictions upon those who wish to use its property. From our perspective, this goes to a much deeper problem which is that you have large public areas (and this is going slightly beyond the scope of this Committee), particularly shopping centres, and so on, and you are finding that because they are privately owned public spaces you are having extremely onerous conditions being legitimately (I use the world “legitimately” in a legal sense) placed upon those who wish to carry out demonstrations which would not be upheld if it was a public space. This goes to the heart of a much deeper problem of increasingly privately owned public space property.

Baroness Mallalieu: I do not think there is any question of the restrictions which are available to be used by the GLA ever having been used in relation to any demonstration. When one reads through them they are extremely wide-ranging. The whole point about Parliament Square is, I think, that it has hitherto been policed sensitively, in that the various owners have, with one or two exceptions on one or two occasions, on the whole, been happy to see demonstrators behaving lawfully in that area. There is no reason to suppose that that is going to change. I think it would be a pity to try to look for difficulties where none have actually arisen.

Q271 Lord Plant of Highfield: Since that was a fairly quick answer I will come back on something. It is really about the status of Parliament Square. I am very much sympathetic to the points that Lady Mallalieu has made but there is another issue and I would be interested to know your view about this. You did say that at least three of you are a bunch of lawyers, so it is a lawyerly kind of question. Recently, in Parliament, the Minister for Justice said: “Having been Home Secretary I discovered that the legal ownership of that piece of land is a nightmare. There’s different bits of it belong to different owners with different rights in respect of it, and, if I may make my own suggestion to my right honourable friend the Home Secretary, one of the things that we have to ensure is that any new legal framework in respect of demonstrations takes proper account of those legal ownership issues.” Do you see the issue of the property rights in various bits of Parliament Square as having anything to do with the scope of the right to demonstrate? After all, if I own the lawn at the back of my house, I can control who says what and when and why and for what purpose.

Mr Schwarz: I do not think the ownership of the property is relevant except if the offence that is being considered relies on who owns the property. You can imagine two offences: one is the Highways Act—an offence can clearly be committed on the pavement or public road—and the other is aggravated trespass, which can only be committed on land which is not the highway or road. With Parliament Square, as elsewhere, it is either highway or it is private—so either Highways Act obstruction of the highway or it is aggravated trespass. Otherwise, the other public order criminal offences apply wherever the offences take place. I do not think, with respect, it is an issue.

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Q272 Emily Thornberry: If various provisions of SOCPA are repealed, we may find ourselves in a situation where it is no longer necessary for the police to be given notification of assembly. I think there has been a consultation about that, and I know that the Met Police are certainly in favour of being given prior notification of assemblies, and I think you will find that the Clerk of the House of Commons and the Serjeant at Arms are as well. I wonder if we could have your comments on whether or not you felt that it was important, for the management of assemblies outside of Parliament, to be giving notification in advance to the police. If so, what size of demonstration or anticipated demonstration and how much notice?

Baroness Mallalieu: For practical purposes, with any sizeable demonstration of anything more than a few dozen the reality is any organiser would be extremely unwise not to give that notification, and any responsible organiser would. I do not think there should be a further strict liability. Are we trying to discourage people from spontaneous protest?

Q273 Emily Thornberry: Or should we suggest it should be voluntary?

Baroness Mallalieu: I suggest it should remain as it is for the present time, which is, in practical terms, that people do give that notice if it is anything other than a couple of people handing out leaflets. Those couple of people should still be entitled to come and do it. Mr Rai: If I understand the question, it is about compulsory authorisation prior—

Q274 Emily Thornberry: Not authorisation—notification. The police need to be notified that there will be an assembly of, perhaps, 20-plus outside Parliament in advance. Do you think that they should?

Mr Rai: So three cases: compulsory prior authorisation; compulsory prior notification and voluntary prior notification.
Q275 Emily Thornberry: Yes.
Mr Rai: I am very reluctant to endorse the idea of making notification compulsory and criminalising the holding of spontaneous demonstrations. That makes me reluctant to endorse that idea. There are strong practical grounds for organisers of demonstrations to contact the police in advance to organise a demonstration of any size because if they do not they may clash with someone else or they may run into police hostility on the day, which stops them at square one. There is a very strong incentive for someone who is trying to organise anything of any scale to do that. The kind of people who are trying to organise something on a large scale who are opposed in principle to co-operation with the police are unlikely to co-operate with compulsory notification either. So I am not sure what would be achieved by that move.
Mr Crossman: A couple of points. I think it is very easy to draw a distinction between a procession and an assembly. You can see the reasons why a procession needs to have prior notification because it is going to be moving, there is going to be traffic affected, the police will need to know routes, and so on. I do not think there is a particular issue over that. However, the need for some sort of legitimate restriction is apparent. This was actually considered recently by the European Court of Human Rights, who have said that the mere fact that prior notification has not been given is not in itself grounds to prevent an assembly taking place, and it is in the nature of the right to assembly that a spontaneous reaction to events is a legitimate and proportionate act in a democratic society. However, I would say that the reason why anyone should feel that they should notify and co-operate with the police (as well as just making life easier for everyone) is that if you do not give notification in advance then the police would be in a legitimate position to place small, onerous limitations under section 14 once it has happened than would otherwise been the case, because the police are having to react to a situation where they have not been able to put prior mechanisms in place to ensure that things go in a lawful manner.

Q276 Emily Thornberry: A restriction under section 14 of what?
Mr Crossman: Of the Public Order Act. The reason why I am saying it is in your interests, if you are organising something, to notify and co-operate with the police is that when you are actually having your assembly on the day you do not want the police turning around and placing restrictions upon you there and then. That is far more likely to happen if you have not previously notified the police. So it is really in everyone’s interests to notify, but there should not be a requirement to notify.

Q277 Lord Norton of Louth: I was going to ask about police powers of arrest—whether they are adequate for dealing with breaches of public order—but I think, from what you have already said, the answer is that you clearly think the existing powers are adequate. Could I put a more specific question, following on from what you were saying, Mr Crossman, just to clarify the point about, particularly, loudspeakers, which is clearly part of the problem. Of course this is very hypothetical but let us say I am stood outside with a friend, I have a loudhailer and I am screaming at Parliament, and a police officer decides that I am causing harassment, and there are two of us—we are an assembly. As I understand what you are saying, under the Public Order Act the police officer could take action. If I told my friend to go away and I am still on my own and, therefore, there is not an assembly, am I right in thinking that the police officer then could not do anything about that?
Mr Crossman: Not on your own description because you used the word “harassment”, and the word “harassment” is an element of section 5 of the Public Order Act, which is an offence, and it does not matter if there is one of you, two of you or any more of you. You are right to say that it would need two of you to place conditions upon you as an assembly—if that clarifies.

Q278 Lord Norton of Louth: That would only relate to the two of us in an assembly, where you can impose conditions, but if I am on my own making a noise which the police officer deems is sufficient to be harassment then the police could take action.
Mr Crossman: Absolutely. And, of course, there is common law breach of the peace as well.
Lord Norton of Louth: Yes.
Chairman: Can we thank you very much for coming to give evidence today? We are grateful to you; you have informed us enormously of your views and, indeed, we are going to take them very much into account. I do have to say something formal, and that is I should have told you at the beginning that Members have declared their interests relevant to this inquiry (mainly because they are lawyers) and these are available today and on the Committee’s website should you wish to read them. Thank you very much indeed.
Supplementary memorandum by the Countryside Alliance (Ev 28)

Prior Notification

I can see the arguments in favour of it being a requirement to notify the police of any assembly just to enable the police to prepare, allocate resources, and make an assessment of the appropriate levels of policing and the likelihood of public order issues, especially where a counter demonstration may be likely in the same vicinity. However, this should be a “where possible” provision and not a requirement, the absence of which would render an assembly illegal. I am unaware that the absence of this requirement for assemblies elsewhere in the country has proved problematic and why Parliament and its environs should be subject to a different regime. It is of course possible the police want notification to be compulsory UK-wide which must be undesirable and seems incompatible with free speech and freedom of assembly. I would refer you to the memorandum which I submitted to the Committee and the case of Bukta and Others v Hungary (2007) in which the European Court of Human Rights found that:

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

Noise

I am afraid I am not an expert on the law here. However, if noise is the primary concern surely a possible solution would in addition to the police powers to impose restrictions under the POA on place and duration, for the reasons given in that Act, but also to specify the duration of noise above a certain volume by mechanical device in a given place. It should however be noted that the existing byelaws already forbid the use of loudspeakers on Parliament Square Gardens and there is only a narrow area of pavement, for which I believe Westminster Council is responsible, where such noise could be made without permission. I would also question whether a restriction on noise etc using the existing POA provisions when imposed on a whole assembly would be disproportionate when enforced against a single person breaking that restriction when part of a bigger group. It would be a concern if this review, in relation to Parliament Square, were to result in further UK-wide restrictions. I am unaware of this being a pressing problem UK wide but can see that due to the unique status of Parliament the issue of a continuous noise problem might be a problem, as opposed to a short term disruption on a given day.

Noise—Imposing Conditions Based on Serious Disruption

In evidence to the Joint Committee the police stated that “serious disruption” sets a high threshold for the level of noise that is necessary before they have power to intervene. They seem to have answered their own point. If the disruption is not “serious” why stop it? I wonder if they had particular case law in mind? Moreover the ordinary powers of arrest and Common Law breach of the peace, not to mention causing alarm or distress and a host of other powers are more than sufficient. My understanding of Sessional Orders was that it does not give the police additional powers but is an instruction to the Metropolitan Police Commissioner in respect of Parliament. It is principally enforced by other legislation and Common Law powers of arrest. If protestors are seriously preventing access to parliament then one would suspect that they would be breaking a whole host of other laws, such as blocking the highway, breach of the peace etc. I believe there are ample laws in place which allow the police to act and that they have sufficient powers to do so. Again I do not see why Parliament and its environs represents some special case and would object to any tightening up of the law throughout the UK.

Lone Demonstrators

The only way a lone demonstrator might be a policing issue could be the continuous use of a megaphone and noise. Clearly if he was abusive, threatening etc he could be arrested under existing Statute and Common law and the police have the power to take action. It seems fundamentally wrong for the police to have powers in respect of an individual beyond those existing where his actions become unlawful. Noise may be an issue but otherwise I can see no need for the police to have additional powers. In respect of Parliament Square there are, as I have already mentioned, existing laws which make it virtually impossible to demonstrate lawfully—see my memorandum.
POWERS OF ARREST AND CONFISCATION

Unless some offence can be identified you cannot take away people’s possessions prior to arrest. Assuming the protestor was peaceful and lawful then the police should have no right to intervene. If the law is changed in respect of extreme noise then they could arrest and following arrest remove equipment. I fail to see what the police are driving at. In theory the Countryside Alliance’s loudspeaker system was illegal on 15 Sept 2004, as we did not have the written consent of the London Mayor under the byelaws. The last sentence is nonsensical. The police have all the powers necessary to “end serious disturbance pending court proceedings” against those duly arrested and charged. I suspect he is talking about noise which would only be an issue on certain narrow strips of pavement. If the law was modified to deal specifically with noise in Parliament Square the powers of arrest etc would apply in the usual way. Once again it would be a concern if such powers were extended UK wide.

PUBLIC SAFETY

Section 14 does allow a senior police officer to impose conditions on a public assembly if he reasonably believes the assembly may result in:

1. Serious public disorder.
2. Serious damage to property.
3. Serious disruption to the life of the community.
4. Or, that the purpose is to coerce by intimidation.

However, conditions may only relate to:

Place.
Duration.
Number of persons who may assemble.

Failure to comply with these provisions knowingly and within one’s control is a criminal offence. It is interesting that Parliament uses the word “serious”. I assume it was deliberate to prevent restrictions on protest where any disruption etc was not serious and to prevent the police using their powers to restrict free speech etc.

There are also Common Law powers of arrest for breach of the peace etc. I see no reason why the police cannot act under the existing law. The POA 1986 is here: http://www.opsi.gov.uk/acts/acts1986/pdf/ukpga_19860064_en.pdf

June 2008
INTRODUCTION

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

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

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

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

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

PROPOSALS SET OUT IN THE DRAFT BILL

Schedule 3, Part 1—Selection of Supreme Court Judges.

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

7. The JAC recognises that the CRA gives the Prime Minister very little discretion in relation to his role in the appointments process and on that basis does not disagree with the Government’s proposal to remove him from the process completely.
Schedule 3, Part 2—Basic provisions about judicial appointments etc.

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

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

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

10. The risk of challenge would be reduced if the key principles were not statutorily based, but any principles agreed would nevertheless need to be very clearly articulated if they are to be meaningful. However, in that regard, the Committee may be interested that the JAC publishes its principles in its Annual Report:
   - Fairness—We are objective in promoting equality of opportunity and we treat people with respect.
   - Professionalism—We are committed to achieving excellence by working in accordance with the highest possible standards.
   - Clarity and openness—We communicate in a clear and direct way.
   - Learning—We strive for continuous improvement and welcome and encourage feedback.
   - Sensitivity—We are considerate and responsive in dealing with people.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Schedule 3, Part 6—Medical Assessments.

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

29. The JAC does not consider that medical checks should be a consideration in the selection of potential candidates—they are an appointment consideration. We therefore agree with the Government that it is more appropriate for the Lord Chancellor (as the appointing authority) to carry out these checks.
Schedule 3, Part 7—Powers of Lord Chancellor in relation to information.

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

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

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

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

Schedule 3, Part 8—Deployment authorisations, nominations etc

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

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

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

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

Proposals Set Out in the White Paper

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

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

39. Our response of January 2008 to the Government’s consultation paper on judicial appointments (CM 7210) highlighted the need for the JAC to engage as soon as it can with the Court Service and the Tribunals Service, to understand their anticipated requirements for appointments over the coming year. And we mentioned that concerns had been expressed that the drafting of the CRA, under which the receipt of a vacancy notice triggers action by the JAC, might inhibit these necessary early discussions.

40. As we said at the time, these concerns have been allayed to a large extent. In consultation with key interested parties, broad agreement has been reached that all parties should ensure that, at the start of each financial year, the JAC is provided with full and accurate documentation on all the vacancies for which appointments will be sought over the coming year.
41. Despite the unpredictable nature of some vacancies the commitment to work together to ensure that the annual programme is itself settled by September (except for unforeseen vacancies) and the essential documentation for the programme has been received before April each year will provide important efficiency dividends, allowing easier scheduling of exercises and more effective use of the staff and other resources available. In view of these changes, the JAC does not consider any legislative change is necessary.

Paragraphs 123 to 130—Providing additional accountability mechanisms.

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

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

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

45. In relation to the power to set targets for the JAC, we believe this proposal also has the potential to compromise the JAC’s independence and the quality of selections made. For example, externally imposed targets create an operational interface between the Lord Chancellor and the JAC and it is not entirely clear how this would sit with the JAC’s duty to select candidates solely on merit [section 63(2) CRA], and the extent to which it might impact on the JAC’s independence from the Executive.

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

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

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

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

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

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

52. The JAC cannot support these proposals.

Paragraph 131—Delegation of the Lord Chancellor’s and Lord Chief Justice’s functions

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

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

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

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

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

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

Paragraphs 132 to 133—A role for Parliament

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

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

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

Paragraph 134—A JAC panel representing potential applicants

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

Paragraph 135 to 136—Size and composition of the JAC

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

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

63. The JAC does not support any proposal for review.
Paragraph 137—Statutory salary protection for certain tribunal judges

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

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

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

Paragraph 139—Reappointment of JAC Commissioners

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

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

Paragraph 140—Disclosure of confidential information to the police

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

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

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

Additional Proposals from the JAC Requiring Legislative Change

Repeal of section 65 of the CRA—Lord Chancellor power to issue guidance to the JAC

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

To guarantee appropriate resourcing of the JAC

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

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

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

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

Repeal of section 94 of the CRA

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

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

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

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

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

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

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

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

June 2008

Examination of Witnesses

Witnesses: Baroness Prashar, CBE, a Member of the House of Lords, Chairman, Judicial Appointments Commission, Professor Dame Hazel Genn, DBE, QC, Judicial Appointment Commissioner and Professor of Socio-Legal Studies, University College London, and Mr Jonathan Sumption, OBE, QC, Judicial Appointments Commissioner, gave evidence.

Q279 Chairman: Welcome. May we thank you very much indeed for coming to talk to our Committee. You know of course that the Committee has a grand title but in fact we are looking at a series of different issues of which one is the suggestions made in the draft Bill for looking again at the judicial appointments process. As experts in that area, we are grateful to you for giving us your advice. The most obvious question I suppose is what has been put to us by a number of witnesses already. That is: is this the time for looking again to significantly changing the judicial appointments process, just three years after the 2005 Act?

Baroness Prashar: Thank you very much indeed. Can I first of all say thank you for giving us this opportunity. We are very pleased to be able to help you with your inquiries. In response to your question as to whether it is too early for legislative change, as you already said yourselves, the Act is only three years old and the Judicial Appointments Commission has been operational for only two years. From our point of view, there is not sufficient evidence to support any significant changes but I think we do need to focus on improving some of the current arrangements. In that sense I think we would not be in favour of major changes but there are some
changes that we would like to see. The changes that we would like to see were very clearly articulated in our response that we made to the consultation paper. They are mainly on the administrative side but there are also a few on the legislative side. One that I think we would most like to see relates to the question of non-statutory eligibility criteria which are currently the responsibility of the Lord Chancellor. We have the responsibility for widening the pool of eligible applicants and so we think the Judicial Appointments Commission should have that responsibility for setting non-statutory criteria and should discharge it in consultation with the Lord Chancellor and the Lord Chief Justice.

Chairman: Would anyone else like to comment on the desirability or need for legislation at this time? None of the other witnesses? Fine.

Q280 Lord Maclean of Rogart: Are you conscious already of there being too small a pool to provide the excellence required?

Baroness Prashar: When you say “a small pool of the excellence required”, that is not our experience in terms of the pool from which we draw candidates. The pool is small when it comes to widening the pool in relation to under-represented groups, if that is what you are driving at.

Q281 Lord Maclean of Rogart: No. It was an open question as to whether you were constrained by any of the existing rules from making the choices that you would wish to make.

Baroness Prashar: I do not think we are constrained by anything which is currently in the legislation to make the choices that we wish to make. As I said, when it comes to widening the pool of candidates, one of the restrictions we do feel is that of the non-statutory eligibility criteria.

Professor Dame Hazel Genn: We are constrained to some extent by the demographics of the legal profession. As you may have heard from others, the representation of black and minority ethnic candidates within the legal profession is a relatively small proportion and we can only fish from the pool that we have. We always look for the most talented candidates. If you ask are there sufficiently talented people of quality to appoint to our posts, the answer is yes. Overall, we have large numbers of people applying and we have very high quality candidates applying to us, so there is not a problem there.

Q282 Lord Armstrong of Ilminster: I think you said that most of the changes that you would like to see were administrative changes and that there were few legislative changes that you were looking at. Could you be more specific about the legislative changes which you would like to see?

Baroness Prashar: The one that we have suggested is repealing section 94 of the Act because we were asked in the past to create a list of candidates under that section. The way that works is that you create a reserve list and people are appointed as and when vacancies arise. Evidence shows that that was a great disincentive for people to apply because you can languish on a reserve list for about a year and not be appointed. We would like to see more appointments made under section 87, which means that if you are selected you will be appointed. We would like to see section 94 repealed. We do not need legislation for that. It could fall into disuse but if you are looking at legislation that is one thing which can be changed. Another thing we have recommended relates to authorisations under section 9(1) of the Supreme Court Act of 1981. Currently we have to concur with the authorisations. What we would like to do is to be able to agree a process with the judiciary which can then be applied. Those are some of the legislative changes that we would like to see.

Q283 Chairman: It may be a matter of detail but section 20 of the draft Bill refers to salary protection for members of tribunals, which presumably would require legislative intervention. You did not mention it. Is that just because you do not agree that there should be salary protection for members of tribunals or is it because it is just a small issue that you would agree should be dealt with?

Mr Sumption: Salary protection for members of tribunals is not a matter with which the Commission is concerned. The terms and conditions of service are determined by the sponsoring department and not by us.

Q284 Chairman: What about the statutory changes made by the draft Bill? Should they be dropped? Do you have a view about the other changes that are set out? You have said what you think is necessary. Are you by implication suggesting that all else is unnecessary?

Baroness Prashar: No. One of the things that we would be concerned about would be the question of giving us the responsibility for appointments below High Court because we think that the constitutional settlement as agreed in the Act is fine. We honestly cannot see why there is a distinction between High Court and above and below High Court because it seems to us that at one level they are wanting to make us an appointing authority and, on the other hand, there is the question of wanting to impose targets on 1

1 Note added by witness: recommendations made by the Lord Chief Justice

2 Note added by witness: to those recommended by the Lord Chief Justice

4 June 2008 Baroness Prashar, CBE, Professor Dame Hazel Genn, DBE, QC and Mr Jonathan Sumption, OBE, QC
us. We think that is an inappropriate way of dealing with what we call an accountability gap. We would not be in favour of creating that division and consequently imposing targets on us.

Professor Dame Hazel Genn: We said in our response to the consultation paper that we did not see an argument for the Lord Chancellor not approving appointments below the High Court level. Our view is that if there is a constitutional argument for the executive being involved in these appointments then that is an argument that applies all the way down the judicial hierarchy. We believe that making a distinction at any level in that hierarchy would create a perception of a division within what should be a unified judiciary. That would be an unhelpful division and could be the sort of thing that might reinforce the sense that there is somehow a glass ceiling somewhere in the judiciary, that posts below the High Court do not count and that those above certainly do and those are the only ones that the Lord Chancellor is interested in. We do not accept the argument for making a distinction and we do not accept the arguments about why that is a reasonable distinction to make. From our point of view, tribunal appointments, appointments at circuit level, at district judge level, are every bit as important as the appointments higher up and they have a huge impact on the public, so we are very much opposed to that.

Q285 Chairman: Baroness Prashar, you pointed out some areas that you thought would be usefully dealt with. You commented that certain aspects should not be pursued but are you suggesting that really all else in the draft Bill is unimportant? It would be better that they be dropped and you think it is damaging to pursue some of the other changes that are set out?

Baroness Prashar: The suggested change dealing with medical checks, for example, is something that we would like to see because we think that should be the responsibility of the appointing authority and that is the Ministry of Justice. Whether that requires legislation I am not sure. If we do not agree in terms of making us a hybrid situation where we are a part appointing and part selecting body, of course that falls away. We are not very happy about having targets imposed upon us and I think that falls away. The other area is the proposal to create a statutory panel. Again we think this is unnecessary because the way we have been working to date give us flexibility. We have engaged very widely with a whole range of organisations that we have to work with. We have established a number of working groups like the Judicial Appointments Advisory Committee which my colleague, Professor Genn, chairs. We also have a Judicial Diversity Forum and a Research Sub-Group. We have the flexibility to create groups as and when we need them. If you have a statutory panel, it will be costly. Who will be members of it? I also think that takes away flexibility. I question whether you want to spend your parliamentary time in creating a statutory panel when we already have flexibility and work very effectively with a whole range of organisations.

Professor Dame Hazel Genn: I feel very strongly that the way we have been working with our advisory group and our research advisory group has created a fantastic partnership. It is the kind of working relationship that you would not get from a statutory panel. Our advisory group which has representatives from the Bar Council, the Law Society, the Institute of Legal Executives and the Council of Circuit Judges, has been working together with us as we go along, looking at the challenges we face for example, in developing good quality qualifying tests, which has an important outcome in encouraging diversity. We have drawn them into our processes. We could not possibly do that with a statutory panel. I do not think it would have the same effect for us; nor would it be as useful for the groups that you would have to have represented on such a panel. From my own experience of working with that group, I just think the way we are working now is much better. I was asked at the beginning about whether or not it is too early for change and did not speak. Certainly my own view is that there are a number of administrative changes that would make our life much easier. There are things that could be done that could smooth our processes but in terms of many of the things being proposed in this legislation my feeling is it is far too early to make a judgment about a new organisation with very important challenges in front of it, that somehow or other it needs to be changed before it has had an opportunity to really get stuck in.

Baroness Prashar: Although we are called the Judicial Appointments Commission, we are technically a Judicial Selection Commission. There are three parties involved. There is the preparation to be done before we get vacancy notices from the Tribunal Service and the Court Service. We do the selection process in the middle and then, we make recommendations. It is those administrative changes and how well each segment of that process currently works that we need to concentrate on rather than looking at legislative changes.

Q286 Lord Armstrong of Ilminster: You would like to see section 94 go. You would therefore accept that it should be repealed in legislation but if it is not you will probably just never use it. It will just fall into disuse?
Baroness Prashar: That is what I said, yes. In fact, we are currently running two selection exercises, one for the High Court and one for the circuit bench, both under section 87.

Professor Dame Hazel Genn: Everybody accepts that the section 94 procedure is not a good thing and I think that people are voluntarily not using it.

Chairman: I failed to say at the beginning that I should ask you to note that Members have declared interests relevant to this inquiry and they are available today and on the Committee’s website.

(The Committee suspended from 4.32pm to 4.43pm for a division in the House of Lords)

Q287 Lord Hart of Chilton: You have answered a number of the questions I am going to put to you but they are directed towards the proposed changes which really stem from the desire on the part of the government to alter the accountability regime. The 2005 Act sought to balance carefully the judicial independence and the democratic accountability so these questions are directed to that. As I have understood it, you say that the Lord Chancellor’s role should not be changed in relation to his obligations. You have not mentioned the Prime Minister. Do you have any views on whether he should be dropped from the regime?

Baroness Prashar: As you are probably aware, the role of the Prime Minister is really presentational so I think that can be dropped.

Q288 Lord Hart of Chilton: It is neither here nor there.

Baroness Prashar: Exactly.

Q289 Lord Hart of Chilton: The drift of what you were saying I think was to set your minds against the Lord Chancellor dropping powers but getting new powers to set targets and issue directions. I got the feeling that you were against that.

Baroness Prashar: Yes.

Mr Sumption: I think that a lot depends on what the targets are concerned with. If the proposal would allow the Lord Chancellor to give directions or set targets which determined how we selected candidates or how we selected people for appointment, or what sort of people we should be selecting, we would regard that as raising really very serious issues of principle about the Commission’s independence from the executive, which was the whole purpose of its creation. Another possibility is that it is concerned with purely operational matters. In relation to that, we have concerns about the kind of guidance and directions that might be given which are altogether more pragmatic. It seems to us first of all that the Lord Chancellor is not necessarily in a very good position to determine what is the most efficient way in which the body with which he is only concerned at arm’s length operates. We also have misgivings that targets are liable to make us less efficient. It is the experience of quite a lot of areas where targets exist that their effect is normally to concentrate resources on the area covered by the targets with adverse effects on the overall efficiency of the organisation. We are concerned that this would simply get in the way of our using resources in the most efficient possible way.

Q290 Lord Hart of Chilton: I think it would also follow from what you have said that you were against there being any splitting of the responsibility of the Lord Chancellor between High Court appointments and appointments below that. I think I am right in thinking that you do not approve of that proposal?

Baroness Prashar: You are absolutely right. We are opposed to that.

Q291 Lord Hart of Chilton: I think it would also follow from what you said that you did not think there really should be any greater scrutiny of the appointments process by Parliament or by the Judicial Appointments Conduct Ombudsman. Things should be allowed to remain as they are for the time being to see how it settles down and evolves. Baroness Prashar: We are not opposed to scrutiny by Parliament. Currently, as you know, we are accountable to Parliament through the Lord Chancellor. We submit an annual report each year and, of course, we can and do appear before select committees. I think that is a proper level of scrutiny. As regards the Ombudsman, I think we would require no change on that because the Ombudsman does investigate complaints and can make recommendations to us. That is also appropriate.

Q292 Lord Armstrong of Ilminster: I think the question which I had in mind to ask has really been answered. You think that the Lord Chancellor’s approval should not be confined to the higher levels of the judiciary but should cover the whole range. Perhaps you would confirm that?

Baroness Prashar: That is right.

Q293 Lord Armstrong of Ilminster: It is proposed that the Prime Minister should be taken out of the chain for appointments of High Court judges and we have heard no counter view. It has been my personal experience that it has not been a mere passing on. There have been occasions when a Prime Minister has quired a recommendation which came from the

4 Note from witness: We do not understand how, as the Minister responsible for the Justice System, under Part 1 of the Courts Act 2003, the Lord Chancellor could discharge that duty and be accountable to Parliament for if it was no longer involved in the appointments process.
Lord Chancellor. I cannot remember a case in which he has overridden it but he has required reconsideration. Does it remain your view that it would be sensible to leave the Prime Minister out of the process entirely?

Baroness Prashar: Yes, because it is presentational. What is different now is that you have an independent organisation—the JAC—which goes through a pretty rigorous process by which selections are made. If the Lord Chancellor is subsequently making the appointment, that should be sufficient.

Q294 Lord Maclennan of Rogart: In answer to an earlier question, I think you gave a clear indication that you felt that diversity was perhaps an issue but not one that should be tackled by statute or by other external intervention. Do you have any views as to how the issue of diversity ought to be tackled?

Baroness Prashar: Yes indeed. Let me just first of all give you the number of things that we would like to see changed vis a vis legislation to help us with that duty. The first one, which we welcome—and it is in the Bill—is the extension of the duty to encourage diversity to the Lord Chancellor and the Lord Chief Justice. At the moment we are the only party who have that statutory duty. This would mean all three parties involved in the appointment process having that responsibility. Secondly, the question of non-statutory eligibility criteria. Currently, the Lord Chancellor has that responsibility and because of our duty to widen the pool we have to question any such criteria set. We think that we are better placed to take that responsibility. That is one thing we would like to see. I think I have already mentioned section 94 and section 9(1). When it comes to widening the pool, it has to be recognised that this is not something that we can do in isolation. We work in partnership with the Bar Council, the Law Society and others because we are very much dependent on the availability of the pool out there. We are doing that very constructively. The way we are doing it is by developing the idea of what the eligible pool consists of and comparing how that matches up with the selections that we make. Also, we have begun to identify other factors. I think that using a blunt instrument like targets imposed externally would not be the way to do it. This issue is far more complex and requires strategies at different levels, all of which we have put into place—i.e., working with others, establishing the diversity forum, undertaking research on why people do not apply. There is a range of things that we are doing to tackle the question of diversity.

Q295 Lord Maclennan of Rogart: The statutory duty to select on merit was much debated in the 2005 Bill. I think you have made it clear that you are not suggesting that that be interfered with?

Baroness Prashar: We are not suggesting that at all. Contrary to popular belief, I would also underline that we believe diversity and merit are not incompatible. We want to find merit wherever it can be found. We want to widen the pool from whence we draw merit.

Q296 Lord Morgan: Bearing on what you have said, the figures seem to be rather worse of late. In relation to ethnic diversity, the recent evidence is going the other way but is this just a kind of blip or is this a source for more profound concern?

Baroness Prashar: It is very difficult to draw a comparison between the figures that we published at the end of April and the figures of the old DCA. We are not comparing like with like because what is the range of selection exercise on which the figures are based? Our figures show that we are beginning to make some encouraging improvement, particularly when it comes to fee paid appointments, where we are appointing more women and minorities in relation to the eligible pool. That is not to say that we are complacent but I think it is for that reason. We have written to the Lord Chancellor to look at whether fee paid experience for salaried posts should be deemed absolutely essential or desirable and to look at part time working. That is why some of the issues in the non-statutory eligibility criteria need to be looked at. There are a number of things that we are doing, as we have said, but from our point of view the figures are beginning to show some encouraging signs. There are other factors which we need to look at. When it comes to fee paid experience, that does have an impact on for example solicitors because the culture in law firms is that they do not normally take time off to do part time, fee paid work. That acts as a

1 Note by the witness: We are somewhat surprised, however, that the duty is also to be extended to Selection Panels, who actually have no role in the encouragement of applications.

2 Note from the witness: or issuing directions

3 Note by the witness: that we are encouraged.
Baroness Prashar, CBE, Professor Dame Hazel Genn, DBE, QC
and Mr Jonathan Sumption, OBE, QC

disincentive. It is for that reason we say that fee paid work should not be essential but desirable. It also means that the culture in the law firms has to change as well. In other words, they have to see it as a kind of credit to the firm if somebody is applying to do fee paid work. It is far more complex and it requires a pretty sophisticated strategy. That is precisely where we are working.

Q297 Lord Morgan: This is happening in other professions, is it not? I am a university teacher.
Baroness Prashar: Exactly.
Professor Dame Hazel Genn: In terms of encouraging signs, it underlines the point that one has to give an organisation like ours time to make progress on these various challenges. We are just in the final stages of a large exercise to appoint about 70 recorders. For the first time, we have used a qualifying test as the first stage for short listing. The reason that we moved to a qualifying test is that we believe it is a more transparent, fairer way of short listing people, rather than short-lists on the basis of self-assessment and references. Of course, the use of references has been criticised at that early stage. The initial signs from that are very encouraging in terms of diversity outcome. We have found that women have progressed in proportion to their applications; solicitors have progressed in proportion to their applications; and black and minority candidates have progressed roughly in proportion to their applications on the basis of an anonymously marked qualifying test. We have found that that test is quite a good predictor of outcome on the selection day so that the people who score very well on the test are very likely to score well on the selection day. That is a sign, in terms of diversity outcome, that we are making progress and we are going to continue using those kinds of new procedures.

Q298 Chairman: You mentioned the fact that solicitors quite often were not prepared to do the part time apprenticeships. Is that not something to do with the fact that the rates paid for part time legal work are too small? The judicial fees are just too small?
Baroness Prashar: My information on that and the discussions that I have had with managing partners in large firms who have done a lot of work on this is that it is not so much the fee paid. It is the fact that if you are working for a firm it is seen as a sign of disloyalty if you apply to be a judge; and if the amount of money you are earning as a solicitor is not commensurate to what you might earn as a judge. It is more the culture and recognition that there is a whole range of things that they can do.

Professor Dame Hazel Genn: Can I confirm that. I recently had a meeting with some women partners in one of the magic circle solicitors’ firms and was talking to them precisely about this because, of course, they retire at a relatively early age. They are looking for other things to do. For them, the idea of taking up a part-time judicial appointment would be impossible because they are required to give 110 per cent time to their job. Secondly, they said it is discouraged at that firm. One woman I spoke to said that she had taken a post as a recorder. She said in the end that she did so simply to be bloody-minded and to be a role model. She also said that she paid a huge price for it both financially and in work terms, in terms of the amount that she had to do to make up the time. It seems to me that there are real issues there for the professions about getting people ready to make progression to judicial appointment. It is not just a job for us; it is a job for the professions as well.

Q299 Baroness Gibson of Market Rasen: You have given us your views about the range of new powers of the Lord Chancellor but there is just one I would like to probe a bit further and that is the proposal to remove judicial posts from schedule 14.
Mr Sumption: We have quite serious concerns about this. As we understand it, the origin of this proposal was to make it easier to make appointments which were in reality redeployments within the existing group of judicial office holders at a particular level. That is an objective with which we have no problem. There is no reason why, if you are redeploying somebody at the same level, there should necessarily be a new selection process. The problem is that the form of the Bill would entitle the Lord Chancellor to remove any schedule 14 office and basically resume the appointing power himself in any circumstances whatever. It appears to us that this is completely inconsistent with the whole rationale for creating an independent Judicial Appointments Commission in the first place. We believe that the redeployment problem can be tackled by a much less extreme form of legislation than that.

Q300 Martin Linton: I have some questions about the key principles. Are they the right ones? Should they be statutory? Should they be excluded from applying to advice under section 98?
Mr Sumption: The first question about the key principles is whether they are necessary or whether they serve any useful purpose. We have an obligation to select on merit and in addition to that we have a wide range of, in some cases, quite exacting obligations imposed on us by the general principles of public law. The problem with these principles is that they are extremely vague. Some of them appear to echo existing principles on public law. Some of
them—e.g. the requirement of proportionality—do not appear to have any obvious bearing on what we do. The difficulty about very vague principles of this sort is that they engender disagreements about what exactly they do mean and in my experience they are greater generators of, in some cases, highly unmeritorious applications for judicial review. There is no reason why the Commission should not be judicially reviewed in appropriate cases but I think it should be clear what it is that they are required to do. If you have extremely vague requirements such as those which are included, you will have people having a go in all sorts of areas which would I think occasion considerable surprise. If I can just give one example; flexibility. Flexibility is, of course, as a matter of business management, a sensible way of making efficient use of your resources. On the other hand, will we see people complaining that, for example, we have not been prepared to accept late applications for appointments? I cite that as simply one example of an area where this has the propensity to make us a great deal less efficient without achieving any compensating advantage and also to generate disputes. As regards your point about section 98 assistance, it seems to us that if there are going to be principles the difficulty about applying them to section 98 assistance is that it can be assistance in almost any area. Because we do not know what kind of assistance the Lord Chancellor might ask us for, it is very difficult to know whether the qualities that you have identified are going to be germane to the assistance in question. I can see the reason why, if you are going to have these qualities, you should not apply them to that sort of thing, but we think that the qualities are, on the whole, unhelpful.

Baroness Prashar: We are just a little segment of the whole process. Those principles not being applied to all the other partners in the process, just to the JAC, would be inapposite as well.

Q301 Chairman: Thank you very much. It has been extremely helpful. We were going to ask you something more about the JAC panel but you have answered those questions, save to ask if you think there should be any changes to the number, composition or process of reappointing commissioners. You are very welcome to comment now but it may be easier for you to respond in writing.

Baroness Prashar: We are very much opposed to any changes in the composition of the Commission because that has been the most effective composition and we think the balance is right. The expertise is right. The Commission operates as a corporate body and I think it has been very effective. There is no evidence that it has been in any way ineffective on that account. We would not be in favour of any changes to the composition. May I thank you very much indeed? We will be submitting a written memorandum to you. If there is any further help you would like, perhaps you can let us know and we would be very happy to provide you with any more information.

Chairman: That is very kind of you. Thank you very much for attending.

9 Note by the witness: We do, however, support the proposed changes to the process for re-appointing non-judicial Commissioners. The proposed arrangements would be both less bureaucratic and less resource intensive and so must be welcomed.

Memorandum by the Mayor of London (Ev 14)

INTRODUCTION

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

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

3. Excluding the permanent protests in Parliament Square, there have been five public gatherings on Parliament Square Garden with approval from the GLA since the introduction of the Serious Organised Crime and Police Act (SOCPA) from 1 August 2005 until 31 May 2008. The MPS have data on all SOCPA authorised rallies that took place in the vicinity of Parliament.
4. The Mayor fully supports proposals which enhance democracy in London and which serve the interests of all those who live, work or visit the capital.

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

CONDITIONS AND POWERS

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

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

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

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

CONSIDERATIONS

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

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

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

MODELS FOR MANAGING DEMONSTRATIONS

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

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

15. Prior to SOCPA, the management and administration of protests on Parliament Square Garden, under the Public Order Act 1986 and GLA byelaws provided a largely effective and simple route for applications to protest. This could be a way forward in managing protest around Parliament whereby the GLA considers application for use and would take advice from the MPS on safety and public order issues.
16. If parts of SOCPA were repealed then the pre SOCPA arrangements of requests for use of Parliament Square Garden would be via the applications process to the GLA. The MPS’s response around the suggested revisions to the Public Order Act is supported. The GLA would work with WCC and the Police to manage protests according to respective responsibilities.

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

Static/Permanent Protests

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

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

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

Loudspeakers

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

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

May 2008

Examination of Witnesses

Witnesses: Mr Chris Allison, MBE, Deputy Assistant Commissioner, Metropolitan Police, Mr Dean Ingledew, Director of Community Protection, Westminster City Council, and Mr Kit Malthouse, Deputy Mayor for Policing, Greater London Authority, gave evidence.

Q302 Chairman: May I welcome you to the Committee and thank you very much indeed for coming along to give us the benefit of your advice on what is one of the very interesting parts of our consideration, namely concerning demonstrations around Parliament. You may or may not be aware that we had evidence from other groups yesterday, those who had an interest in carrying out demonstrations, and they more or less suggested that it would be a jolly good idea to repeal SOCPA but absolutely nothing else was required. That may be a précis of what they said, but very little was required as the law already provided most of what you guys need. If I could start from that premise, what have been the main problems of sections 132 to 138 of SOCPA and do you think that the provision should
be repealed? I appreciate of course you have put in a Metropolitan Police proposition which says that there are changes but you do not suggest repeals. Chris Allison, perhaps you would like to start off by answering that?

**Mr Allison:** Hopefully all Members of the Committee have had a copy of our response. We made it quite plain in there that we thought it was time to look at this and potentially repeal sections 132 through to 138. At the same time we felt it was necessary to harmonise parts of the Public Order Act and add further provisions to the Public Order Act, given the fact that the Public Order Act was passed in 1986 and significant things have changed in relation to our society in that time, specifically the issue of security. There are some things about the Public Order Act in relation to processions and I suppose we need the distinction. SOCPA only ever applied to static demonstrations. It never applied to processions or marches. Therefore we have two different regimes that operate. Our take as the Metropolitan Police is that, for the future, what we should do is have in effect harmonised conditions applied to both marches and demonstrations, increase the times on which we could put conditions in to include security and include safety of those members of the public who are taking part so that we can effectively manage the number of protests that take place in this particular area. The first main challenge that we have had in relation to SOCPA is the one of public perception. There has been a perception put out there that SOCPA has in some way prevented protest. It has not prevented protest because we have no power to prevent protest whatsoever. We have to give authority to anybody who applies. All we can do in certain circumstances is put conditions on the people but it does not stop them protesting. The one concern that has come from those who wish to protest is around the time. Yes, there is a time limit. It does say six days’ notice in SOCPA, or where that is not reasonably practicable 24 hours. Again, in our response, we have suggested that in any future provision or change of the Public Order Act you move that to follow the conditions around processions. In processions, it is six days’ notice or as soon as is reasonably practicable, recognising that sometimes things do happen almost instantaneously, but you should still inform us. Therefore, we have suggested the same in relation to marches. I suppose the main challenge is public perception which resulted in a large number of demonstrations which were not about other parliamentary business or other issues of an international nature or a national nature but were just protests about SOCPA itself. As a result of that, we ended up with a number of people who sought to use the bureaucracy and the administration that comes on the back of SOCPA to try and undermine it. There was a number of people who then were putting multiple applications in. That has been the main challenge, though in the current year, 2008, a lot of that has calmed down so some of the difficulties and challenges we were having have gone away. We are still of the mind that a move to a more harmonised process through the Public Order Act would probably be better.

**Q303 Chairman:** Before I ask the others to answer that same first question, can I ask a supplementary? It has been suggested that the conditions that you apply can significantly change the nature of the demonstration. Is there any evidence that you have so applied conditions as to justify that concern?

**Mr Allison:** I would not say so. The concern is have we tried to stop people having protests. No, we have not. We have only applied conditions. I have the numbers of demonstrations we have had. Out of the maybe 2,000 demonstrations to which this has applied, it is fewer than 20 where we will have applied any conditions. The most visible one—we have to be honest about it—is the condition that was applied to Mr Haw. This is not about Mr Haw. This is the wider issue, but we did apply a condition on the grounds of security to Mr Haw, that his protest should only be a certain size on the grounds of security because we sincerely felt that, if it continued at the size that it was, not that he was a security threat himself but somebody could use him by way of some form of Trojan horse. They could use the cover of his demonstration to put something down that nobody would realise and then subsequently we could face some form of terrorist attack. I do not recall any time where we have put a condition on which has physically changed the nature of a protest. We have just tried to manage it to ensure that parliamentary process can go on and we can minimise the disruption to the life of the community.

**Q304 Emily Thornberry:** There was recently a protest organised by Abortion Rights which took place outside of Parliament. Did you apply any conditions to that or do they apply the conditions themselves?

**Mr Allison:** Forgive me. I do not know the detail on that. I can come back to you.

**Q305 Emily Thornberry:** For example in particular, it was not possible for Members of Parliament to go out and speak to the protestors because there was a very large group and there was a group of anti-choice protestors next door. I do not think there were any mics or any systems whereby a speech could be made or people could come out and speak to the protestors. I just wondered if that had been a self-imposed condition or whether the police had imposed it. That is the last demonstration that I know of and I have had some involvement and I just wondered.

**Mr Allison:** I regret I cannot tell you whether there were any conditions on that one but we can come back to the Committee on that. It is generally very, very rare that we have had to put conditions onto...
demonstrations since August 2005. We have to justify why we have done it. They have to be proportionate, necessary and in line with the Act and the Human Rights Act. The key bit for us as the police service is that, in anything that we are doing for the future in terms of the law, we really do see it as a matter for Parliament to make the decisions about what should and should not take place, as we tried to say in our report. If there are certain lines in the sand, it is a matter for Parliament to clearly define where they believe demonstrations should take place. That is for the benefit of everybody, of protestors, parliamentarians and those who go about business in this House, the wider general public and the police so that we are all singing off the same song sheet. We all know what the rules are. Then there is less chance of a conflict and less chance of confusion.

**Q306 Chairman:** Can I ask the other witnesses if they have anything to add to those comments about SOCPA generally and the need for retaining any part of it?

*Mr Ingledew:* From the City Council perspective, I assume we will be dealing with the issue of noise separately, so I will hold my water to a degree on that but I would point out that a great deal of officer time is spent administering the requests for noise with very little sanction in the way of controlling it when there is a breach in the order or a breach in the conditions that have been imposed. Our view would be that there is no constructive purpose served by us managing that kind of request.

**Q307 Chairman:** Congratulations on your appointment. I know the Mayor’s office has made specific comments about noise so we will come back to that later but generally, on the need for SOCPA, do you have a particular view?

*Mr Malthouse:* Not any different. With my Deputy Mayor for Policing hat on, we support Chris completely around this notion that a myth has arisen that the police are somehow arbitrating on whether people can democratically demonstrate or not. We would fully support the removal of that particular provision and, if you like, a better public understanding of what can and cannot take place in Parliament Square in terms of definite geographical areas defined by a democratic body, about where protests should take place, because then the police know exactly where the lines are. So do the public and then that is policeable, rather than there being any notion of discretion by the police over whether the protest should take place or where it should take place. Our problems that we have experienced have been largely environmental to do with the static demonstrations, around the irritant caused by the permanent resident demonstration. I am sure we will come on to that later.

**Q308 Chairman:** Would any of you be concerned if there was a repeal of those particular provisions without any form of replacement at all, simply relying on the existing law elsewhere?

*Mr Malthouse:* Yes, most definitely.

*Mr Allison:* Yes, on a number of grounds. First, at the moment, we can impose conditions on the grounds of security if it is felt necessary. If the current Public Order Act was just repealed and we returned to section 14 of the Public Order Act and managed static demonstrations, or even processions which came through and then became static demonstrations, we would have no power to put anything on in relation to security. We also would have no power to put any condition on in relation to public safety, which we have found quite valuable on the odd occasion when we have had to do it. Also, I have slight concerns that at the moment for a moving procession people have to give us notice and that is accepted within the Public Order Act. If you just return to section 14 alone, there would be no requirement for any notification. I am not asking for authorisation. I understand the concerns that creates. This is the most heavily demonstrated bit of real estate in the country. Quite understandably, people want to come here because it is the heart of our democracy. They want to come here and make their point but, as a result of that, we as a service have to manage that for the benefit of the protestors, parliamentarians and the wider public. We do not have a standing army of officers just sitting there, waiting to come out to be able to deal with this. If it was repealed, we would look for some level of replacement so that we could ensure that we could impose the necessary, appropriate and proportionate conditions and have a notification process so that we could make sure we could manage it appropriately.

**Q309 Chairman:** It was put yesterday by the Countryside Alliance that before the 2005 Act there was adequate provision, but it was a question of a lack of will or perhaps resources to ensure the public safety, noise, security and access to Parliament. Presumably you disagree with that?

*Mr Allison:* I disagree with that. There is no provision in there whatsoever in relation to security. We have to accept that things have moved on. The other thing that we need to consider is the issue of sessional orders. Although we are focusing on SOCPA and the static demonstration, as much a concern to Members of the various Houses here is the issue of the marches that come through here. Again, we are being increasingly challenged, quite rightly so, by those who wish to protest, who ask us on every occasion to justify why we have said no to a particular march. Whereas in the past we were able to say, “Sessional orders apply. Therefore you cannot march down there” and people accepted it, we are now being
lighting and burning flags that belong to the penned areas. Both those groups have a habit of passionately believing in their particular view, we felt in relation to SOCPA. On an occasion earlier on last kinds of conditions?

If it is not about duration or size, what are the other conditions could you impose on assemblies that you would be the practical effect of that? What kind of conditions could you impose on assemblies that you cannot now?

Mr Allison: You are right. In terms of harmonisation, on assembly we are limited to the types of condition which is duration and size. There is one other. I will look it up in a minute. On a procession, we can impose any condition that we feel is appropriate and proportionate. What we are saying is it does seem silly. Anything that is there to demonstrate, if we can prove that it is necessary, proportionate and justified, we should be able to put conditions on it.

Q311 Martin Linton: Can you just give an example? If it is not about duration or size, what are the other kinds of conditions?

Mr Allison: It may be the content, what is there. Let us think of some of the conditions that we have put in relation to SOCPA. On an occasion earlier on last year, when we had two opposition groups who wanted to demonstrate at the same time, both passionately believing in their particular view, we felt the best way to manage them was to put them into penned areas. Both those groups have a habit of lighting and burning flags that belong to the opposition group. We took the view that it was an appropriate condition, because we were penning people in the areas to keep them apart, to say that they could not burn any flags in that area on a public safety ground because if you suddenly burn something in a confined area everybody around it suddenly moves. Our view is, give us the power to put any conditions on any protest, whether it is a procession or whether it is a demonstration, provided they fit the various criteria, and again we would be seeking an extension to include security and public safety as part of that, so that we can make sure that these pass off for the benefit of everybody.

Q312 Lord Maclean of Rogart: With regard to static demonstrations, and in view of the fact that Parliament Square is being redeveloped, do you have a view as to whether or not the space should be designated within that area in which you would be managing a static demonstration? You mentioned the responsibility of Parliament in this matter but Parliament would be informed by the views of the police as to what is appropriate, and would you, if you had such a defined area for demonstrations, take the view that a different sort of legal regime might be appropriate to demonstrations in that area from that which covered the mobile demonstrations?

Mr Allison: I may bring in Kit here because obviously which covered the mobile demonstrations?

Mr Allison: I may bring in Kit here because obviously the bit in the centre is GLA property and we work together in relation to how we manage protests. It is a protest that would come to us about a demonstration in Parliament Square. We would give them authority and if necessary conditions. As I say, it is not often that we do, but if it is a large demonstration they then have to go and get authority from the Greater London Authority to be able to mount that demonstration, if it is on the green area or the paved area, on the far side. The closest area is Westminster City Council property where the current demonstrations are. If it was decided that you would define an area where protests would be allowed I would be quite happy with that. It would be a matter for the GLA. I think the challenge in all of these would be how big an area is that because our protests vary in size. We could have something which could be one or two people up to something like when the Crounside Alliance came out, as they did many years ago when they brought one of the biggest demonstrations to central London, and they said, “We want to put it all on Parliament Square”. There is a limit in terms of the numbers. Would we be saying, “You can take over the whole of that area”, because if you are saying that then you are limiting it for use for other people. It is back to the definition. I think the key bit for me, sir, about defining from Parliament is that it is about what Parliament thinks is acceptable in this particular area to allow Parliament to go about its democratic process and do
its business, and that includes access and egress. In relation to what demonstrations look like, to my mind that is not a matter for the Police Service. We are only concerned with the points of law. If there are those who are concerned about what things look like in a particular area, that should be legislated for rather than us as the Police Service making arbitrary decisions about it. I do not see that role for the police at all.

Q313 Sir George Young: The new Mayor came up with some very robust views in his evidence to us. He does not agree that Parliament Square garden should be used as a free camp site, creating an unsightly public health hazard of offence to the thousands of Londoners and visitors who use this public space every day. Presumably those views also apply to the stretch of pavement that abuts the gardens.

Mr Malthouse: The pavement does not belong to us. It belongs to Westminster Council.

Q314 Sir George Young: But the views would apply equally to the pavement.

Mr Malthouse: Yes. I think the nature of a permanent demonstration is something that we would be keen to explore. The current demonstration is residential in nature and causes a lot more problems perhaps than the over-20-year 24-hour vigil which took place outside South Africa House where there were not similar problems because it was not residential in nature.

Q315 Sir George Young: I think there is a distinction between permanent protests like Mr Haw and more conventional ones. Presumably Mr Haw would not be allowed to do what he is now doing in Trafalgar Square.

Mr Malthouse: No.

Q316 Sir George Young: And so if it was pedestrianised, following Lord Maclellan’s point, that type of protest simply would not be allowed to happen. It would be an obstruction to a public highway.

Mr Malthouse: Yes. I think we would have more power to be able to control it and put conditions on it and the nature of it. On Lord Maclellan’s point, we did look initially at the notion of having a defined space where permanent demonstrations could take place but in the end we were looking at it from the wrong end of the telescope in that if you do that (a) you encourage people to come and use it but (b) you then get competing groups which use it on a permanent basis, so effectively people are booking slots for years or however long it may be. One of the things we find attractive about the notion from the police is that you as an organisation should define what access you need, what corridors geographically specifically you need kept free to allow the full function of the building, and then it is left to us, frankly, the three of us, to sort out and streamline the management of what is left and the conditions and what-have-you about the demonstrations that take place, so rather than define a space where they can demonstrate I think it would be easier for everybody if you defined specifically where you want to be able to move freely and then leave the rest to us.

Mr Allison: If I may come back on obstruction, obviously, if there is anything that takes place on what I describe as the green area of Parliament Square that is the GLA property and there is not the offence of obstruction but there are the byelaws which say, “You cannot be on here because it is GLA property”, and that has been used in the past. In relation to the footway, that is seen as the public highway at the current time and actually Mr Haw’s demonstration has been found by the courts not to be an obstruction. Westminster City Council and the Metropolitan Police a number of years ago did take action to see if it was an obstruction and it was found by the courts not to be.

Q317 Sir George Young: That was because they used that particular stretch of pavement, whereas if it became a pedestrianised area presumably that argument would lapse.

Mr Allison: That would be a matter for the courts rather than us, and again it would depend on the definition of the new Parliament Square, what is GLA property and therefore covered by the byelaws and what is the public highway, and obviously obstruction law applies to the public highway, so it would depend on where the boundaries were drawn.

Q318 Lord Armstrong of Ilminster: Are you able, and if you are not would you like to be able, to impose conditions on the duration of static demonstrations in Parliament Square?

Mr Allison: I am not asking for that, sir. I do not think there is any justification for me to do so. The Act as it is at the moment is about security, it is about access to and from the building, it is about serious disruption to the life of the community and a range of others, and I can find no reason why, on the basis of any of those things that we want to achieve, I could ever say to somebody, “This is the time limit on your demonstration”. I cannot find any proportionate condition that would allow that to occur. I am certainly not asking for it. If Parliament or others feel that it is important that we do put time limits on, that is fine but I do not think that is a matter for the Police Service. Clearly, if there was something that would impact on security, if there was a demonstration there at a time when we had something that had security implications, then we might put conditions on to move that demonstration for that period of time, but
as of a general nature there is not anything where I can say, “Proportionate condition, you cannot be there for more than ten hours”.

Q319 Lord Armstrong of Ilminster: The submission from the Mayor of London says, “A key concern with regard to conditions of protests to be held on Parliament Square is proportionality and duration”. Perhaps Mr Malthouse could answer this question. Would the Mayor like to impose conditions on duration?

Mr Malthouse: Obviously, on the land that we control we do currently have conditions about what goes on there. I guess it is a definition of where the public highway lies and where it does not. Obviously, we have to manage this within Trafalgar Square, competing demonstrations and competing groups who wish to use the square, and the system that operates around Trafalgar Square, which I think we pointed you to in our submission, works well and is generally accepted by those groups who use it for festivals, demonstrations and similar things, and we think something along those lines in Parliament Square would be equitable and fair for everybody else.

Q320 Emily Thornberry: I want to ask you about a couple of things. I presume that it is quite common for there to be demonstrations of opposing groups at the same time, particularly if there is a piece of legislation on a particular issue, and when you were talking about being penned in I began to be able to visualise that. It seems to me that if we have New or Old Palace Yard on the one hand and then we have got Parliament Square on the other, is it not more of a common practice to be able to separate the groups completely rather than having them in pens next to each other when, for example, you may have one group wishing to pray and another group wishing to sing? My other question, and it may be a lack of imagination on my part, is that I would appreciate it if you were able to help us with some concrete examples of when there would be security implications and what sorts of conditions you need to put on particular things in order to ensure the security of Parliament.

Mr Allison: Thankfully, and I will touch wood, while we do have occasion the competing groups who will come down and both protest on different sides of an issue, it does not happen as often here as you would expect. Usually people come to protest on a particular point of view and usually we are able to keep them well apart. There are some occasions, like the protest I was talking about last year, where both protest groups said, “We want to demonstrate in the same area”. When you keep them apart, they were 40 to 50 yards apart and there was a big barrier in between the two of them to try and keep them calm and they were then in their own penned areas, but I have to say generally we have not had big issues with the competing groups ending up in disorder with each other. Where we do anticipate that we are able, through policing operations, through the use of pens, the use of barriers, to keep people far enough apart, and generally people who come to protest here protest legitimately and lawfully. That is the reality of it.

Q321 Emily Thornberry: Have you ever had a situation where you have put one in Old Palace Yard and the other group in Parliament Square, because those seem to be natural barriers because there are cars there?

Mr Allison: The only challenge for us in all of these is that you have groups who will say to us, “We want to go to this particular area”, and it does come on a first-come, first-served basis, so if the first group has applied and we have given authority and another group comes along and says, “We want to do a counter demonstration”, we will then give them authority but we will say, “You will have to go somewhere else”, and the reason for that condition, which is perfectly justified, is, “You cannot go there because somebody else is there. Come and negotiate”, and 99.9 per cent of the time negotiations work very well and we do keep the groups separate. In relation to the security, the sorts of conditions we put on individuals in relation to security are, for instance, the size of their protest. Mr Haw—and it is important to say that this is not about Mr Haw; this is about protests around Parliament—is an example of somebody we have put conditions on. At one point it was 41 metres worth of protest and our condition was, “You should reduce the size of your protest to something that is three by three by one”. The rationale behind that is that you can keep secure something that is like what you have around you when you are going into an airport queue with all your luggage around you. You can make sure that you know what is around you, what is there. Somebody cannot put something in without you knowing about it, whereas with something as long as it was somebody could put something there without us knowing about it and ten minutes later a device could go off. We have also put conditions on people who have protests in Downing Street, which is that individuals will say, “I want to go in there”. At the moment that is a public place. Again, Parliament may take the view, as we said, that that is an area where they think there should not be protests and protests in Richmond Terrace right opposite are effective to allow people their right to protest, but for those that we have allowed to go into Downing Street we have said that they will be a certain penned area and they will be searched before they go in there, so there is a range of conditions around that because of
the very nature of what Downing Street is. Those are
the sorts of conditions that we put on. As I say, of
the nearly 2,000 demonstrations that we have had, it
has been rare that we have had to do it but there have not
been occasions that we have had to do it and we will
be saying as the Police Service that we think we need
that ability to do it to ensure that we can keep not
only the general public, not only protesters, but
everybody in this building and our officers safe.

Q322 Emily Thornberry: But do you need additional
legislation to give you the power to make decisions in
relation to security, or is it not right that existing
legislation is already sufficient?
Mr Allison: It is not right. We would need a change
to the Public Order Act. The Public Order Act only
allows me to apply conditions in the event of serious
public disorder, serious damage to property or
serious disruption to the life of the community. The
Public Order Act, because it was written in 1986 when
security was not done in the same way that we are
dealing with it as of now, is about a different sort of
security.

Q323 Emily Thornberry: What about section 44 of
the Terrorism Act which gives you power to stop and
search?
Mr Allison: That gives me a power to stop and search
but it does not give me a power to put conditions on
anybody.

Q324 Lord Armstrong of Ilminster: Am I right in
thinking the Public Order Act applies only to
marches and not to static demonstrations?
Mr Allison: No, sir. It applies to static
demonstrations nationally but it has been disapplyed
in the SOCPA area. Under section 132 of SOCPA
they specifically disapplyed section 14 in this
particular area.

Q325 Lord Armstrong of Ilminster: But you would
like to see that put back if SOCPA goes?
Mr Allison: If SOCPA goes, sir, then it would
automatically come back, but what we are saying is if
it did come back we feel that we would need some
extra powers within the Public Order Act to allow us
to put conditions on people in line with what SOCPA
does, which is security and safety of people, and our
view is no, there is not existing legislation that gives
us that power.

Q326 Emily Thornberry: If I might ask one more
question just to follow this up, the examples you gave
I would have thought were exactly the sorts of
effects of circumstances in which the Public Order Act
would apply. You were saying, for example, with
regard to the area outside Parliament, possibly
someone could toss a bomb into one of the tents or
something like that, or in Downing Street, you ensure
that people are penned into a particular area and
searched beforehand, presumably again in order to
stop serious unrest and threat to life. There is a lower
level of security, is there not, which I think you were
talking about, something which is not currently
covered under the Public Order Act, and I still do not
really understand what that might be.

Mr Allison: I apologise; I am not getting it over. At
the moment I can only impose conditions for those
three things that I talked about—serious public
disorder. If I have intelligence that there is going to
be serious public disorder I can impose conditions. If
I have intelligence that there is going to be serious
criminal damage I can impose conditions or if I
believe there is going to be serious disruption to the
life of the community.

Q327 Emily Thornberry: Under the Public Order
Act?
Mr Allison: Under the Public Order Act.

Q328 Emily Thornberry: What else do you need?
Surely that is enough.
Mr Allison: If I had a view that a demonstration
might cause a security risk—

Q329 Emily Thornberry: Like what?
Mr Allison: The very nature of Mr Haw’s protest
being 41 metres long. I could not impose a condition
under disruption to the life of the community or
criminal damage to property or serious public
disorder which required him to reduce the size of
his protest.

Q330 Chairman: It is a definitional thing, is it? It is
the serious disorder point you are saying is too high
a bar. Is that what you are saying?
Mr Allison: It looks at something completely
different. Serious public disorder is very different
from somebody planting a device and the device
going off. It is on the grounds of security. If I believe
that I am going to have 10,000 left wing and right
wing protesters turning up to a particular
demonstration and meeting at one particular point
where I fear serious public disorder, then I would
impose conditions on the two marches that they went
on different routes because I can because I anticipate
serious public disorder, but at the moment under the
Public Order Act I have no power. Because I fear that
this may create a security breach I have no power to
put conditions on whatsoever because it does not sit
within the current legislative framework.

Q331 Martin Linton: Do you think there is an
inherent security risk in allowing large static
demonstrations just across the road from Carriage
Gates? We asked Baroness Mallalieu yesterday about
the Countryside Alliance demonstration in September 2004, before this Act came in, and in her report she admitted that there were “troublemakers who appeared to be inciting an otherwise peaceful crowd”. She conceded that within the demonstration there were people who wanted to storm the Carriage Gates. It would seem to me that any large demonstration could pose that risk.

Mr Allison: Most large demonstrations do not pose that risk. Why? Just because of the numbers of people that come. People come and they passionately believe in the cause but they also believe in the rule of law, but there are, sadly, those elements who will go that one step beyond and we have seen that on a number of protests.

Q332 Martin Linton: You are saying you would have to make a judgment in advance if this was the kind of demonstration which might pose a risk of trying to get into Parliament or throwing things at it or whatever, you would then limit the size of it or what?

Mr Allison: The law allows us to impose conditions beforehand if we consider one of those three conditions might occur or, as and when that demonstration is taking place, to then impose conditions to prevent one of those likely outcomes. We have used that power on a number of occasions in London. If you go back a number of years to the fuel protest in, I think, 2001, we imposed a condition on a mobile protest that was coming. We used section 12 of the Public Order Act to say, “Look: this is the defined route that you will go on”. In some of the Mayday protests in recent years, again, we have used section 12 of the Public Order Act if, as a demonstration has gone on, we have felt that it has got to the stage that we need to impose extra conditions on it to minimise what we felt was going to be severe public disorder.

Q333 Martin Linton: So could you use the Public Order Act to impose those conditions on demonstrations in Parliament Square?

Mr Allison: Yes, we could. Again, if I had a march coming through Parliament this week which we anticipated was going to end up with severe public disorder because a group of anarchists had decided they wanted to storm Parliament, we could impose conditions under the current sections 11 and 12 of the Public Order Act. In relation to static demonstrations we currently use SOCPA but if SOCPA was repealed and section 14 came back, then yes, we could use those conditions. However, what we are saying is that under section 14 we are limited in the conditions that we can impose because they can only be on the location, the numbers and the time that it is there, and we would say that we would want the wider power.

Q334 Lord Hart of Chilton: You touched on this earlier and it is going back to the time before SOCPA to the Sessional Orders. You indicated, and I have not read this, that Lord Stevens gave evidence to a committee and indicated that the Sessional Orders were really past their sell-by date. In a way I would like to know what precisely was it that made them go past their sell-by date because we understood from some of the evidence yesterday that arrests were made up to a point under the Sessional Orders and then you stopped arresting people. I do not know why that was and perhaps you could help us by explaining a little bit as to the defects in the Sessional Orders and the problem or mischief that has to be corrected.

Mr Allison: I have got a copy of the statement that was submitted by Lord Stevens to the Procedures Committee; he gave evidence on 8 July 2003 and I will quote it: “The Act is antiquated and not designed for modern-day protests and issues. The age of the provision also it means that it was not drafted to take account of the rights to peaceful assembly and freedom of expression”. The way in which the Sessional Orders works is that both Houses pass a processional order. That is served upon my Commissioner. My Commissioner then passes something called Commissioner’s Directions which declares in a particular area of London that the roads will be kept clear to allow free passage of peers to this House when it is sitting. That relies on 1839 legislation for which there are some breaches. If we then say, “You cannot walk down this particular street because you are interfering with peers going about their business”, and they choose to carry on doing it, we do now have a power of arrest if they refuse to give us any details, but it is a very minor offence with a very minor fine. It is seen as the lowest level. The advice that we were given was that since the time of that Act the Human Rights Act has come along, there has been a Public Order Act come along, there has been a declared right for people to have freedom of assembly and freedom of expression, and therefore to rely on something such as Sessional Orders was no longer tenable, given that it was so weak. The “Stop the War” protest from last October probably gives the most visible demonstration of that where people were queuing up to take us to judicial review if we were going to try and prevent them coming down here on the basis of Sessional Orders because the view is that they are no longer Human Rights Act compliant. The only way in which I could ban a march coming down here is if it was serious public disorder, serious criminal damage or serious disruption to the life of the community, and the advice I was given was that we could manage the protest in such a way that we knew it was not going to be disorderly, we knew it was not going to cause massive criminal damage and we could manage it in...
such a way that it would not cause severe disruption to the life of the community and as a result a march would come down here. There are various views within both Houses. There are those who believe that there should be no marches whatsoever in this particular area. There are those who believe that there should be all sorts of marches. There are those who believe that Sessional Orders can allow us to stop marches coming down here. In previous years we have gone to demonstrations and we have been able to say that Sessional Orders apply and most people go. “All right, that is fine. We will not go there. Where can we go?” Increasingly, and understandably, people are checking and pushing and wanting to make sure that the police are using powers lawfully and appropriately and where there is not a power for us to do something then people are challenging us and there is a recognition that now with Sessional Orders we need to move on, which is why we are back to where we would be looking to Parliament to define what it is that you need to undergo your business which defines where protests and what sorts of protests can take place, which means that we can then manage the protest working with those who wish to come and do demonstrations. I hope that has answered the question.

Q335 Lord Tyler: I have a supplementary perhaps for all three of you. The Sessional Orders obviously are primarily concerned with when either House is sitting. Do any of you feel there should be a different regime when we are in recess or at weekends, or do you, for example, take a different attitude to marches outwith the parliamentary session?

Mr Allison: Clearly, from the police side, yes. The way we have managed this over the years is that traditionally we would try and not have any marches during the time that the House was sitting within the sessional area but, as I say, we are being increasingly challenged by those who wish to protest because they are saying, “The whole reason that we are protesting is to go down and see parliamentarians at the time that they are sitting”, but what we did at weekends was allow people to do their big marches and we obviously saw many large marches come through central London at that time. My take would be that if we could find a set of rules that you as Parliament decided were appropriate and then we applied them all the time it would make it a lot easier for everybody to understand. Where we have our biggest challenges is where there is confusion. Where there is confusion about what people can and cannot do that generally leads to conflict and that leads to people feeling unhappy. If we were in a position where we could clearly articulate, “These are the rules of the game and they are the rules of the game that apply 24 hours a day 365 days a year”, and they are seen by everybody as being proportionate, I think that would be better for all of us.

Q336 Lord Tyler: Do the other witnesses concur?

Mr Malthouse: Yes. The other thing we would say is that we have tended to favour weekends for this kind of thing, not least because the Trafalgar Square/Parliament Square corridor is pretty key in terms of traffic flow and that disruption is minimised at weekends and during the summer and those kinds of times, and we would support the police here.

Mr Ingledew: As far as we are concerned the big issue is that we have residents, we have other businesses; it is not just the government estate that is here, and that actually it can add significant costs to the city if this disruption is allowed to continue without the police imposing reasonable constraint on the activity.

Q337 Baroness Gibson of Market Rasen: Can I bring us back to the thorny problem of noise and the legal framework surrounding noise? If the powers to prevent noise in the 2005 Act were repealed, especially those relating to loudspeakers, would the police have a sufficient power to prevent noise and what about the powers for putting conditions on a maximum noise level? What about the question of a blanket ban on loudspeakers? That surrounding issue seems to be a very difficult one to deal with.

Mr Allison: Yes, it is a difficult one and I will probably defer quite a bit to my colleague from the local authority because the reality is that we are not experts in relation to noise in the Police Service. The statutory body responsible for noise is the local authority. Our position in relation to this is that if SOCPA was repealed the only time that we could possibly put a condition on in relation to noise would be, and it would generally be after a protest was occurring, if the noise was such that it was causing serious disruption to the life of the community. We would be unlikely to hit any of the other conditions, and if those other conditions are security and the safety of the public even there it would only be—the reality is that the people who would be most affected would be those who work and operate in this building. Again, for us to be able to impose such a condition we would be looking for somebody to come forward and say, “We are not able to operate. It is seriously affecting us”. That is the challenge, the word “seriously”. Many demonstrators—and I have spoken to many of them over the years—use their loudhailers because they want to get their message across and they feel that if they are just shouting on the other side of the road, with all the traffic that is going past they do not get heard so they want it. Therefore, for the test and for me to be able to take action and be seen to be acting correctly in the courts it would have to be seriously disrupting the life of this community or some other community in the area and
that is probably the area that Dean will come from. In relation to setting maximum sound levels, that is not something that the Police Service would do. We have no expertise in it, we have no knowledge in it. I also think it would be very difficult to do. The maximum sound level at six o’clock in the morning is going to be very different from the maximum sound level at 11 o’clock and at nine o’clock at night, and those would change on a daily basis with no notice. If suddenly there is a big accident out there you will have masses of traffic and therefore I think it would be very difficult to have a framework where you declared a maximum level of sound because there would be those who are protesting, saying, “Hang on. At this particular time when I want my message to get across I want people in there to hear what I am saying. I cannot get that message over”.  

Mr Ingledew: I congratulate the police on their thorough and complete understanding of the noise issues. The first thing is that if you look at noise from the local government perspective, noise actually creates a nuisance. That is the way legislation frames it. That nuisance is really aimed around protecting residential areas but the courts have been tolerant with us in terms of applying it to work premises as well. I think if you then look at how we assess it, largely the courts are more than happy with the judgment and assessment and experience of environmental health officers, so having a pair of ears and a bit of common sense tends to be the judgment that is often applied. SOCPA changed that in that it brought in the Control of Pollution Act and therefore required us to authorise these loudhailers, et cetera. If we were to look at demonstrations that we have experienced, what we have found is that when we have tried to measure the sound as each phase of traffic passes through Parliament Square the sound of the loudspeakers disappears; it is drowned out by the noise of the traffic, so if you put that in perspective in terms of do we want to start considering legislation to ban loudhailers, et cetera, I think it is quite interesting in that regard.

Q338 Martin Linton: And the traffic?  
Mr Ingledew: Yes, that is another option, of course. If you were to look at the plans around the World Squares that will happen in 2011, that may change things in that the demonstration could perhaps be much closer to you. The key issue is nuisance. The key issue is the extent of that problem. In terms of setting a rate of noise, we know the rate of decibels at which it becomes painful to humans and when we have tried to set with Mr Haw, for example, a certain level of decibels what we have found is that his equipment could not actually reach that level. We found, as I say, that when the traffic goes past it is drowned out. As Chris said, the big issue is that at different times of the day in different atmospheric conditions the level of noise produced by a particular implement varies considerably, so it would be immensely difficult for us to deal with that. Then, of course, going back to the base piece of legislation, it specifically excludes political noise created during any kind of political demonstration, so we are in some difficulty there.

Mr Malthouse: From our point of view you cannot use a loudhailer unless you have got written permission from the Mayor. Unfortunately, in the byelaw there is no sanction if you disobey that. Under the trading byelaws, if you trade in contravention of the conditions or indeed of a licence we can seize the equipment. We cannot actually seize any loudhailers that are used in contravention and we may take the opportunity to review the byelaws and update that in advance of the expansion of space in Parliament Square in 2011.

Q339 Chairman: You mentioned the 1839 Act. We are advised that apparently it allows the police to restrict the use of horns or noisy instruments. Would that be a power that the police could look at, again for regulation of loudhailers?  
Mr Allison: I think sir, again, going back to 1839 legislation, society has moved on significantly from then. The courts’ view of the Human Rights Act, which is an individual wishing to make their point, and us using a bit of legislation from that far ago to try and prevent them doing so I think would create us some challenges. Again, in relation to all of these, the ultimate decision maker on whether the prosecution goes ahead is not the Police Service; it is the Crown Prosecution Service on whether it is in the public interest. One of the biggest concerns for the House may not be the prosecution that takes place but is this going to make a difference to what is going on there and now, and the reality is that we do not have a power of seizure in relation to these sorts of things. If there was any form of offence, if somebody was committing an offence and we knew them very well, therefore we had no power of arrest, and that is an issue that is covered in here, and we may well get to that later, we do not have the power to take that loudhailer off them and say, “You are committing an offence. We are now going to stop you doing it”. We may report them for the offence but they can continue doing it.

Q340 Chairman: But would you welcome that power? The Mayor’s paper suggested that power should be created. Would you recommend that power as well?  
Mr Allison: I think it depends again on what are we saying can and cannot be done? It is back to Parliament setting out some clear framework upon what you think is appropriate to allow free running of this House so that it can do its business and then
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giving us the powers to take action against those people who then step across that line, a line that seems acceptable by all. I mentioned the power of arrest. We are faced with a situation at the moment where, under the current legislation, we have individuals who we know very well. They are breaking the law and they are continuing to break the law after we have told them that we know they are breaking the law and we are going to take action against them but we do not have a power of arrest because it does not fit any of the arrest conditions, and therefore they can just continue committing that particular breach. We say that undermines what we are trying to do and therefore we think there should be times when we are empowered to make an arrest where somebody continues to commit an offence after it has been pointed out to them and when we are taking action against them.

Mr Ingledew: One of the elements we require is, of course, complaint, and it has been extremely difficult in respect of the use of loudhailers et cetera around Parliament Square to get anybody who is willing to complain about the noise, and the second thing is that you cannot deal with noise in isolation. There are far more considerations that the Public Order Commander of the police has to bear in mind before such legislation is used or such intervention taken.

Mr Allison: Not all the time. To prove an offence of alarm, harassment or distress would be very difficult in relation to a political protest or some form of protest around here. Again, in all of these it would generally appear over a period of time. I am not saying it never would happen but we have constantly got to balance the right to free speech for an individual who is saying, “I want to be there. My views may not be in accordance with other people’s but certainly I have got a right to hold those views”, so there is a significant challenge around us using section 5 of the Public Order Act because many people would say, “That is the police just trying to stifle protest”. In addition to that there are those situations where that individual may have overstaged the mark, as we have seen on occasion here, and they have gone too far so that we do have sufficient evidence of alarm, harassment and distress, but once again we would need somebody who is saying, “I am alarmed, I am harassed, I am distressed”, and willing to go to court to give a statement because there are challenges. We as police officers cannot be alarmed or harassed or distressed. If we know that individual very well there is no need for us to arrest them to interview them because we have already got the evidence. We can serve a summons on them and therefore none of the arrest conditions applies. Therefore, we can say, “Right, we are reporting you. You will go to court in the future because you will get a summons”, but we cannot arrest them; therefore we cannot take the loudhailer away from them so they still remain in situ.

Q341 Martin Linton: Are you saying that if and when SOCPA is repealed the people who use loudhailers will therefore use them without hindrance from ATMs and RPMs every day?

Mr Ingledew: Very much so, yes. In the absence of complaint and in the absence of a statutory nuisance being discovered then we have to go to the evidence. Mr Malthouse: And in the absence of a power to confiscate the loudhailers.

Mr Ingledew: Or arrest the person using them.

Mr Allison: In the absence of an offence. There are a lot of absences there.

Baroness Gibson of Market Rasen: Can you give us a phone number before you go and then we know where to complain?

Q342 Martin Linton: In view of what you have said already about the level of noise, if somebody from Number 1 Parliament Street complains that the noise is unbearable, as I have often heard them do, what chance is there going to be that you will be able to use the powers without SOCPA to force them to reduce the noise level?

Mr Ingledew: It is not a statutory nuisance because the Act specifically excludes protests.

Q343 Emily Thornberry: We heard from some solicitors yesterday who were talking about if there was an offence whereby there was alarm, harassment and distress caused the person could be arrested and as part of that arrest the loudhailer could be taken away. Is it your evidence that that is not correct?

Mr Allison: Not all the time. To prove an offence of alarm, harassment or distress would be very difficult in relation to a political protest or some form of protest around here. Again, in all of these it would generally appear over a period of time. I am not saying it never would happen but we have constantly got to balance the right to free speech for an individual who is saying, “I want to be there. My views may not be in accordance with other people’s but certainly I have got a right to hold those views”, so there is a significant challenge around us using section 5 of the Public Order Act because many people would say, “That is the police just trying to stifle protest”. In addition to that there are those situations where that individual may have overstaged the mark, as we have seen on occasion here, and they have gone too far so that we do have sufficient evidence of alarm, harassment and distress, but once again we would need somebody who is saying, “I am alarmed, I am harassed, I am distressed”, and willing to go to court to give a statement because there are challenges. We as police officers cannot be alarmed or harassed or distressed. If we know that individual very well there is no need for us to arrest them to interview them because we have already got the evidence. We can serve a summons on them and therefore none of the arrest conditions applies. Therefore, we can say, “Right, we are reporting you. You will go to court in the future because you will get a summons”, but we cannot arrest them; therefore we cannot take the loudhailer away from them so they still remain in situ.

Q344 Emily Thornberry: So if someone on the second floor of 1 Parliament Street is distressed by being shouted at on a regular basis and told that, for example, she may be responsible for the death of large numbers of Iraqi babies, she needs to go to the police and complain?

Mr Allison: If she can and signs a complaint saying, “I am feeling alarmed, harassed or distressed”, in the current situation what we would do is send that file to the Crown Prosecution Service, “An allegation has been made. This is the situation”. The Crown Prosecution Service would make a decision about whether to issue a summons or not, and if the summons was issued then we would serve the summons. However, in the sorts of cases I think you are talking about we certainly would not go and arrest people on the basis of that information because a protester will say, “But that is my point of view. I am expressing my point of view. They have got a right to hold those views?”. It is a very difficult line, as you see. We are stuck right in the middle.
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Q345 Martin Linton: But if somebody had a 200-megawatt amplifier out in the middle of Parliament Square that was pumping out noise at a fantastic level presumably there would be some way of stopping it. 

Mr Allison: I think in those circumstances, and I was talking with Dean earlier on about this, if I am honest I would find it difficult to see, given the background noise, how I could ever say that was creating serious disruption to the life of this community. However, if somebody turned up with an articulated lorry with a sound system such as we see at Notting Hill Carnival and parked it opposite and had it running for four or five hours I could quite easily see where I could be justified in saying, “I think that is potentially a serious disruption and I am now going to put a condition and the condition is that you stop”. Again, the difficulty there may be what the length of your protest is. If they then say, “Okay, but you know who I am. I am not going to stop”, I might not have a power of arrest to enable me then to take them away and take the sound system away.

Q346 Emily Thornberry: Not even for obstruction? 

Mr Allison: If they were obstructing that is slightly different.

Q347 Emily Thornberry: What if they are adjacent to the highway? 

Mr Allison: No, only if they are obstructing the highway.

Mr Malthouse: If they set it up on the grass we would not have any power because they would not be obstructing. Therefore there would be no power for us to confiscate.

Q348 Martin Linton: Why would you have no power? 

Mr Malthouse: Because we do not have a power to confiscate equipment for a protest. If they had permission for a protest, unless they had an unexpectedly huge loudhailer we would not have any power to take it away.

Q349 Chairman: So are you saying there are no powers or it is your belief that you do not have the right to judge serious disruption? It is a judgment issue? I think it is the Trade Union and Labour Relations Act where there is some provision which allows some control. Have you looked across the board at the other possibilities or are you suggesting that there is simply not anything at the moment that can help you control what is a nuisance, to most parliamentarians anyway? 

Mr Allison: I do not have a power to impose conditions, sir, in relation to nuisance around the Public Order Act.

Q350 Chairman: What about the local authority? I am certain there are powers for the local authority to use.

Mr Ingledew: The problem we would have, again, if noise was the issue, is that the Act specifically excludes political protests.

Q351 Chairman: It would be really helpful if each of you could send us a paper explaining what we have been asking about because it would be extremely helpful if you could tell us what you think the powers are at present and what you think you need to deal particularly with this small issue. We appreciate that everyone around the table has a sort of personal interest in this that we ought probably to declare but it is one which we would like to see a resolution to. 

Mr Allison: Can I confirm that that is in relation to the noise issue, because I think the rest of the Metropolitan Police position hopefully is set out in the paper, or do you need some clarification on what we have written in here?

Q352 Chairman: I think the noise issue in particular is something that we would very much welcome a note on. The Committee certainly nods in approval. If we can go back to the Brian Haw situation, not in particular but generally the use of tents in the area around Parliament, do you take the view, any or all of you, that if the 2005 Act is repealed the powers to do anything about that would then be diminished or would there be something under the Public Order Act or otherwise that would be of help? 

Mr Allison: We at the current time have no power to say to somebody that they cannot have a tent in a particular area, or they cannot have an encampment. The position in relation to Mr Haw is that we have given the condition as to the size of his protest. When he started to put a tent there we started discussions with him about the tent being part of his protest, and he then applied for a judicial review of that decision and that judicial review is still ongoing. We are waiting for that and it is a very busy court at the moment, but the legal advice upon us was that it would be inappropriate for us then to go and start doing some enforced moving while he was judicially reviewing the decision, so we are having to manage it. I formed the view that I do not actually have something which says, “No, you cannot put a tent there”. I only have the ability to say, “You cannot do something because of security or access to this area”, all the conditions as laid out in SOCPA. If we move to the Public Order Act, I could only put a condition on if it was serious disruption to the life of the community. It is all of those things. There is nothing there that allows me to say to somebody, “You cannot put a tent there”. 

Q353 Chairman: It seems that then the situation is that we would not want to go there in terms of a draft constitutional renewal bill.
Q353 Chairman: Would the local authority welcome some power, if they do not think they already have it, to resolve this issue of structures?

Mr Ingledew: I think our problem in this particular case is one of obstruction. We had hoped to use the obstruction rules, and there are different facets to the obstruction rules, in order to remove the tents and elements of demonstration. Unfortunately, the courts did not support that, nor would they support our application for an injunction along those lines. There are two opportunities here. One is that in the interim, prior to 2011, the status quo will remain in Parliament Square and perhaps there is some opportunity for the GLA and ourselves to talk to each other about who is responsible for that piece of pavement, because they, of course, are in a very strong position to refuse permission to put tents there, but we cannot replicate that, so that is an avenue of inquiry we could seek.

Mr Malthouse: We have had, as you will have noticed, some success in terms of getting the tents off the grass. In 2007 there was quite a large encampment built up and we do have a specific byelaw that without written permission you cannot erect a tent, but unfortunately that only applies to the grass; it does not apply to the pavement because the pavement does not come under our purview. If the whole square did as part of the redevelopment then obviously we would be able to impose that condition and we could stop tents being erected. That is one of the issues. As I said earlier, the irritant for us is around the residential nature of this. I will not go into some of the details but some of the sanitary arrangements are not particularly brilliant. Some of the people who come to participate in the camp seem to think that the rest of Parliament Square is part of their sanitary arrangements and that causes us all sorts of problems, so we are keen to try and control that but this little strip of pavement causes us a problem.

Mr Allison: Coming back to the obstruction bit, I have been helpfully reminded by my colleague that what the High Court said in relation to the obstruction was that they added an additional test and the additional test was one of “Was it unreasonable?”, so you might be causing a bit of an obstruction but was that obstruction unreasonable? It is using that test as well that led them to say, “Okay, he is causing a bit of an obstruction but in the circumstances and where it is, it is not unreasonable. Therefore, he is not committing an offence of obstruction”. We just need to factor that into our decisions.

Mr Ingledew: When we move on to the new arrangements of the World Squares plan I think between ourselves we need to make sure that there are sufficient byelaws in place to make sure that we can manage that within the square. Were the tented encampment to move to one of the other areas of pavement around the square then I am quite confident that we could apply convenience in terms of any obstruction because the obstruction would be there for all to see.

Q354 Baroness Gibson of Market Rasen: I think earlier you said that one of the reasons that he was not creating an obstruction was that nobody used that pavement. The answer to that is that you would not, would you, because he has been there a long time so most of us who would perhaps have used that area of pavement do not do so. How was the assessment made?

Mr Ingledew: If you were to look at the use of that pavement prior to Brian’s arrival, because of the traffic flow arrangements and the pedestrian crossing arrangements very few people use it. In order to prove the offence you have to prove that the free passage of the highway has been obstructed, and most people could walk past even the existing demonstration, provided they were not bothered by Brian and the sanitary arrangements referred to by Kit, without any problem at all. That is where the court held that the test of reasonableness was appropriate—so that you can pass.

The Committee suspended from 6.13 pm to 6.23 pm for a division in the House of Lords

Chairman: We are quorate again. We do apologise. We want to try and finish this session by 6.30 so if we move on to two more questions and then if there is anything beyond that we can perhaps deal with it in writing because you have been extremely useful already.

Q355 Lord Armstrong of Ilminster: Look: there is this terrible state of the square, the sort of wigwams and tents and God knows what. You all know what I mean. It does not do us any credit in the eyes of the world, tourists or anybody. Something has got to be done about it. It is not in my opinion the job of the police to do it. It is the job of the local authority to decide how the square should be used in the public interest. There is always a confrontation between human rights and human interests. There is the right to demonstrate, fair enough. There is a right to have the decency of a reasonable square, clean and tidy, in the national interest as part of our heritage. Could you please write to the Chairman and let him have your thoughts?

Mr Ingledew: Yes, I would be delighted to do so. Think Westminster Council’s record on keeping this very precious city of ours clean and appropriate for all our visitors is extremely positive and we will continue to do that. There is a big issue about this being an English Heritage site. It is a very important part of our country. It is the impression that most tourists and visitors have when they leave the country, so we fully support that, but, like all local
Mr Allison: I fully accept that and in our submission we have said that we only think as the Metropolitan Police that there is a need for that notification for a static protest to occur in a very small area around Parliament and a reduced area of the SOCPA list. Our rationale behind that is because of the large numbers of demonstrations that come here and therefore to effectively manage that, to make sure that we have got the ability to police it if necessary. That is why we would like prior notification. We recognise there is a difference between the two and we are not advocating that that notification should apply to any static demonstration wherever it takes place in the country, just the small area around Parliament.

Emily Thornberry: Would it not be possible to manage protests if there was not a compulsory scheme? 

Mr Allison: The challenge for us comes from the fact that you may end up with a large number of protests all turning up at the same time. As I said earlier, we do not have a standing army of officers who are available to come down here and deal with this. If we know that we are having a large number of protests taking place we make provision for that and warn officers specially to come and do that duty. That is the benefit of having an advance notification. Also, if we are likely to see conflict between two groups we hopefully can apply conditions prior to these demonstrations taking place to prevent that conflict. It is always difficult if that conflict has started to take place for us to then separate individuals. First we get the officers and then separate the individuals. My take is that prevention is better than cure. This is not about an authorisation process. I understand fully the concerns that people have. I think that sadly has been misrepresented and the public have a view that we as the Police Service are somehow controlling and stopping people protesting under SOCPA. We are not. Anybody who applies to protest we have to allow to protest and we do, but what we are saying is that to manage this bit of very important real estate which has a large number of demonstrations we feel that we need some form of notification process.

Emily Thornberry: So in order to demonstrate in Parliament Square and not give notice you have to be a lone protestor?

Mr Allison: Yes. We would be quite happy with that, but what we would be saying, and again it would need an amendment to the Act, is that for this small area we would like the ability, because the Public Order Act applies to marches and processions and static protests or assemblies of two or more people, to put conditions on a lone protestor if required because there are occasions when a lone protestor can cause significant disruption or can cause one of the various

Lord Armstrong of Ilminster: As to how we go about it, I am not an expert in that branch of the law. Perhaps you could explain what steps should be taken.

Mr Malthouse: What we have been trying to highlight is that it is not as if we have not been doing anything. We have been attempting to control and ameliorate the effects of it but legally we have been restricted and the courts have not been sympathetic to your view, sir, and they have maintained that the people who are there have a right to be there and have a right to protest, notwithstanding the objections that we have made.

Emily Thornberry: I want to ask you about prior notification and really it is a question of whether you would welcome a scheme that was voluntary or only applied to groups over a certain size.

Mr Allison: In our response what we said and what I said earlier was that it is important for us to be able to manage this bit of real estate on behalf of everybody who uses it. That is the parliamentarians and that is also the people who protest. With a voluntary notification scheme, again what you get is all those who are going to be very supportive and never create any problems whatsoever and will probably be people we never ever have to put conditions on. If there were to be such a scheme, and we are advocating such a scheme, we would want it to go back to harmonisation of the Public Order Act: they have to notify us that they are going to march or demonstrate. That is accepted up and down the country. If anybody does want to do that then six days before or as soon as practicable they will tell us they want to march or process in a particular area. What we are saying is that for this bit of area, or a smaller area than SOCPA in the past, anybody who wishes to assemble under section 14 (and the definition of “assembly” in the Act is two or more people) should notify the police to let us know because we can then ensure that we have not got two or three protests going to exactly the same place at exactly the same time.

Emily Thornberry: So you would say compulsory notification for static protests?

Mr Allison: Yes, in exactly the same way as there is that requirement in law for processions and marches.

Emily Thornberry: And there is a difference, we appreciate, between a static protest and a march. There would be all sorts of management needs for a march that you would not need for a static protest.

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elements that are in the Act or that we would hope would be in the Public Order Act. We would not want prior notification for a lone protestor; we would be happy that we could probably manage that, but if, say, we ended up with two lone protestors outside Downing Street, one on each side of Richmond Terrace, one from the far right and one from the far left, we might want to have the ability to put conditions on them so that we could keep them apart and make sure that the life of the community could go on.

Mr Ingledew: I very much support prior notification because on behalf of my own community we have a right to be policed and the spontaneous demonstrations invariably take police away from Westminster at the first instance, which is very disruptive to my Borough Commander colleague who is obviously trying to police the normal problems and issues within Westminster, so prior notification invariably means that either he can plan or we get the support from Chris’s outfit to make sure that the right resources are put in place. Otherwise we have constant disruption and you actually see the difference in our crime figures and response.

Q362 Emily Thornberry: In what way would you see a new law that you envisage being any less restrictive than the current 2005 legislation?

Mr Allison: I suppose I would answer that by saying that I do not see the 2005 legislation being restrictive. I think it has a group of people who believe that it is. I do not think it is because we do allow everybody to protest. Yes, it gives us the power to put conditions on but, as I say, out of the couple of thousand demonstrations we have had we have only put them on in a handful of cases. The only potential restriction that people could be concerned about is where they have to give a minimum of 24 hours’ notice and that has received much publicity. We are actually saying move it into the Public Order Act where we would not require that; it would be six days’ notice or as much notice as is practicable, recognising that sometimes things happen that people spontaneously want to protest about, and we accept that, but what we would be saying in those cases is, “Give us notification when you are coming even if it is as you are on the way, so that we can put in place the necessary controls”. I do not think the current Act is restrictive although I fully accept why people have got concerns about it, but I think we can make it better for everybody by putting it all into the Public Order Act. We can make it better for everybody by clearly defining what Parliament thinks it needs to have access to and from this building by Parliament saying what is acceptable and what is not acceptable in this area. Once that is clearly defined for everybody we can work with the protesters and with people in this building and the wider public to make sure that is put into place.

Mr Malthouse: I guess also, where it would be less restrictive is around the wide geographical area which is delineated at the moment. That is frankly part of what caused so much consternation among the public. I do not know if you remember but there was supposed to be—it never quite got off the ground—a protest where they were linking their hands around the boundary of this so-called draconian area. That would disappear, of course and there would hopefully be specific proposals around Parliament Square that would recognise its special status at the heart of democracy and would remove this general ban that resulted in the exhibition in the Tate and all that kind of stuff, so that provocation restriction would go. In terms of notice, we are in the fortunate position of having run an extremely successful notice period scheme for Trafalgar Square, so we operate on a five-day notice basis because of the byelaws, and in fact, the land there is not deemed to be public; it is GLA land, and that works perfectly well and it is very well accepted by everybody using the square, not least because they recognise that you have to queue for your slot. So many people want to use it that the only fair way to do it is for people to notify so that they get the proper whack that they want to demonstrate on or hold their festival in the square.

Mr Allison: Can I just reiterate the significant change, and it is in our response, which is that the area that we would propose that the notification process would apply to and our ability to apply conditions to it, and it would really be restrictive to the close element around the parliamentary estate, so Parliament Square, a little bit Abington, part of the way down and up Whitehall till you cover Downing Street, front and back, and obviously Portcullis. We would not be looking for the big area because we recognise the concerns that that was creating.

Chairman: Thank you very much indeed for all those interesting comments. We are certainly going to take them all into account and we are grateful to you for coming.
**Supplementary memorandum by Metropolitan Police Service (Ev 61)**

**MANAGING PROTEST AROUND PARLIAMENT**

This follow up report was requested by the Chair of the Joint Committee on the draft Constitutional Renewal Bill following a hearing at which representatives of the Metropolitan Police Service, Westminster City Council and Greater London Authority gave evidence.

This report should be read in conjunction with the MPS’s formal response to the Government’s consultation document about Managing Protest around Parliament. The former sets out the MPS position in relation to SOCPA and Sessional Orders.

The Committee specifically asked the following questions in relation to noise:

(a) the range of powers that would be available to deal with noise upon the repeal of Sections 132 to 138 SOCPA.

(b) whether it is considered that these powers are adequate to prevent disruption from loudspeakers and other noise.

(c) if the powers are seen as inadequate, what legal framework should apply.

The MPS response is as follows:

Loudhailers are seen by protestors as a legitimate way of getting their message across and they are also used by organisers to control and get messages to members of their demonstration. While they may be seen as annoying to some, their use is seen by others as a part of their right to protest in a democratic society.

The control of noise is a matter for Local Authorities who are both responsible and have the expertise to deal with such matters. The MPS highlighted in its original response the need for Parliament to clearly set out what is and what is not acceptable in the area around the parliamentary estate. Noise is clearly an issue and as such, the MPS believes that Parliament should set out in the legislation an acceptable level of noise that can be used by public address equipment in this area. This level would have to be monitored by the Local Authority, in this case Westminster City Council and they would need powers of seizure for those found exceeding this limit to prevent a continuation of the offence.

In the event of the repeal of SOCPA, the only possible power that the MPS could consider using would be Section 14 of the Public Order Act to place a condition on an assembly but this could only be done if the level of noise amounted to serious disruption to the life of the community. The MPS’s view is that it would be very rare that the use of a loudhailer would meet this test but if there were those within the community who felt that the noise was causing a serious disruption, they would need to make statements and give evidence at court.

The additional challenge is that the conditions that can be placed on an assembly are currently limited to its location, duration and the numbers present. As such, the MPS could not prevent the use of any loudhailer but could only require the demonstration to move location or to finish earlier than planned, which both create considerable challenges for any policing operation. The MPS response to the original consultation document requested that the Public Order Act be harmonised so that the police can place any conditions on an assembly in the same way that they can for a procession. Harmonising the Act would allow the MPS to place a condition that a loudhailer is not used in the event that members of the community made statements and were willing to attend court to give evidence on the serious disruption that such noise was causing. However it is important to point out that with the general background levels of noise that already occur in that area, the MPS feels that it would only be on very rare occasions that it could justify using this power.

Mention of S5 Public Order Act was made at the hearing. While the use of inappropriate words or language could be regulated by using this offence, the MPS does not believe that this offence could be used to prevent someone using a loudhailer as a part of their protest on the basis of noise level.

The MPS view has also been sought on the following questions:

(a) Is it your understanding that conditions on the place and duration of an assembly under section 14 of the Public Order Act 1986 would have to be imposed on the entire assembly in order to address serious disruption caused by a minority of participants?

The MPS believes that any condition that it places on an assembly has to apply to all of those taking part and cannot be applied just to the small minority who are undertaking the behaviour that justifies the condition being imposed.
(b) You mentioned a preference for ensuring certainty in relation to the type of conduct that is acceptable during protest around Parliament. In terms of noise disturbance, do you have a view on whether the power to impose conditions on grounds of serious disruption to the life of the community meets that aim?

As stated above, the MPS believes that it would only be on very rare occasions that the necessary grounds would be present to justify placing a condition in relation to noise and this would only occur when members of the community came forward and gave statements. In addition, as mentioned above, S14 currently limits the conditions that can be imposed to location, duration and numbers involved and so would need to be changed to allow us to apply a condition that was limited to the use of a loudhailer.

The MPS does firmly believe that it is a matter for Parliament to clearly articulate the conduct that is acceptable in the area around the parliamentary estate. This could include maximum sound levels which would then have to be monitored by the Local Authority.

(c) How often have the police relied upon the power to impose conditions on the grounds of a risk to security or public safety? Is there any evidence that security or public safety has been improved as a result of the power to impose conditions on either of these grounds? What are the practical implications of removing the power to impose conditions on these grounds?

Conditions under SOCPA have only been applied on a number of occasions in comparison with all of the protests that have taken place. However, the ability to place conditions has ensured that we have been able to put in place effective controls on some of our most challenging demonstrations. The example given at the hearing about a condition that there was no burning of flags because of the public safety issues associated with such an activity in a confined area prevented people becoming injured. A condition limiting the size of Mr Haw’s protest has reduced the possibility of his demonstration being used as a place in which another could hide a terrorist device. It has also meant a massive reduction in the number of officers having to be deployed on a daily basis to look through Mr Haw’s demonstration to check that nothing had been left. This condition was imposed mainly on the grounds of security and public safety.

In the case of another demonstration for which the organiser given notice of an intention to demonstrate in Downing Street, the security grounds were used to impose a condition that the demonstration would take place outside Downing Street. This was because of the declared intent of the protestor to arrest a member of the Government and the security issues that this would have created if he had tried.

The practical implications of removing these powers would mean that the type of protests outlined above would have gone ahead with no conditions and as such the risks would be far higher for all concerned.

(d) You mentioned the importance of being able to impose conditions on lone protestors. Can you provide any specific examples of lone protestors causing one of the recognised types of risk under section 14 POA or section 134(3) of SOCPA?

The last two examples in the paragraph above relate to lone protestors and show why it is vital that we have to have the power to impose conditions on lone protestors.

(e) Whether there are adequate police powers to regulate access in the event that S132 to S138 SOCPA are repealed?

The MPS position is set out in our response to the original consultation document and was covered during the evidence. In essence, the MPS believes that Sessional Orders are now outdated and of no real use. Reliance on s52 of the Metropolitan Police Act 1839 freestanding of sessional orders is not considered appropriate to regulate access to the parliamentary estate in 2008. If SOCPA were repealed, the MPS would only be able to use the provisions of the Public Order Act to put conditions on those who wish to protest and these could only be used in extreme circumstances. As such, the MPS only has very limited powers.

It has been suggested that police can make use of the offence of highway obstruction to control protest and to facilitate access to the parliamentary estate. The High Court judgement in relation to Mr Haw from 2002 made it clear that when someone is exercising a right to free speech, an obstruction of the highway must be not only wilful but also unreasonable before it will be unlawful. By way of example, it could be said that a march of 50,000 protestors going past Parliament to protest about an issue that is being debated in the House, is not an offence, as although it is causing an obstruction, it is reasonable in the circumstances and access can be obtained to Parliament via Portcullis House. The reality is that obstruction is a minor criminal offence that cannot be effectively relied upon to manage protest. A better legislative framework is required so that police
can effectively and proportionately balance the competing interests in the planning stage of a protest, as well as during the event.

It is vital for Parliament to clearly define the levels of access it requires to its estate to allow the democratic process to operate. If it is felt that there must be unfettered access both in vehicles and on foot, this needs to be clearly articulated. With this in mind, Parliament will also need to define any areas where protest is not allowed because it will hinder the required access. There will also be a need for an offence of protesting in any area that is defined as prohibited and the necessary arrest powers to enable action to be taken against persistent offenders.

June 2008

**Supplementary memorandum by the Mayor of London (Ev 14a)**

**Introduction**

1. Further to evidence provided to the Joint Committee on Wednesday 4 June 2008 by the Greater London Authority the following provides supplementary written evidence and the requested response on the issue of noise.

**Supplementary Questions on Noise**

(a) *The range of powers that will continue to be available upon the repeal of sections 132 to 138 of the Serious Organised Crime and Police Act 2005*

(b) *Whether you consider those powers to be adequate to prevent disruption from loudspeakers and other noise?*

(c) *If you feel those powers are inadequate, what legal framework should apply?*

2. Restrictions on the use of loudspeakers are covered in Trafalgar Square and Parliament Square Garden Byelaws 2000 pursuant to the GLA Act 1999. The byelaws are attached at Appendix B. These state in Section 5, acts within the Square for which written permission is required, the use of “an apparatus for the transmission, reception, reproduction or amplification of sound, speech or images…”

3. However, the byelaws do not currently provide the GLA with the ability to seize loudhailers or other noise transmitting devices. Where such devices are used without prior written permission, the GLA would seek to obtain details of the persons involved should a prosecution be pursued. The GLA would also advise the Metropolitan Police Service of the breach and the failure of any individual to comply with the GLA requests to cease use of the device.

4. Prosecution will be considered on a case-by-case basis where any breach of byelaw is identified. However, the aim will be to firstly seek compliance without recourse to formal enforcement procedures. The GLA policy on prosecution under breach of the byelaws by virtue of the GLA Act may need to be reviewed and considered in light of any legislative changes.

5. The GLA has a role of enforcement but not arrest and in this way we rely on the Metropolitan Police powers of arrest and questioning.

6. Section 385 of the GLA Act 1999 allows for the Authority to make byelaws that are considered necessary for the securing the proper management of the squares and the preservation of order and the prevention of abuses there. The GLA may take the opportunity to review the byelaws (Local Government & Public Involvement in Health Act 2007) powers to include scope for loudspeakers and right to seize powers, as per trading under the byelaws, for up to 28 days.

7. Any powers around loudspeakers and other noise emitting devices would need to allow for permission for their use to be granted as part of the conditions for demonstrations and events where this was considered necessary, for example to facilitate safe running of an event. There would also need to be exceptions to allow for use by the Police, Emergency Services and local authorities.

8. We would support the Metropolitan Police view that further provisions are required under the Public Order Act if sections 132–138 of SOCPA are repealed that would enable conditions to be imposed on public demonstrations and the like where necessary. This could be considered to include loudhailers and other devices.

*June 2008*
TUESDAY 10 JUNE 2008

Memorandum by FDA (Ev 21)

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

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

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

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

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

6. Firstly, we have been advised by the Cabinet Office that once the Bill is enshrined in statute, the use of prerogative powers to make Orders in Council will fall away, and that any future use of the Royal Prerogative in the civil service is only possible where this is allowed for on the face of the Bill, eg in relation to vetting. The Joint Committee will want to be satisfied of this interpretation. Moreover, if the subsequent management of the civil service is to rely on statutory provisions, then as drafted the Bill appears to leave a number of important issues unaddressed. In particular, one of the advantages of such legislation, in our view, is that it would extend to civil servants the protection of employment legislation enjoyed by other workers. We should like to be convinced that the Bill successfully achieves this, and would not wish to see what we regard as contractual matters, such as vetting, left under Prerogative powers. An underlying concern of the FDA is that we are keen to draw a distinction within the Bill between current Government intention (which may be benign but is necessarily transitory) and Constitutional protections, which we believe should be permanent.

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

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

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

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

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

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

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

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

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

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

Questions Raised by the Joint Consultative Committee

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

17. The FDA has long argued that the civil service has a wider accountability to Parliament, beyond its obligation to the Government of the day. We accept the statement in the Civil Service Code that the civil service “supports the Government of the day in delivering and implementing its policies and in delivering public services. Civil servants are accountable to Ministers, who are in turn accountable to Parliament”.

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

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

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

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

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

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

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

25. Fifthly, we share the concern of PASC (paragraph 28) that the Bill must encapsulate the core values adequately, and that the definition in particular of “impartiality” must be strengthened and political impartiality made a statutory requirement.
However, in addition to this primary accountability, the civil service should have a status separate from that of the Government of the day: there are not only certain practical functions for which civil servants are directly accountable to Parliament (such as the role of an Accounting Officer) but also a constitutional understanding that there must be a wider accountability for the civil service to protect the interests of future Governments and citizens.

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

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

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

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

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

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

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

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

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

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

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

25. The FDA recognises the difficulty in not defining the number of Special Advisers, and endorses the sentiments of Sir Robin Mountfield quoted in PASC (Para 41). However, as explained above, we believe that the key issue in the context of Special Advisors is to address the question of their powers. An attempt to define the numbers of the Special Advisors might in practice simply lead to the establishing of a norm. It would be important therefore to be clear on what the functions of Special Advisors are on the face of the Bill. The current wording which refers to them “assisting” Ministers is inadequate, or at least incomplete, in part for reasons we have already discussed above.
10. Is the way that the Draft Bill defines Civil Servants and The Civil Service appropriate? Are the exclusions in Clause 25 (2) appropriate?

26. Our concerns on this matter are explained above in paragraphs 7 to 10. In principle we believe that all employees of the state should have the full protection of statute law and that matters relating to their employment should be removed from the Royal Prerogative decisions. We recognise that this raises practical issues in some circumstances. In this context of this Bill, therefore, the FDA is content with the exclusions in Clause 25 (2), although the Joint Committee will wish to note that the staff of GCHQ are civil servants. Staff in the Secret Intelligence Service and the Security Service are Crown Servants. We also believe that parallel legislation for the Northern Ireland Civil Service (and Courts Service) should also be enacted.

Other Issues

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

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

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

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

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

32. There is a danger at the moment that the concept of appointment on merit is being defined in a way that undermines the health of the civil service and risks becoming a tick box exercise rather than recognising that the civil service is an organic entity operating in a complex political environment in which broader management needs must be an important consideration. It is already arguable that Ministers and the civil service as an organisation are suffering from the loss of “collective memory” (which is not simply a matter of filing but a historic understanding of complex issues) and experience that recent practices have fostered.
33. It is important therefore that the Bill does nothing to exacerbate this problem.

*June 2008*

**Memorandum by the Public and Commercial Services Union (PCS) and Prospect (Ev 25)**

**INTRODUCTION**

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

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

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

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

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

5. The argument for keeping the Secret Intelligence Service, the Security Service and GCHQ outside the scope of the Draft Bill as set out in paragraph 195 of the White Paper is that the “Government does not believe it would be sensible to operate two different systems, and therefore a saving provision for the retention of the prerogative in this area . . .” Whilst PCS and Prospect can understand why the Government wishes to retain a single system for national security vetting, it is very mindful of the way that the prerogative was used to ban trade unions from GCHQ in 1984. We would therefore urge the Joint Committee to reconsider the argument being put forward for exclusion in each case.

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

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

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

7. Yes, the statute should indicate who recommendations should be made to. It is recommended that they are made to the Head of the Civil Service, in the first instance.
Should the Commission be given the power and resources to initiate investigations without an appeal being made to it?

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

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

9. The exemptions listed under clause 34(3) appear to be a departure from what was listed under clause 8 (3) of the Civil Service Bill 2004. Whereas the exemptions in the 2004 Civil Service Bill are precise and clear, thereby leaving little room for misinterpretation, those listed in the Draft Bill under clause 34(3) are ambiguous, and therefore open to misinterpretation. We would recommend that further consideration is given to this clause, and in particular clarity in terms of what will actually be the impact on the ground.

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

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

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

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

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

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

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

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

Definition and Scope

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

16. Instead, clause 25 says that the relevant Part of the Bill “applies to the civil service of the State” with the exclusion of the Secret Intelligence Service, the Security Service, GCHQ and the Northern Ireland Civil and Court Services—clause 25(2). The same clause then blandly states that references to the civil service and civil servants “are to be read accordingly”—clause 25(3).
17. In particular, despite previous consultation on the possible definition of civil servants and submissions as to their status, the Bill does not address such long-standing issues as the contract of employment, the identity of the employer, whether to place civil servants on the same footing as other employees and whether to amend or revoke entirely those provisions that deny a range of employment rights to civil servants and others in Crown employment.

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

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

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

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

Exclusion of Employment Protection Rights

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

Employment Rights Act 1996

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

   (a) Pt IV, together with ss 45 and 101 (rights for shop and betting workers in relation to Sunday working);
   (b) ss 86–91 (minimum periods of notice);
   (c) Pt XI (redundancy rights) (further provisions excluding redundancy rights are contained in ss 159 and 160); and
   (d) Pt XII (rights on employer’s insolvency).

24. It was presumably thought that the second and third of these entitlements were inconsistent with employment at the pleasure of the Crown. PCS and Prospect may consider that with the passage of time, that stance can no longer be justified (if it ever was) and so (again, whether or not civil servants are given contracts of employment) the exclusions should be ended. As we suggest above, if employee status is conferred on civil servants by the Bill, section 191 should be repealed except for (1) (amended as necessary), (3), (4) (da) and (e), and (5). Part XII should still be excluded for civil servants (since an insolvent Crown could not make payments through the Insolvency Service). Section 159 should also be repealed.

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

26. Section 191(5) imposes a limit on the right to time off for public duties under s 50 where the individual’s post is politically restricted, and to the extent that the public duties (eg service as a councillor) would infringe the restriction. We would recommend a repeal of this provision.
27. Section 193 specifically excludes Part IVA of the Act (protection for whistleblowers) in relation to the staff of the Security Service, the Secret Intelligence Service and GCHQ.

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

**TULRCA: Redundancy Consultation**

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

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

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

**TUPE**

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

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

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

**Special Provisions**

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

**TULRCA: Trade Disputes**

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

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

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

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

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

Sections 171 and 177 ERA 1996

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

42. Section 177 of ERA 1996 gives certain potential rights to those whose employment falls within section 159 ERA 1996 (which basically means civil servants, together with those working for NDPBs who are entitled to be members of the PCSPS). The right under section 177 (1) is to take a claim to an employment tribunal for entitlement to a payment under a redundancy compensation scheme (which the CSCS would amount to) where the terms and conditions upon which a person is employed include provision for the making of such a payment (which arguably is the case for civil servants and NDPB employees) and where the terms and conditions include provision "for referring to an employment tribunal any question as to the rights of any person to such a payment in respect of that employment or as to the amount of such a payment" (177(1)(b) ERA 1996). This latter condition does not appear to have been met, since the terms and conditions of civil servants or those working for NDPBs do not contain, to our knowledge, such a term. Further, the CSCS does not appear to contain any general right to take a claim to an Employment Tribunal in relation to a payment under the CSCS.

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

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

9 June 2008

Examination of Witnesses

Witnesses: Mr Jonathan Baume, General Secretary, First Division Association (FDA) and Mr Charles Cochrane, Secretary, Council of Civil Service Unions, and Director of Policy, Public and Commercial Services Union, gave evidence.

Chairman: Good afternoon. Can I welcome you to the Joint Committee and thank you for your attendance. I do apologise that we have kept you a few minutes, but I guess that as you have waited 150 years for the Bill another seven minutes is not too long. Could I at the very beginning say that members of the Committee have declared interests relating to the interests that may be discussed by this Committee and that information is on the web page if anyone wishes to see it. May I ask if there are any other declarations of interest that need to be made?

Lord Hart of Chilton: I suppose in the context of what we are going to discuss, I ought to declare the fact that I was a special adviser for nine years.
Lord Armstrong of Ilminster: I should disclose that I was Head of the Civil Service for six years.

Lord Maclennan of Rogart: I am a member of the Advisory Committee on Business Appointments.

Q363 Chairman: This all means that many members know a lot about this. Thank you very much. Could I ask the first question. Do you have concerns that ministers are failing to respect the political neutrality of the Civil Service? If so, are the provisions set out in the draft bill sufficient or do you think there is more that should be added?

Mr Baume: Good afternoon. Thank you for the invitation. Obviously this is a very distinguished gathering that we are a part of. From an FDA perspective, we are not particularly concerned at the moment that there is a lack of respect for the neutrality and impartiality of the Civil Service. That is not to say there are not occasional incidents where a civil servant might have felt a minister or a special adviser was pushing against boundaries but this is not an issue that we feel is a major one at the moment.

There are broader issues, part of which I think are raised in the evidence, about the relationship between the Civil Service and ministers and the way the Civil Service has changed its nature over the years, the way in which policy is drawn up and brought together, and more subtle issues around the concept of what the Civil Service is there for. I get worried at times about an emphasis too much in public, perhaps, on the Civil Service somehow delivering, without recognising that a core part of the Civil Service role is to design policy that is, to use that phrase, “fit for purpose”: policy that can be made to work on the ground and takes into account the experience of practitioners in whatever the issue is. But that is a broader issue about the role and expectation of the Civil Service rather than the more narrowly focused one in the question about the failure by ministers to respect the Civil Service. I do not think there is an immediate problem with this Government or previous governments around respect for the neutrality. The fact that there has been general cross-party support for the concept of a Civil Service Act, whatever the argument might be about particular provisions, is an indication that amongst ministers and MPs more generally there is an understanding that the political impartiality of the Civil Service is something that must continue to be respected.

Mr Cochrane: I am happy with this broad position that Jonathan has set out.

Q364 Lord Plant: As you know, clause 27 of the draft bill would confer on the Minister for the Civil Service a general power to manage the Civil Service, and it would cover, among other things, appointment, dismissal and the imposition of rules on civil servants. The Public Administration Committee said in their report, which was published just a few days ago, that the Government had clearly changed its mind since the earlier consultation document and that now there is this power to manage individual civil servants—or at least that is one way of reading the draft bill—whereas the previous consultation did not have that in it. Do you think it is appropriate that the Government should have this power?

Mr Cochrane: One of the failings that we see in the parts of the Bill dealing with the Civil Service—which is obviously where our major interest is—is that there are a lot of unanswered questions. We are all having to surmise what may be in the Government’s mind and speculate on what the reality might be if the Bill is introduced. I think that is compounded by the problem that we will turn to later, the debate around who manages the Civil Service. It strikes us that you have to be very clear about what this thing called the Civil Service is that you are managing. It is one of the things that the Bill does not quite spell out. Also, I think there is an issue in relation to the difference between what is said in the draft bill, or even what is recognised as the current conventional constitutional position, and what is the day-to-day position. In reality, whilst we have a Minister for the Civil Service who is the Prime Minister, it is probably fair to say—and this is no disrespect to the Prime Minister—it is not a major feature of his workload. It is currently delegated to the Cabinet Office and for day-to-day purposes undertaken by the Parliamentary Secretary in the Cabinet Office—who has made an excellent job of it. Even more so than that, because of the Civil Service (Management Functions) Act that went through Parliament in the early 1990s, the reality is that the bulk of the management the Civil Service, including matters such as pay determination, is delegated to departments. On one level, it is fairly easy to see, whatever may be suggested in the Bill, what is the real day-to-day impact it will have on that management of the Civil Service and, subject to any contrary evidence, our suspicion is that it will have a very little impact on the day-to-day reality of how the Civil Service is managed.

Mr Baume: At the heart of this Bill is an attempt to move the Civil Service away from the exercise of the royal prerogative and to give civil servants formal contracts of employment and the Civil Service formal legal status. Clearly these are quite difficult legal issues. On the one hand, civil servants remain servants of the Crown, which is a slightly opaque concept in itself. As Jonathan has mentioned, it is what defines a civil servant. The Civil Service Civil Service (Management Functions) Act is trying to bring some of this together. This Bill comes back to the (Management Functions) Act and somehow replicates it in this current legislation. One question the FDA has asked is: Is this what we should be
Mr Baume: The Prime Minister is going to delegate it anyway, in reality.

Q368 Chairman: The suggestion I thought you were making was that for the Prime Minister it is all very peripheral to his mainstream concerns. Would it not be in the interests of the Civil Service to have a minister who was essentially in charge of the Civil Service and that was his main job.

Mr Cochrane: One of the things we would welcome as, if you like, a representative of the people who are employed by the Government or the Crown, is some clarity and continuity. We have had the present position of the Prime Minister effectively as the Minister for the Civil Service for longer than Jonathan and I can remember—and that is quite a considerable time—but below that we have had a very wide variety of ministers having the day-to-day responsibility. Currently it is the Parliamentary Secretary in the Cabinet Office, but at various times it has been Lords Privy Seal, ministers in the Treasury, people who have been in the Cabinet. It has even been someone who was an unpaid Parliamentary Secretary at one time, which does not strike us at all as a satisfactory position. Whatever answer we come up with, I agree very much with what Jonathan said, I think it should be a permanent official. It should be much clearer at what level ministerial responsibility rests and what the relationship is with the Prime Minister who has the full responsibility. In the very ad hoc arrangement that we have now, for the moment it rests in the Cabinet Office, but going back over 20 to 25 years it has rested in a number of other manifestations.

Q369 Lord Campbell of Alloway: You say that this has to be investigated; that it has to be considered; this is something for discussion. What is your proposal? I do not understand.

Mr Baume: In a nutshell, the proposal is that the Prime Minister, who has the full responsibility. Currently it is the Parliamentary Secretary in the Cabinet Office, but at various times it has been Lords Privy Seal, ministers in the Treasury, people who have been in the Cabinet. It has even been someone who was an unpaid Parliamentary Secretary at one time, which does not strike us at all as a satisfactory position. Whatever answer we come up with, I agree very much with what Jonathan said, I think it should be a permanent official. It should be much clearer at what level ministerial responsibility rests and what the relationship is with the Prime Minister who has the full responsibility. In the very ad hoc arrangement that we have now, for the moment it rests in the Cabinet Office, but going back over 20 to 25 years it has rested in a number of other manifestations.

Q370 Lord Campbell of Alloway: What is the point you are trying to get at?

Mr Baume: That it should not be vested in ministers to have the legal power to appoint or dismiss civil servants.

Q371 Lord Campbell of Alloway: Would you agree that in pressing that you have to be very careful not to kill the objective by intricate statutory provision. Do you understand what I am putting to you?
Mr Baume: I do indeed, which is why I recognise that this is a matter that certainly some legal minds who understand the intricacies of this would need to consider further. Given that we expect it will be several months before the Bill is finally tabled before Parliament, there is time over the summer and autumn to investigate this particular issue in greater depth, so that all of us are clear what the implications and practical aspects of this will be. At the moment, it looks unusual that we will put into statute a power for a politician in effect to hire and fire civil servants, even if at the moment the practicalities are that they are normally matters delegated to officials but through ministers.

Mr Cochrane: We would also echo what you said in the introduction. We are very conscious that it has taken 150 years to get to this point. As we said in our evidence that we submitted yesterday, we have no certainty that there will ever be another opportunity, if we have to wait 150 years for it, so it is hugely important that we get this right. As Jonathan said, some of these are horrendously complicated issues which people have been trying to get their heads around for the last 150 years, and we do not want to end up with a once-and-for-all-piece of legislation that either gets it wrong or creates a problem for us in the future. If the Bill is to move forward, there needs to be a lot more discussion outside of that, before the Bill is laid, to make sure that we have got it right and it is one that then would have the support of people who work for government.

Q372 Lord Armstrong of Ilminster: If the power conferred on the Minister for the Civil Service is a general power to manage the Civil Service, including, among other things, appointment and dismissal, I suppose that that implies that the Minister is accountable for the exercise of that power, even if the power is exercised by delegation via somebody else, possibly not a minister but a senior official. Is it a danger that this would lead to parliamentary questioning about the appointment and dismissal of individual civil servants? If so, in your view is that a desirable state to be in?

Mr Baume: From our point of view, it is important that the accountability of the Civil Service is through ministers; that is, the accountability of the Civil Service as an organisation and the actions of departments. This is why this issue, as you have rightly pointed out, can be quite complicated. From my perspective, the accountability for the behaviour of individual civil servants should be through the Head of the Civil Service. The Head of the Civil Service takes responsibility for the actions of individual civil servants, whilst ministers take responsibility for the actions of the organisation. There is a difference between the concept of the Civil Service as a collective organisation working to serve ministers, which can, as an organisation, make mistakes or may need to explain how it has influenced particular issues, and the actions of an individual working within that. I am General Secretary of a trade union but in a sense I am the employer of 25 staff. My Executive Committee in a sense is accountable for the actions of the organisation, the FDA; I am accountable if a member of my staff makes a mistake or there is something wrong. That is an employment relationship that is not uncommon in any organisation, public or private. This issue of the Civil Service accountability, I appreciate, is quite a fraught one—and it has come up in recent months around problems which have emerged into the public domain in the Civil Service. The Head of the Civil Service should remain accountable for the behaviour of civil servants, delegated across individual departments. Ministers are responsible and accountable for the actions of government (of which the Civil Service is a core part of the Executive, a core part of the government) as a wider collective body. I do not know if that helps, Lord Armstrong. I would not want to see ministers themselves having to account for the behaviour of an individual civil servant or the hiring or firing of an individual civil servant. I think that would be wrong and it is not a position in which ministers, I think, would want to be in the future. This is again why this issue is worthy of some further explanation and legal thought. It may be that it is right, it may be that this is where we settle, but certainly we would want to be more confident than we are at the moment that the drafting as it stands is the right approach.

Mr Cochrane: It is also important to remember in the discussion, when we are talking about the accountability potentially of ministers to Parliament for individual civil servants, that there are still well over half a million civil servants. There are probably something like 100 different units, what we would call bargaining units, into which the Civil Service is broken down. At the risk of being slightly facetious, you could almost see Parliament grinding to a halt in trying to deal with a whole host of individual issues around that. There is quite a complex point there. It is important in the discussions, when we are talking about the Civil Service, always to be aware that we are not just talking about Whitehall or the SCS, or the Yes, Minister parody—something which we dislike intensely—but we are talking about people—530,000 is the latest figure—in every town and city, in a huge range of specialisms. It is part of the problem with the Bill, in trying to address something called the Civil Service, that the Civil Service is such a wide issue.

Q373 Lord Maclean of Rogart: I would like to ask the witnesses some questions about their views on the role of Parliament itself and its relationship to the
Civil Service. We have had, as you probably know, evidence which has been contrasting about the power of Parliament to oversee the management, perhaps through supervision of the codes in their operation. Do you have a view about that?

Mr Cochrane: To follow on from what I was trying to say just now: if Parliament were to do that and get much more involved in the approval of codes, it is quite difficult to see where that would end. Currently there are at least three codes which apply to the Civil Service. There is the Civil Service Code itself; the Recruitment Code, which is used by the commissioners; and a document called the Civil Service Management Code, which, for want of a better description, is something like the Civil Service staff handbook. If the concept was that any changes to those had to be approved by Parliament—which is a very complex process—it brings an entirely new dimension to the traditional discussions that take place between the Civil Service unions and Civil Service management about pay and conditions, and would take us to a model which is much closer to that such as in Germany, where, of course, the civil service has a very different statutory basis from what it has in this country. On the other hand, Parliament already has some quite significant degrees of scrutiny over things such as changes to the Civil Service pension scheme, which are all dealt with by what I believe are called negative resolutions under the terms of the 1972 Superannuation Act, and they all have to be approved in that way. The role of PASC in recent years has devoted a lot of time to Civil Service issues and I think it is one that we have all applauded and welcomed. We have not always agreed with their conclusions but I think that degree of scrutiny has proved to be right.

Q374 Lord Maclennan of Rogart: You have no principal opposition to direct parliamentary oversight. You are not saying that has to be through a minister.

Mr Baume: It has to be through a minister.

Q375 Lord Maclennan of Rogart: You are saying the oversight has to be through a minister.

Mr Baume: The Civil Service Code and the Civil Service Management Code are contractual terms for civil servants and are issues on which we, in effect, negotiate. The role therefore of Parliament is an oversight but not a directive and final decision-taking oversight. I think the codes have to be ones that are finally agreed within the Civil Service—and that, in practice, coming back to the earlier discussion, means through the government of the day—but I think changes particularly to the Civil Service Code—because the Management Code is a terms and conditions handbook—are ones that should be subject, as they were a couple of years ago, to wide consultation, including public consultation, but the final decisions, because they are contractual terms, have to be taken by ministers at that point. What is important is that on the face of the Bill are the key principles that must be incorporated within such codes, but the fine print, if you want, are matters that should be left within the Civil Service after, of course, wide consultation, including with the Public Administration Select Committee or other select committees and with committees of the House of Lords that it is felt would be appropriate.

Lord Campbell of Alloway: On the code it is so terribly important to get to grips with exactly what you are saying. Is this code a code of guidance which you are putting forward, devised by the Civil Service, which has no legal efficacy but is in fact administered by the Head of the Civil Service without access to courts of law, because I think—and I am not quite sure—you do not have access now to the courts of law for a breach of whatever code you are doing. Could you deal with this. Could you explain what it is you are proposing.

Chairman: To get that clear, I think Lord Campbell is asking about the status of the current Civil Service Code and whether or not a Civil Service Code appended to an Act would for the first time establish some legal liability. I suspect the answer may be yes, but you may wish to comment.

Q376 Lord Campbell of Alloway: Thank you very much.

Mr Cochrane: I suppose we both ought to start off with the premise that neither of us are lawyers, so we bow to those who are. The Civil Service Code as such—which is, for want of a better phrase, a code of conduct—has no statutory basis at the moment and is something that was introduced after a lot of pressure and campaigning by some of our predecessors about 15 years ago. Generally, I think all of us have accepted that it would be better if it had a statutory basis. The Civil Service Recruitment Code, which is also one of these, is a document that is produced by the Civil Service Commissioners under the powers they have. I assume it would follow, if the provisions in the suggested Bill were to put the Civil Service Commissioners on a statutory basis, that their Recruitment Code would become in some ways a statutory document. I do not believe that any of the proposals that are before us today say much about the Civil Service Management Code as such. I do not think there is a suggestion that that would become a statutory document and our view would be that we would not want that to become a statutory document in that sense—because it forms part of civil servants’ contractual terms, to put it in an oversimplified way. It is one of these complications which is brought about by having three different
things called codes, and a real potential for confusion.

Mr Baume: The Civil Service Code of 20 or so paragraphs is part of the contractual terms of the civil servant. In that sense, were a civil servant to breach the terms of that code, they would be subject to disciplinary action within the Civil Service by the Civil Service as their employer and, therefore, in a sense it has a legal status in that context. I think the FDA said it would be reluctant to see the code attached to the Bill, simply because, for example, it has been amended three times in the past ten years, in an uncontentious way but with consultation—partly, as I said, as a consequence of the devolved assemblies in Scotland, Wales and Northern Ireland—but it does have a power within the Civil Service upon civil servants because it is part of their contract of employment. Therefore, because it would be perhaps inflexible to have it on the face of the Bill, having broad principles on the face of the Bill is very important indeed, recognising that the wording around those principles is something that should be, in our view, kept as a matter within the Civil Service, with the role of the Civil Service commissioners. Baroness Prashar steered through the last rewriting of the code in a very successful and very popular way. She made it much more user-friendly as a document. Does that clarify the point that was being asked?

Chairman: I think that does. Thank you.

Q377 Lord Tyler: To continue with the parliamentary oversight issue, I wonder whether you agree with the PASC committee report (paragraph 66) when they refer to the way in which a prime minister can make changes to the machinery of government. This is the architecture of Whitehall dramatically changed one Friday afternoon in the middle of a recess, when he abolished one department, created another, et cetera—which of course not only has a great deal of importance for your members but also can have a very disruptive effect on the whole machinery of government. The committee said such changes “can be disruptive and costly” yet is something which prime ministers “can and do make without any form of parliamentary check”.

Mr Cochrane: You are absolutely right, with the passage of years and with the break-up of what would be seen as centralised Civil Service bargaining, so that we now have different pay and service conditions in different government departments and even within some government departments, the implications of machinery of government changes are far more profound now on our members than they would have been 20 years ago. Twenty years ago, apart from trying to remember what the new name of your department was, in effect you just carried on. Now we have a position where in relation to some of the machinery of government changes that took place last year, departments are still trying to work through some of the implications of the terms and conditions. Also, again to be slightly facetious, I think the Government may be running out of names and acronyms for new departments. On the other hand it has always been such. Perhaps governments do it more often than they used to but they have always had this power to do it. Whilst, from our point of view, we would quite welcome a period of stability to let the current departments continue and to develop, whether that is a power that this Government or any other government would want to give up, I have some reservations about. But I am sure if you asked the individual civil servants working there they would say, “Please leave us alone.”

Mr Baume: Charles has picked up on the terms and conditions issues—and there are lots of HR issues that emerge out of all of this—but people should not underestimate the amount of time, people, resources that are needed to reorganise a department. Certainly the FDA view is not so much that this is not a power that should remain with government—and I did not fully understand what the PASC were arguing in paragraph 67—but it is the way you do it. Successful reorganisations of departments are those that take place with sufficient planning. I have never for the life of me seen why, if a government wishes to split a department, merge a department, do a reorganisation, this is a matter that cannot be thought through some months in advance, to give everybody time to work through the implication and possibly consult for a limited period before you make the change. One of the most successful machinery of government changes was setting up Jobcentre Plus, which brought together parts of the old Department of Social Security and the old Employment Department, which is where my personal roots lay, and that worked because 18 months was spent in putting together a new organisation, employing over 100,000 people, reconciling IT systems, different methods of dealing with the public, the flows in and out of money. All of these things take place behind the scenes and are very, very time-consuming and have an impact on the ability of government to give a quality service to the general public, or to more narrow groups, depending on the policy framework in the department. It is spending the time to plan ahead, maybe even thinking about the proper business case, rather than making these off-the-cuff announcements when the Permanent Secretary finds out six hours before the Prime Minister stands up in the House and makes the announcement.

Q378 Lord Tyler: But he does not make an announcement to the House. That is the point.
Mr Baume: He just makes it.

Q379 Lord Tyler: Yes. It just happens and it can happen in the middle of the recess. The select committee was particularly concerned that there was no parliamentary oversight in that particular action of government.

Mr Baume: I think that is a matter in a sense for Parliament. From our point of view, we want a process that is well managed and is thought through in advance, rather than trying to work through the implications once the announcement has been made, which is too often the position, with governments of all parties, that we find ourselves in.

Chairman: I am afraid one or two of our colleagues have to go at 2.30. It is not a discourtesy to our witnesses but the House of Commons sits at that time. I am going to call Martin Linton out of turn to ask his question.

Q380 Martin Linton: That is very kind of you, Chairman. I want to ask about impartiality, which has been mentioned once or twice, and the part of the Bill that talks about civil servants' integrity, honesty, objectivity and impartiality. It then goes on to say that special advisers do not need to have the latter two qualities, objectivity and impartiality. Impartiality by itself means nothing unless you say what someone is being impartial towards. Should it not really be political impartiality?

Mr Baume: It is political impartiality. I would have said that the political impartiality is that the Civil Service serves with—to use of Sir Gus O'Donnell's phrase—passion, pride, professionalism, pace for the elected government of the day. It is there to serve the government of the day; it is not a neutral body between government and opposition. But if the government of the day changes—and we saw this happening in Scotland, for example, last May with Labour to the Socialist National Party—it serves, with exactly the same level of commitment, professionalism, et cetera, an incoming party; in other words, it is there to serve the government of the day and it is part of the government—therefore it is not neutral or impartial in a sense between government and opposition parties—but it serves the government of whatever political colour with exactly the same zeal and professionalism, et cetera. That is what we are talking about. It is the political impartiality and an ability to serve different governments and, therefore, an obligation on individual civil servants to be able and willing to serve parties of different colours, whatever their own private personal political colour.

Q381 Martin Linton: Obviously it is important for the Civil Service as a whole to work for whichever party is in government. If a particular civil servant were to say that he was against selection in education and he would not work for a government that wanted to reintroduce it, should that person not be a civil servant?

Mr Baume: In my view, no. That person should not be a civil servant. You have to have the ability to be able to work through whatever policy the government of the day would put forward. All civil servants have private political beliefs, of course. They are people working in a political part of the environment—they are probably more political in that sense than many members of the general public—but they have to be able to use that professional ability to help formulate and deliver policies of whatever government is elected. It will mean that on one day you are setting up a particular policy and a week later you might be dismantling that policy. That comes with the job. Most civil servants are very proud of being able to do that. It is why they are there. It is not about campaigners and lobbyists and zealots, if you want, in that.

Q382 Martin Linton: The Civil Service Code defines impartiality as “acting solely according to the merits of the case”. Surely special advisers would act according to the merits of the case and it is a bit of an insult to special advisers to suggest that they do not.

Mr Baume: Special advisers are there because they believe in the programme of the political party in office and they are there to serve the individual minister. Let us be blunt: special advisers serve ministers, not the government. Civil servants are there to serve the government of the day; special advisers are there to serve their individual minister. In the real world they work for their minister. If that means the interests of their minister are different from the interest of government, they are there to serve the interests of their minister.

Q383 Chairman: The question that is really being asked is: Is there a distinction between political impartiality and some other form of impartiality as to the issue itself? I do not mean we could not care what the outcome was, obviously, but an impartiality that is wider than simply political impartiality. The code does seem to distinguish between those two at the present time. Is that a proper distinction or do you see a distinction between those two?

Mr Cochrane: I think there are two impartialities, if that makes sense. There is the political impartiality which Jonathan referred to and which is extremely important, but there is also the impartiality of civil servants in dealing with their casework, if you like. For the civil servants who are sitting behind the desk in a Jobcentre, it is just as important that not only are they politically impartial but they are impartial in their day-to-day dealings with the public. The question is perhaps more about what are the qualities...
of special advisers. We are reasonably comfortable with what is being said about civil servants.

Q384 Martin Linton: This law proposes to make a distinction between the code as it applies to civil servants and advisers. It does not apply to special advisers but it does apply to civil servants. Clearly special advisers do try to act on the right side of the case; so do ministers; so do governments. They may have a different perception of the merits of the case, but they still believe in the merits of the case. Otherwise they would not do it. It implies somehow that they have some exterior loyalty to some foreign ideology or something, but surely that is not the case.

Mr Cochrane: I am sure you are right. We are sitting here today trying to comment on the Bill as it impacts on our members and our civil servants. Jonathan and I do have an interest in special advisers and in many cases very much welcome the work they do, but that is, if you like, not the role we are sitting here to discuss. It is a slight way of ducking the question.

Martin Linton: It is raised by the back door.

Chairman: I think we have to move on to special advisers a bit later.

Q385 Lord Plant: I have a supplementary about Whitehall reorganisation. I am intrigued in terms of the sort of timescale of these things. From where you sit, how would you judge something like the reorganisation of something like the Department of Education when the new Prime Minister came in last year. How long did it take for that kind of reorganisation to settle down and for things to get going in a focused way again? I am not asking you for the merits of the reorganisation but how long did it take to work?

Mr Cochrane: The short answer is that it is still unresolved and there is still work taking place in the former Education Department to deal with the consequences of the machinery of government changes last year. I think it would be fair to say that the merger of Inland Revenue and Customs & Excise, which was known about in advance and worked to for a considerable time, has largely been implemented. One can draw conclusions from that, picking up on Jonathan’s point. Some planning of the business case must be a better way of doing it than a snap decision overnight and then trying to deal with the consequences for government. At the end of the day, the departments are there to provide a service to the public. If they are then having to devote resources into a catch-up process about trying to fit in with new names and new responsibilities and new ministers, it cannot be the best way of doing it.

Mr Baume: The Treasury certainly in recent years has not allowed any additional funding to be devoted to managing the reorganisation of departments, so the departments which end up merging, apart from all the businesses of splitting budgets and other quite complicated matters, do not have any extra money available to manage that process. All of the time and energy that is spent rebuilding a department, or merging or dismantling or whatever is done, has to be found within the resources that were previously made available for its administration and spending programme. That is money diverted from other work. I would say that it generally takes about two years to manage a machinery of government change.

Q386 Lord Norton of Louth: This question is really to do with the role of the Civil Service Commission, particularly as to whether it should have the power to initiate investigations of its own. We have received rather different evidence on that. The Commissioner herself is rather sitting on the fence. The FDA submission to us endorses the Public Administration Select Committee’s recommendation that it should have the power to initiate inquiries. Would you like to justify the recommendations or think it through. What would be the resource implications for the Commission if it had that capacity?

Mr Baume: I am smiling because I think that is one where we internally have also been hesitating. I have personally spoken to the Civil Service Commissioner and I know where her reservations have come from, but obviously she will be giving evidence and can explain all of that. We also have some doubts because we certainly do not see it as the role of the Commission to be spending most of its time involved in investigations. We are also aware that, if the power is there, people will try to use it for party political reasons. That is just the way the world is, that people will put in a complaint. We have seen it over the behaviour of MPs in other contexts, where investigations have been be launched. We think that there ought to be a power there, because the need might arise, but it should be used on a very circumspect basis. I think in the end it must be a matter for the Commission, perhaps in consultation with the Head of the Civil Service, because, clearly, it could be a matter that ministers may not wish to see investigated but there may be a legitimate concern. I think the Civil Service has a role there—as the Head of the Civil Service rather than perhaps as Cabinet Secretary—to give a view on that. In a sense, the constraints around the Commission are the resources made available to it. Its budget is fairly small in real terms and most of that is spent on day-to-day work, on recruitment/appointment work. In a sense, if that budget is kept reasonably tight, then the constraint is there simply because the Commission would not have the time or the resources to mount such investigations. As a provision, however, it seems to make sense that that provision is there for the Commission in certain special circumstances which only they can determine. In terms of third party
Northern Ireland Civil Service seems to me tied up with the whole issue of government in Northern Ireland and matters for them but I think it would have been helpful if the Bill had spelt out the reasons, so that we were all clear rather than at the moment us all having to speculate about why we think it is. Also, in the spirit of the changes that have taken place to the running of the various security services since the 1990s, openness about the reason for this is something that everyone would welcome. The second point I would like to mention is that there is a wider issue for that definition in the Bill, in that, unlike the draft bill produced a few years ago, which attempted to define what Civil Service was and attempted to set out certain bodies which were not part of it—which was a difficult task in itself—this Bill does not, apart from those five exclusions, really help us in defining who the Civil Service are to which the Bill will apply. In the evidence that PCS and Prospect (two of the other Civil Service unions) submitted yesterday, we tried to explore this in much more depth, partly because we think there are all sorts of anomalies. For example, what is the difference between a civil servant and a Crown servant? Is a servant of the Crown different from a Crown servant? They are all phrases that are used in various legislation. There is even the phrase “in Crown employment”. I can speculate on what the difference is but if we have this once-and-for-all opportunity to have the Bill, it does strike us that it should be very clear. We have referred in our evidence to a recent case that went to the Employment Tribunal which involved the Adult Learning Inspectorate. We had always assumed that was a non-departmental public body, but for the purpose of the Employment Tribunal decided that those people were “in Crown employment”. That leads us on to something which, again, we have said in our evidence. If people are in Crown employment—going back to Jonathan’s point about conventional or normal contractual terms—there are all sorts of employment law anomalies which do not apply to people who are covered by those categories. I was going to say it is a real dog’s breakfast, but I am sure that is not the sort of language one should use here. It is a very confusing situation. It is one of these things that is hugely important to us. Let us have some clarity in the Bill so that everyone knows what they are. It is hugely important to our members to be clear about what they are—if they are a civil servant, what does it mean?—and to have clarity about the law, and, hopefully, in terms of employment law, to be put on the same basis as everyone else.

Chairman: I think probably you have given us the ideas that we need to ask the Minister about when the Minister comes. Thank you for that. Perhaps we could move on.

Q388 Lord Plant: This is a question about appointment on merit. As you know, the Bill states the principle that “A person’s selection must be on
merit on the basis of fair and open competition” and then it does list certain exceptions to that: “(a) an appointment made directly by the Queen; (b) a diplomatic appointment as a head of mission or as Governor of an overseas territory; (c) an appointment as special adviser; and (d) a selection excepted by the recruitment principles.” The select committee and others have said that this list of exceptions needs greater justification. Furthermore, if they can be justified, should, for example, a selection excepted by the recruitment principles be made by the Civil Service commissioners rather than by the Government, if there is to be a move away from purely meritocratic principles.

Mr Baume: Working through that list in clause 34(3) of the Bill, there are particular appointments by Her Majesty and that is not something we would want to intervene in. Surely we share the view of PASC that there is no reason why any member of the Diplomatic Service should not be appointed by a normal process. That does not mean that there will not be people from outside the Diplomatic Services. Both Conservative and Labour Governments have appointed on occasions politicians to diplomatic roles, and it may be that those appointments are perfectly appropriate but they should be made through fair and open competition and not as a political act. Therefore we do not think there should be any exception from fair and open competition for the Diplomatic Service. Special advisers are, of course, appointed individually by ministers. Again, that is the principle of special advisers, and we would not seek to argue with that. As to (d), the selection from the exception there, I have heard the argument made that there are certain jobs and short term appointments where it might be appropriate for that to happen—and if you listen to the argument colleagues from the Cabinet Office, for example, will make there is some merit in that. However, this is very broadly drafted and the explanatory notes do not leave you much the wiser about what is in reality intended here. Therefore, I think their conclusion would be that there might be a case—I think there probably is a case—for having some exceptions to the normal rules but these need to be quite tightly constrained. Two points: firstly, they should be made by the Commission, not by the government—it should be for the Commission to determine a good case has been made why this post or a small number of posts should be exempted for these reasons; secondly, they should be transparent. We should know through the annual report or through some other mechanism, but certainly on a timely basis, why exceptions have been made, what was the argument in that particular case; just as we have a report, of course about appointments that are made through the normal channels. So, just in conclusion, no appointments should be excepted, I think, from the Diplomatic Service. If an ex-minister is capable for a diplomatic post there is no reason why they should not compete for that post in the normal way. Secondly, the Civil Service exceptions—yes, there may be a case but it should be explained and it should be extremely transparent and managed through the Commission itself.

Q389 Chairman: Do you agree with that?

Mr Cochrane: Yes, but could I add two quick points? I think it is important that we are all clear quite what these exceptions might be and what the consequences are, because I have heard it suggested that what some people would like to see is a change from what we have at the moment, where the Civil Service, to use the old speak, runs a competition with an opening date, an advertisement and a closing date, and then all the applicants who have applied by the closing date are then considered and put into order. Moving to a system whereby the competition would open, people would apply and the first suitable one would then be appointed, which is a fairly significant change from where we are now, may well be the right answer—I doubt, personally—but I think we need to be clear if that is one of the proposals. The second consequence is that there is an issue at the moment about what happens when people are appointed in good faith on their part to the Civil Service and it subsequently transpires that it is in contravention of the rules and currently those appointments are regarded as null and void, which is perhaps right in a legal sense but it is disastrous for the individual—and we include this in our evidence—and I think some provision needs to be included here that if through no fault of their own, if for an individual the appointment is null and void then there is a way of trying to find a fair remedy for that.

Q390 Sir George Young: The final question on special advisers. We have read what the FDA said in evidence, which is that the current wording in the Bill, which refers to them “assisting ministers”, is inadequate or at least incomplete. I have also seen what PASC said in their report, which is this: “It needs to be absolutely clear in primary legislation that no special advisers should be able to authorise expenditure, or to exercise either management functions or statutory powers.” Would you go along with that, that there should be something on the face of the Bill restricting what a special adviser can do?

Mr Baume: The short answer: absolutely, yes. I share the view of PASC. I will not go through the FDA’s evidence again because obviously you have read it, Sir George, and looked at it, but we need to define much more clearly the role of special advisers, making the point that the FDA certainly has been very supportive of the role of special advisers—we have special advisers in membership. But it is important that their role is clearly defined on the face
of the Bill, given that they are such an important exception to the normal rules, and we would endorse the PASC view that there needs to be that included within that role, around not just the management of the all the civil servants but also authorisation of expenditure, etcetera, for which the Permanent Secretary and Accounting Officer would otherwise be responsible.

Q391 Sir George Young: Perhaps the next question can be equally robustly answered. Should there be a cap on the number of special advisers? 
Mr Baume: Not as robustly answered. A very, very difficult problem; in terms of the FDA we are a bit split on this matter. I understand Sir Robin Mountfields concerns which he expressed very eloquently before PASC, and certainly in Scotland there is a cap on the numbers of special advisers in the Bill—I have forgotten the name now—that sets up the Scottish Parliament and the Scottish Government. If you set a cap you will end up with a norm; if you set 100 you will end up with 100 special advisers. If you set a budgetary constraint special advisers will work for £20,000 a year because they just want to work for a couple of years in central government, etcetera. It is a very difficult one. We do not have the answer to that. To date, to be fair, I do not think there has been a problem with numbers—whether it is Labour or Conservative actually the numbers have rarely varied round about Number 10. Cabinet Ministers under successive Prime Ministers have generally been allocated two special advisers, maybe the odd part-time person or the unpaid adviser because we do not come out of public purse. It has actually been in Number 10 where there has been an expansion of numbers or a contraction, but even then you might be talking between 30 and 40 people rather than between 30 and 300 people. But clearly there is the ability at the moment for a future Prime Minister to decide to appoint 1000 special advisers from the public purse, and if you have a strong majority in Parliament you would not be challenged on that in the reality, and trying to find a reasonable way—I tend to feel that somehow commonsense between the parties dictates that this is not a route that one particular Government will want to go down to set precedents.

Q392 Chairman: So the answer is maybe?
Mr Baume: The answer is maybe, and I think we need to think through—I think there is an obligation to try and think through—a satisfactory parliamentary oversight of the system of special advisers for everybody's benefit, because it is money from public funds. I am sorry to prevaricate on this but it is a very difficult one to answer.
Chairman: I do apologise as well because we are really short of time now

Q393 Mr Chope: It has been suggested by some that we should recognise special advisers are political advisers, call them such and fund them in the same way as we do in Opposition out of the short money, and then that would stop the public confusion which there is at the moment. Do you agree with that?
Mr Baume: The only slight caveat to that—because I generally agree with the sentiment of it—is that there has been a separate debate about the management of special advisers, who is responsible, how could the special advisers fit via the powers of the Permanent Secretary, and trying to get that balance right of the Permanent Secretary having an ability and an oversight to special advisers, or should the special advisers be solely responsible to the minister and managed entirely by the minister? Because special advisers are temporary civil servants, a special category of civil servant, therefore you have to have the definitions right and you have to have a chain of management internally that operates effectively so the special advisers are part of a broader Civil Service machine, whilst recognising their special status. So you could have an afternoon seminar—in fact we have had afternoon seminars—on the role of special advisers, but just to get those nuances that we do not get lost in the broader issues I think for the face of the Bill certainly defining the powers very rigorously would be important, but maybe there is the space for a separate discussion on how we actually confirm their status because they are a valuable part of the system, as long as it works effectively, which, to be fair, most of the time it does.
Fiona Mactaggart: You have talked a lot about impartiality in relation to political impartiality but there is another impartiality principle, I think, which is the principle that public powers should not be used to further the private purposes of those who are entrusted with it, and is there something that we need to put in this Bill to prevent the abuse of public power, as I think has been illustrated by a report released by the Public Accounts Committee today. Is this something that should be in this Bill to prevent that kind of abuse of public power by civil servants or former civil servants?

Q394 Chairman: Have you never thought about it?
Mr Cochrane: No, I have quite often; I am trying to think of the short answer to the question! Part of the answer is the point I made earlier, that if there is a problem—if there is a problem—it relates to a very small part of the Civil Service and the overwhelming half a million in the Civil Service are never going to be in that situation, nor should they be. But I think it is also much more about a much greater scrutiny of what, for a shorthand, I would call the privatisation process, and I think that is where the real answer to this lies. With hindsight—and hindsight is a wonderful thing—that issue could have been foreseen.
and I think it could have been controlled, and perhaps there is a role for Parliament in taking a much greater view over these proposals around outsourcing and contracting out, which could have prevented that problem happening.

Q395 Fiona Mactaggart: I cannot see how Parliament could have dealt with some of the commercial confidentiality issues that were coming up.

Mr Baume: Commercial confidentiality is certainly something that we have argued about for a long time. Successive governments have said there is no reason to employ commercial confidentiality for the most part, but then successive governments then choose to blanket almost anything that they do not wish to have scrutinised with commercial confidentiality. Much greater transparency and far less use of commercial confidentiality I think would be a boon for government in the round. I think we have all felt concerned—the National Audit Office Report this morning, I have not read it yet but I have read the newspaper reports and the news coverage and there are issues around the Foreign Office international development body as well, which have well publicised. I do not want to get into the detail of all of that. But there is also a role for the National Audit Office and Select Committees in scrutinising the ongoing work of departments rather than scrutinising retrospectively the activities of departments. I do not think there is a big problem out there but I think there is an issue about the scrutiny of these complex decisions around privatisation, or whatever, of trading funds and things like that, that actually should be subject to much greater continuing scrutiny than we receive, and a general view that commercial confidentiality is overused far too much in government to mask what should be legitimate scrutiny by Parliament or other bodies of actually what is taking place. It is not a party political thing; I think successive governments have used that facility far too much.

Q396 Lord Maclean of Rogart: Two questions about the terms of employment of civil servants in the Bill. Should the Bill recognise and provide for circumstances in which the obligation of civil servants to serve ministers as their employers may have to be modified by a wider obligation to serve Parliament or the public? The kind of circumstance in which it might come up would be where a Select Committee was seeking answers to factual questions, which arguably the government would not necessarily wish to disclose. Not a matter of policy but a matter of fact. That is the first question. The second, on the terms, is related to Fiona Mactaggart’s in a slightly different way: should the initial contract recognise that following the termination of employment in the Civil Service there may be jobs which are unsuitable and which should not be acceptable and should not be capable of being accepted after the Civil Service has ceased in that role?

Mr Baume: Just picking up that latter point, because I am conscious I did not fully answer Fiona Mactaggart’s question. Just in the business appointment rules issue, I think there needs to be a rigorous system of the business appointment rules that do actually say there are certain roles that it is not appropriate for civil servants to go into, and it has to be balanced—particularly when the Civil Service is shedding jobs, as we are at the moment, and people may find themselves having to find new employment at the age of 50, and if you have spent a number of years working in a particular area of expertise inevitably your expertise is in that field, and therefore it needs to be a commonsense application of those rules. None the less, I think it is in the public interest and the interests of the Civil Service that there is a rigorous process of vetting future appointments for more senior people, as long as that is handled fairly and with sensitivities to people’s personal situations. I think that is already in place—and we can argue about fine-tuning the system—so I do not think it is anything that needs to be picked up in the Bill itself, but I think it is something that should continue to be a rigorous process of the exiting, if you want, of civil servants—it could be post retirement—just as I think it is entirely appropriate that there is a system of vetting memoirs, diaries, etcetera, of civil servants who leave public office. I think these are proper mechanisms to have in place.

Mr Cochrane: If I may add, I think that there is a very technical answer to that which I think is a disconnect between the business appointment rules and TUPE transfers, which if you really want me to I can do you a note on, because there is a bit of a problem about the connecting thing, that people are not opting to go but theoretically they are being transferred to a new employer, which is different to someone applying for a job. But it is quite a technical point. The other part of the question is I think there are two answers about the employer point. One is a contractual one and we very much hope that the Bill will make it crystal clear for ever more—perhaps that is a slightly over ambitious statement—that the employer of civil servants is the Crown, full-stop, and there is no ambiguity about that. I think it is into that but it would just be nice to see an absolutely straightforward statement because at the moment there is quite a bit of confusion about it and it is confusion that has got involved in court cases and so forth, and it does go back very much to the machinery of government point again. If we are going to have constant machinery of government changes then it needs to be even clearer that the
ultimate employer is the Crown. I think there is a second point, which is perhaps a more philosophical but equally important one, about whose the responsibilities are and is the responsibility solely for the minister, how much is the responsibility for Parliament, and increasingly with the partnership working in which the Civil Service is involved now how will partnerships fit into that? An early example of that was government offices which had been set up and I think generally worked very well indeed, but in theory the people are still all responsible to their individual Secretaries of State, which is not the best way of running things, and actually even before you start getting involved in outside agencies as well as in partnership operations. So I think some more clarity about that in trying to encapsulate that into words would probably be helpful, provided that it does not lead to more confusion from where we started.

Mr Baume: Just a final point.

Q397 Chairman: On the final point, yes.
Mr Baume: Just on accountability. This is an issue that we have been looking at for perhaps 20 years or so. Certainly the FDA view is that civil servants work for the elected government for their appropriate minister, etcetera, and the wording is set out in the Code. But we have always recognised that on the one hand there are some individual civil servants who have a wider role to Parliament as accounting officers or duties as lawyers—a third of FDA members are lawyers in different guises, prosecution or government legal service—or statisticians who have responsibilities under wider codes, the Statistics Commission, and bodies like that. So there are those wider accountabilities. But the Civil Service does have in existence an accountability and a responsibility, if you want, to Parliament over and above its day to day obligations to the government of the day, because the Civil Service is there not only to serve the government of the day but also to be in a fit state to serve future governments after general elections year by year, and that wider accountability is less straightforward in terms of its definition, but it is one factor why we think a Civil Service Bill is appropriate, because Parliament has an interest in the continuing future of the Civil Service and the Civil Service that is, to use that phrase again, fit for purpose and able, following a general election, to come in and serve a future government. Enshrining that in legislation is difficult but it is something that I think very important in understanding actually why we are here arguing about the detail of that part of the overall Bill that relates to the Civil Service.

Chairman: Thank you very much indeed. Thank you for coming along. We are so sorry it went over a bit but we are grateful for all that you have said.

Memorandum by Committee on Standards in Public Life (Ev 20)

CIVIL SERVICE PROVISIONS

BACKGROUND

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

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

GENERAL

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

1 Respectively Cm2850-I (May 1995), Cm 4557-I (January 2000) and Cm 5775 (April 2003).
4. Annex A lists the recommendations in the Committee’s Ninth Report—its fullest statement about a Civil Service Act—and an indication of whether the recommendation is covered by the provisions of the draft Bill. The Committee does not necessarily remain committed to all its earlier recommendations, recognising that in certain aspects, the situation has changed materially since 2003. For example, in respect of the Civil Service Commissioners’ power to initiate an investigation into a complaint about breach of the Code, the Committee is aware that the Commissioners themselves are no longer proposing the need for this power, that they feel adequate arrangements may in any case exist through consultation with the Head of the Civil Service over emerging concerns, and that a provision for additional Commission functions exists at clause 40 of the Bill if needed. In general however, the Committee believes that most of its recommendations from 2003 remain appropriate.

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

**Committee Comments on Part 5 of the Draft Bill**

**Application**

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

**Codes of Conduct**

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

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

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

10. An alternative approach could be to adopt the Committee’s Ninth Report recommendation, that the codes for both civil servants and special advisers should be promulgated by means of affirmative order. We recognise that this approach would reduce the flexibility with which the Codes could be changed. But we...

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2 In the current Civil Service Code, “Impartiality” refers variously to political impartiality; serving the public impartially; and reflecting a commitment to equality and diversity.
believe that the general argument in favour of certainty and Parliamentary accountability has been accepted in principle anyway by the Government in its acceptance of the need to move the management of the Civil Service from a prerogative to a statutory basis.

**Appointments, Status & Powers of the Civil Service Commission**

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

12. We note the provision for the Commission to approve exceptions to the fair and open competition requirements where these are “justified by the needs of the civil service”. While we understand that similar wording already exists in the recruitment code (and that the Ninth Report acknowledged exceptions to selection on merit in its recommendations), use of this power would clearly require rigorous justification and monitoring. We would also raise the question of whether it is in fact the “needs of the civil service” which are relevant in justifying exceptions, or whether the test should be justification “in the public interest”.

**Special Advisers**

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

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

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

**June 2008**

Annex A

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

**Recommendation**

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

In particular, this should:

(a) define the status of the Civil Service
(b) include a statutory obligation on ministers to uphold the impartiality of the Civil Service
(c) set out the responsibility of the Civil Service Commissioners for ensuring that the principle of selection on merit is properly applied, together with the ability to make exceptions from that principle
(d) set out the Civil Service core values, including the overriding principle of selection on merit

✓
DRAFT CONSTITUTIONAL RENEWAL BILL: EVIDENCE

(e) grant powers for the Civil Service Commissioners to investigate, on their own initiative, and to report on the operation of the Civil Service recruitment as it concerns the application of the principle of selection on merit
(f) provide for the First Civil Service Commissioner to be appointed after consultation with opposition leaders
(g) define the status of special advisers as a category of government servant distinct from the Civil Service
(h) state what special advisers cannot do
(i) include power for the Civil Service Code and the Code of Conduct for special advisers to be given effect as statutory instruments requiring the approval of both House of Parliament and amendable by the same procedure
(j) state the total number of special advisers, with an upper limit subject to alteration by resolution approved by both Houses of Parliament
(k) provide for two special adviser posts in the Prime Minister’s Office with executive powers
(l) define special advisers with executive powers by derogation from the restrictions on what other special advisers can do
(m) require an annual statement to Parliament on paid and unpaid special advisers.

Memorandum by The Executive Committee of the Better Government Initiative (Ev 19)

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

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

PREPARATION OF POLICIES AND LEGISLATION

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

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

— the setting and achievement of high standards for the preparation of legislation and major policy proposals;
— the routine use of consultation documents—expressed in terms that enable both Parliament and the public to follow the argument—that make it clear on what evidence policies have been based and why particular options have been chosen;
— a reduction in the volume of legislation;
— strengthening the capacity of Parliament to hold the government to account (one of the government’s own express aims).

The four are of course closely linked. Rigorous standards of policy preparation backed by consultation processes that engage all those with an interest in the proposals including, crucially, those who will be responsible for implementing them, would reduce the number of flawed Acts requiring adjustment and amendment in subsequent legislation. Strengthened Parliamentary scrutiny would be a powerful disincentive to rushed or inadequate preparation.
The BGI’s report *Governing Well* includes a wide range of recommendations that are relevant to these issues. Those proposals that are perhaps most relevant in the context of the Constitutional Renewal Bill are:

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

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

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

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

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

The text of our exchange of correspondence with the Leader of the House of Commons is on our website.

**The Civil Service**

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

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

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

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

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

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

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

— a limit on the use of Special Advisers either by numbers or by a financial constraint as Lord Butler, a member of the BGI has proposed. We also support his proposal that Special Advisers should have a separate status from Civil Servants given the extent of the differences in the values they are expected to observe and their rules of appointment;
provision for the Civil Service Code, and that for Special Advisers, to be subject to approval or amendment by Parliament (preferably by Affirmative Resolution);

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

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

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

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

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

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

May 2008

Examination of Witnesses

Witnesses: Sir Christopher Kelly, Chair, Committee on Standards in Public Life, Sir Christopher Foster, Chairman and Sir Richard Mottram, Better Government Initiative, gave evidence.

Chairman: Good afternoon and can we welcome you to the Joint Committee and in particular today to the discussion of the proposed Civil Service Bill. Can I also apologise right now for (a) keeping you for such a long time and (b) then to tell you that as a result of other colleagues’ parliamentary duties we may be short of a quorum in about 20 minutes from now, and the consequence of that is that we are going to briefly ask you as much as we may and at the end what we have not asked you, we would be grateful if you would be good enough to respond in writing. But let us start anyway. Lord Tyler.

Q398 Lord Tyler: Do you have particular concerns that ministerial or special adviser behaviour either in the past when you were all very distinguished members of the Civil Service, or more recently, has failed to respect the political neutrality of the Civil Service? And do you think that there is a legislative opportunity with the current Draft Bill or do you think that would not be appropriate to try and deal with that, assuming you think there is a problem?

Sir Christopher Kelly: Although you are looking to me I would defer to Richard for more recent experience of ministerial advisers.

Sir Richard Mottram: If we take those two questions, on the first question what I do not think is the case—certainly in my experience—is that ministers are actively seeking to undermine the political impartiality of the Civil Service. So I do not have experience of many examples of that happening. What I think has been happening—and perhaps to an increasing extent—is that ministers give relatively less weight to the contribution of the Civil Service in the formulation of policy and in advising generally and that the balance of knowledge and expertise inside government has shifted away from the Civil Service. So I think the issue is whether that is or is not a desirable development—and obviously as a former civil servant I would have views about this, which the Committee might not share—but I certainly think that there has been a change and that the weight and the influence of the Civil Service has been reducing, particularly in the centre of government, and personally I think that is a pity. On the second of your questions, I think the answer is legislation is a good idea if it is good legislation. So if the legislation itself gives support to and makes stronger some of these aspects then it is a good idea. I personally do not believe that this Bill in its present form is particularly strong legislation in that sense.

Sir Christopher Foster: I agree absolutely but may I just add two points from our own written evidence to you where we recommend: “A duty of ministers, also in the Ministerial Code at present, ‘to give fair consideration and due weight to informed and
impartial advice from civil servants’ as well as from other sources and to ensure that opportunity is to provide that advice.” That is the duty which directly relates to one of the points that Richard Mottram made. We also talk about political impartiality by suggesting for inclusion in the bill, “A duty of civil servants to serve the government of the day, but also to behave in such a way as to be able to secure the confidence of a future administration of a different political persuasion.” Those are the sorts of things which we have in mind as being very germane to this particular issue.

Sir Christopher Kelly: I have very little to add to what Richard and Christopher have said. My direct experience of this is much less recent than Richard’s. Certainly there were concerns about this when the Committee on Standards in Public Life published in its ninth report, which is now three or four years ago. As to whether legislative provisions have any drawbacks, it is as Richard said—good legislation does not. I think part of the problem of course is that if you fix something in concrete it becomes less flexible; if, on the other hand, you rely on generalities then it becomes less useful as a guide to behaviour.

Q399 Lord Norton: Following up on the point about protecting impartiality. It may be there has not been a problem in terms of ministers trying to erode the impartiality of the Civil Service but there may be a case for at least ensuring it is protected in the future. The Better Government Initiative of course in their evidence recommends there should be a statutory duty on ministers to have regard to that impartiality. So perhaps we could start with Sir Christopher Foster, since he put in that evidence, what difference do you think that would make in practice and is there not a problem if you ensnared that in legislation you are then creating problems in terms of whether it is justiceability or not?

Sir Christopher Foster: The first point is I think we do believe that this is such an important issue, and so important for the future not only for the Civil Service but of government, that we recommend it. We do not pretend to be experts on justiciability. I am sure you will be getting evidence from elsewhere. As we understand it, the procedures at the present moment are justiciable in the sense that, as procedures, they can be examined under Judicial Review. But less clear, perhaps, is to what difference this particular change would make. I do not know if either of my colleagues have any thoughts on this.

Sir Christopher Kelly: I suspect that the effect of a statutory duty by itself would be largely symbolic, which does not mean to say that it is not an important piece of symbolism, but it would be largely symbolic. I think you need to look at the package as a whole. If there was no legislative underpinning for this very crucial aspect of the codes, and if the codes themselves were not even subject to affirmative order, then I think one would begin to worry about whether the underpinning was strong as you would want it to be. So I think you would need to look at this as part of the overall checks and balances and not just in isolation.

Q400 Ian Lucas: Sir Richard, I just want to pick you up on one point you referred to. You said that there had been a shift away from taking advice from the Civil Service.

Sir Richard Mottram: Yes.

Q401 Ian Lucas: To whom?

Sir Richard Mottram: I think to a combination of special advisers and others. I certainly do not think that this is a trend that is wholly undesirable—I was not suggesting that, because as those of us who were civil servants have said on many, many occasions we do not claim in any way that the Civil Service should have a monopoly of advising ministers. So these are all balance questions. What I was saying was that over the last 30 to 40 years there has been a developing trend towards giving more weight to the role of special advisers and that has speeded up, and I think a question for the Committee is how far they wish that trend to continue or not to continue and what safeguards, if any, there are in the Bill as drafted that would prevent that trend actually, if the government so decided, speeding up.

Q402 Ian Lucas: By “others” do you mean think-tanks?

Sir Richard Mottram: Yes, think-tanks, consultants, all sorts of people. As I say, I am not arguing that that is undesirable.

Chairman: I am going to call on Lord Campbell now. He asked that we should circulate beforehand the note of Lord Butler, and I think you have had the opportunity to see that. Lord Campbell, perhaps you would be happy to ask your questions?

Q403 Lord Campbell of Alloway: I hope you have had an opportunity to look at the note?

Sir Richard Mottram: Yes.

Q404 Lord Campbell of Alloway: First of all—and nobody has dealt with this so far today—we have heard quite a lot about special advisers but nobody has dealt with the problem. Do you agree with Lord Butler’s view that a change in the status of political advisers should be so that they are no longer civil servants but are financed by the extension of “short” money through the government party; that this would have the additional effect of limiting their number. I will leave experts for the moment because you get into a tangle if you try to deal with those at
the same time. Special political advisers, what are you views, sir?

Sir Richard Mottram: I think the point that Lord Butler is making—and I think he does differentiate himself really between special advisers and what we might call expert advisers, and I will come to them in a second—is that if, as I think most people would think, a civil servant is defined actually by the way in which he or she is recruited and by the values that he or she is expected to uphold, then special advisers do not look much like a civil servant. I think the reason why they have been treated as civil servants—although you would have to ask government witnesses this, and I am not a government witness, obviously—is because for all sorts of administrative reasons it is quite convenient to treat them as a category of civil servant, and that is to do with how they are paid and all the rules that govern their conduct. But I think what Lord Butler is saying is that at the very highest level of description special advisers do not look like civil servants and perhaps it would be helpful if we got away from the confusion of treating them as though they were. Coming on to expert advisers, under the Bill the Civil Service Commission could itself, if it felt it appropriate, actually give exemptions to expert advisers so that they could be recruited as civil servants on a temporary basis within the framework of the Bill and within the framework of the Civil Service Commission’s rules. So going down Lord Butler’s route would not mean that it was impossible for government to appoint expert advisers outwith a limit to do with special advisers. The third point, what Lord Butler is obviously seeking to do through this—and I am not here to speak for him, he is rather more grand than me—is to cap the number of special advisers, and obviously the Committee has no doubt been looking at that and other Committees have looked at this—I know the Public Administration Select Committee has looked at this and argued probably against a cap. What I would say is I think that the merit of this is that it is quite an elegant and interesting idea. It would probably create some bureaucratic difficulty. What I think the Committee has to ask itself is if it does not go down this sort of route, under the framework of the Bill as drafted there is in my view nothing which would prevent a future government—I am not suggesting either the present government or a future government has this in mind—virtually reversing the ratio of civil servants and special advisers and politicising every senior job in government. This is not prohibited under the Bill as drafted. I think that is my concern; this is one way of avoiding that. It is quite an elegant way of doing it; others think it is inappropriate to limit the number of special advisers.

Sir Christopher Foster: Perhaps I could just add one point to that because in the BGI we did discuss this, we had the benefit of knowing what Lord Butler was going to write to you, and in general we do support it. The particular mechanism, whether it is a financial ceiling or whatever ceiling, is much more arguable, but there should be some effective ceiling of that kind we thought was appropriate.

Sir Christopher Kelly: I do not have the advantage of having had a discussion in the Committee on Standards in Public Life on these issues as Better Government Initiative clearly has, so this would be a personal view. I think the Lord Butler proposal in effect is recognising reality; the question is are the bureaucratic implications of doing that a price worth paying to make concrete what everyone recognises to be the case? What is clear to me, which is a slightly different point, is that whereas the Governance of Britain paper said it wanted to make the position of special advisers and the relationship with civil servants permanent in the forthcoming legislation—I think these are the words they used—actually the Bill does not seem to achieve that end.

Q405 Lord Maclennan of Rogart: This Committee has received varying advice about how Parliament might be involved in overseeing the operation of the Service, whether through approval of its codes or through scrutiny of ministers’ powers and ministers’ powers of the managing of the Civil Service. I wonder if we could hear from our witnesses this afternoon on that.

Sir Christopher Foster: Our view is very much that we see civil servants as being responsible to the government. We do see Parliament as having a role if the Select Committee wishes to scrutinise some particular area of government or its ministerial behaviour. That is perfectly reasonable. We also think that there is a strong case for a parliamentary resolution, in a sense requiring the government to set out its principles on this, as indeed on other matters, and that the government should then respond by in some sense stating its principles, its codes as being in response to such parliamentary resolution. Our idea here is twofold. On the one hand we do believe the time has come to have some greater sanction than perhaps the sanction provided by the government in some sense determining its own regulation in these matters, but we are extremely reluctant at this stage—and we probably hope forever—to contemplate a truly legalistic set of sanctions to ensure that these codes are operated effectively.

Sir Richard Mottram: Could I add to points? One is, I think there is a very interesting question of balance in how Parliament deals with the Civil Service if it is the wish of government and of Parliament that the Civil Service should be a politically impartial organisation because the thing that you absolutely want to avoid is so much discussion of the Civil Service in a partisan way that you undermine its political impartiality. At the same time obviously you
have to ensure that it is being properly scrutinised and the way in that is done, it seems to me, is through the work of the Public Administration Select Committee and through the terms of competence in the work of the Public Accounts Committee and so on. So I do not see a need for any fundamental shift in the constitutional relationships and I think it is very important in our constitution that civil servants, as Christopher said, are seen to account to Parliament through ministers and that Parliament holds ministers to account for the way in which the civil servant is being organised and managed, but Parliament does not get into the detail to the point of itself beginning to erode political impartiality. I think that is quite a nice little balance that has to be struck.

Sir Christopher Foster: And we do actually say we think that Parliament should approve the codes and also the amendments to the codes as part of the process.

Sir Christopher Kelly: I very much endorse what has just been said. When my committee looked these issues as long ago as 2003 they actually recommended that both the Civil Service code and the special adviser code should be subject to affirmative order and I do not think we really understand why there should be any difficulties in doing that.

Q406 Lord Maclean of Rogart: Slightly unrelated but a cognate supplementary, you mentioned that civil servants should be accountable to Parliament through ministers but that slightly underlies a difficult problem that may arise if civil servants see a catch between the public interest or their duty to the public and their duty perhaps to the honesty and truth if they withhold, for example, purely factual information. Do you think that the legislation we are contemplating ought to recognise that the obligation of civil servants may be wider than the direct accountability through ministers?

Sir Richard Mottram: I do not actually because I think that if you get into that sort of argument you get into quite a slippery slope. I think the duties of civil servants are quite clear and in the version of the code that the government published recently I think they are well set out—I was slightly involved in that so perhaps I should not talk about what a marvellous document it is—but I think it is a clear document. For example, a minister cannot ask a civil servant to do something that is illegal or unethical and expect them to do it. And there are all sorts of built-in safeguards in the system to prevent civil servants being expected to do these things. But I do not think it is for civil servants to define a sense of what is the public interest and then to argue, “As my view of the public interest is this and my minister’s view of the public interest is that, it is perfectly okay if I pursue my view and I leak to a newspaper or I go out and make a speech”, or whatever. This is not a basis for good government; the basis for good government is to define obligations on ministers, obligations on civil servants, to operate obviously within the framework of the law and have clear accountability.

Q407 Lord Armstrong of Ilminster: The Bill gives us no formal definition of the Civil Service, it just says that Part 4 of the Draft Bill applies to the Civil Service of the state excluding those parts listed in clause 25(2) and that includes the security services, including GCHQ. Do you think we could improve on the definitions of the Civil Service for the purpose of this Bill? That is the first question. The second, even if the Bill goes forward as it is, should there be any protection for the staff of the excluded agencies, the security agencies and GCHQ, to have access to the Civil Service Commissioners for complaints? Or should they be subject to the same sort of requirements for recruitment through fair and open competition as the Civil Service without them?

Sir Christopher Foster: On the first point we have made the argument, following Robin Butler, that indeed the special adviser should be excluded from the Civil Service; we think that is a practical and sensible point. I have to say that we passed on the point of the definition of the Civil Service; we know that there are innumerable competing possibilities that various bodies have brought to our attention, but we are not at all clear that any one of them is ideal or indeed necessary. But perhaps on the second point I will turn to Richard.

Sir Richard Mottram: I would just say in relation to the Intelligence Agencies, having had some responsibility for them until quite recently, I quite understand the logic which has led the government to say that the three agencies should be treated similarly. Then I think you get into an interesting, rather more detailed set of issues about which parts of the Bill as they apply generally to civil servants might be expected to apply to all three Intelligence Agencies, if you treated them as three? I think the answer to that is there is no reason why an obligation on the agencies as in the case of the Civil Service to recruit and, in my view promote—because I think that should also be part of this Bill—on merit, that would raise no difficulty whatsoever for the intelligence agencies because that is what they do now, but it is just not enshrined in any legislation. If you then said that you should apply the Civil Service code to the agencies, I think without getting into the detail of that when you read the Civil Service code and you think of some of the things the agencies do, which are governed by separate law actually, then that might not be a perfect mix. Then I think the agencies, to my knowledge, are quite happy to involve, for instance, the first Civil Service Commissioner in some of their senior appointments and some of her colleagues. What I think they would
be very reluctant to do, for good reason, is to accept legislation which placed a duty on them really to open up all of their personnel and their personnel files and all their practices to the scrutiny of the Civil Service Commission, as a home department would, for instance. And I think that would be undesirable. So I can see why the government does not want to apply all of the provisions of this Act to the agencies; I can see why they want to treat GCHQ like its sister agencies or its brother agencies. The bit that could be dealt with, if you wanted to, would be recruitment and promotion on merit.

Q408 Lord Armstrong of Ilminster: As a rider to this, is it still the case that both in GCHQ and in the intelligence and security agencies there are existing processes for dealing with complaints, which give members of the service the right to take complaints to an independent body?

Sir Richard Mottram: Exactly so, and I should have said that, Lord Armstrong. So precisely because they are not covered by some of these provisions alternative arrangements have been put in place which do include an individual that they can all take their complaints to, and that individual who they take their complaints to has access to the directors of each of the agencies and there is visibility and transparency in that process which also involves other people. So in my previous job, for instance, I saw the reports of that person and they were taking the temperature of what life was like inside the agencies.

Sir Christopher Kelly: Can I just add to that? I start from a slightly different position than Richard and Christopher, but I think I end up in the same position. I think on principle things like appointment on merit and competition through merit should apply to the security agencies, among others, and the presumption is that is where you start and then you have to justify the exceptions from that.

Sir Richard Mottram: I entirely agree with that.

Sir Christopher Kelly: Although I am not an expert on the definition either I would have thought that one advantage of the definition is that actually what it does is it puts more focus on the exceptions, and so you can identify where the exceptions are. If, on the other hand, putting into statute some of these issues for the Civil Service is the right thing to do, then I would have thought the argument was that there ought to be some way of ensuring that the equivalent arrangements in the security services, should also have the same level of support.

Q409 Lord Armstrong of Ilminster: When it comes to recruitment and promotion by merit, Sir Richard said that that happens already in the agencies—and I am sure that is the case—would you wish that to be subject to the scrutiny of the Civil Service Commission or would you feel that for the same sorts of reasons that were being mentioned that the agencies should be given the duty of recruiting and promoting on merit but should not be expected to be accountable outside?

Sir Christopher Kelly: Speaking personally, I am perfectly happy to accept the argument that there are peculiar circumstances, which Richard has outlined, but that does depend on the assumption that an equivalent arrangement is in place, as we are assured it is.

Q410 Lord Norton: Coming back to the Civil Service Commission, whether it should have the power itself to initiate enquiries of its own. I think we may get different views of the evidence we have received on this, as we have from other witnesses. Is there a case for allowing that? What would be the implications in terms of resources and what are the wider implications of actually empowering them to do that?

Sir Richard Mottram: Personally I think this is a very interesting subject because of course the first Civil Service Commissioner, in evidence I have seen that she gave, for example, to the Public Administration Select Committee, herself seems to be quite cautious about this. I am a bit reluctant to second-guess her view. My own view is that the Civil Service Commission should have the power to initiate enquiries but this should be framed in a way—and again the Public Administration Select Committee I think have made some interesting points about this—which, as far as possible, deals with the First Civil Service Commissioner’s concern that she does not want to be inundated with frivolous things she has to deal with and diverted from her fundamental task, which I understand. But my view is that they should have this power. If you then asked the question what might be an argument against it, I cannot really think of a good argument against giving a regulator such a power, and all experience suggests that the Civil Service Commissioners would exercise this responsibly. It might have resource implications but it is not a great consumer of resources and I do not myself regard that as an appropriate or decisive consideration.

Sir Christopher Foster: We think we also added on this the importance of the Commission being allowed to undertake inquiries, not necessarily on the basis of complaint, because we see that kind of function as being tremendously important.

Sir Christopher Kelly: My committee made a recommendation that they should have this power in 2003. At the time the Civil Service Commissioner supported that. She has now changed her mind.

Sir Richard Mottram: A different Commissioner.

Sir Christopher Kelly: She has now changed the mind of the Commission, thank you! We have not discussed this in my Committee in any detail but
personal find it a little difficult to understand why, if you are a regulator, you would not want to have
this power.

Q411 Lord Norton: Just to reinforce the point that Sir Richard made, it is not necessarily in response to
complaints, actually it is a power to look at issues more widely on their own initiative that you think is
actually important?

Sir Richard Mottram: Yes. I think this is a good point
that Christopher made. To give an illustration of this,
the present Commissioners under the present First
Civil Service Commissioner have taken a much more
forward position in relation to the Civil Service code,
both on the importance of it being drafted in a way in
which civil servants could understand it, which may
sound a crazy thing but actually was rather
important, and so it got redrafted. And then pressing
departments to show that they were properly
incorporating the code into their work and in the way
in which they dealt with their employees, and that is
quite a proactive thing, and it is precisely that sort of
ting—which is the core purposes of the Bill—where
I think it is appropriate for them to have that power
to initiate and to take action. Certainly in that case,
far from it being difficult or awkward for the
government, the government—and I was involved in
this myself—then cooperated with the Commission
as we thought it was an extremely positive exercise
for the Civil Service and the contribution they made
was valuable both to the management of the Service
and to its regulation.

Sir Christopher Foster: We also added that we think
the Commissioner should, if they want, initiate
surveys amongst civil servants. It also goes beyond
the investigation of complaints.

Q412 Sir George Young: We talked about special
advisers and, Sir Richard, you made it clear that there
was nothing at the moment to stop a future
administration just appointing huge numbers of
special advisers, and you made it clear you thought
that would be a bad thing. But could you just look at
the functions? The Committee on Standards in Public
Life basically said that control over functions was
more important than control over numbers. What are
the controls on the functions of a special adviser
that you would like to see incorporated in the draft
Bill?

Sir Richard Mottram: What I think is interesting
about this is that the government’s 2004 draft
actually specified things which special advisers could
not do, and you might expect that that would remain.
These were quite important things that they could
not do—they could not authorise the expenditure of
public funds; they could not exercise any power given
under an Act; they could not exercise any function
relating to the appraisal, reward or disciplining of
civil servants, and so on. There is in the special
adviser’s code a provision now that says that they
cannot let contracts. Presumably—although I do not
know because I was not involved in the preparation
of the new draft of the Bill—the government has left
all this out for reasons of flexibility, but I think that
the effect of leaving it out is actually as I said at the
beginning, to leave open the possibility, hypothetically, that under this Bill the powers of the
Civil Service could largely be exercised by civil
servants with a designation of special adviser. People
may think this is absurd but that is what the Bill
would permit. Therefore, I think there is a strong
argument for putting on the face of the Bill those
tings which special advisers cannot do as well as a
definition of what they can do, which is to assist
ministers, and I think the “assist” word follows on
from the Public Administration Select Committee,
and there is a history to that. But I cannot see why
tings they cannot do are not on the face of the Bill,
and I think that is also the view of the Public
Administration Select Committee.

Sir Christopher Kelly: The 2003 report of the
Committee on Standards in Public Life was quite
specific about the things that we thought should be
not allowed. Special advisers should not be involved
in the appraisal, reward, discipline or promotion of
civil servants, authorising public expenditure,
exercising management functions—all the things you
would expect to see there, most of which were in the
2004 draft of the Bill and have now disappeared. I
think the key point is the one made in the Governance
of Britain paper itself—the point I made earlier—
where it says that what we want to do is to make
permanent the arrangements for special advisers in
the forthcoming legislation and this Bill does not
actually achieve that.

Sir George Young: That sounds like a question for the
minister, Chairman.

Q413 Chairman: I am grateful to you for helping us
prepare our list for the minister, thank you!

Sir Richard Mottram: It will make one of us in
particular very popular, Chairman!

Chairman: Can I thank you very much, and can I also
thank colleagues who managed to change their
arrangements so as to maintain a quorum so we were
able to complete our questions. I do have to tell
you—because I always forget at the beginning—that
you should note that Members have declared
interests relevant to the inquiry and these are
available on the website. Beyond that, can I thank
you very much for coming along to help us, and
indeed for your written papers?
WEDNESDAY 11 JUNE 2008

Michael Jabez Foster, in the Chair

Present Armstrong of Ilminster, L Fraser of Carmyllie, L Gibson of Market Rasen, B Hart of Chilton, L Morgan, L Norton of Louth, L Tyler, L Williamson of Horton, L

Examination of Witnesses

Witnesses: Lord Wilson of Dinton, a Member of the House of Lords, Cabinet Secretary 1998–2002, Lord Turnbull, a Member of the House of Lords and Professor Peter Hennessy, Attlee Professor of Contemporary British History, Queen Mary, University of London, gave evidence.

Chairman: Good afternoon. Thank you very much indeed for coming to join our Committee and offering evidence on the Civil Service part of our consideration. As you know, the Joint Committee is charged with looking at a whole series of issues, the proposal for a Civil Service Act being only part. Thank you very much for coming to offer your advice on that. Can I first ask Lord Armstrong to start.

Lord Armstrong of Ilminster: I do not think I need to declare an interest with these particular witnesses.

Chairman: Can I stop you, Lord Armstrong, I do apologise. We probably all ought to declare our interests. I have to tell you that members have declared their interests and they are on the website if anyone would wish to see them. Are there any other declarations that need to be made today? If not, please carry on.

Q414 Lord Armstrong of Ilminster: Thank you. The question I would like to ask is do you think that there should be and we need to have legislation putting the Civil Service on a statutory footing, a Civil Service Act by any other name?

Lord Wilson of Dinton: I am on record, when I was Secretary of the Cabinet and Head of the Civil Service, as being in strong support of the case for a Bill, so I warmly welcome this Bill. It is not fashionable to say anything nice about the Prime Minister, but I think he should be given credit for this Bill, as I think should go to the Public Administration Select Committee, who have longpressed for it, and the Committee on Standards in Public Life who also made an important contribution. The reasons why I think a Bill is a good idea I set out in a speech some years ago, which I can make available to the Committee. In essence, the Civil Service has been going, and will continue to go, through rapid change. We live in a period when governments come to power with large majorities and with many members who do not know the underlying conventions of the Civil Service, who have got no experience of government—that is not a criticism, it is a neutral observation—when there are high demands on the Civil Service to perform well and when there is much other constitutional change. These throw up issues about all sorts of things, like the role of special advisers, opening up the Service to outsiders, new ways of working, which very often are about boundaries and it would be a great help to have in statute some of the basic ground rules and principles so that you do not have to argue everything from scratch. It is also worth remembering that Orders in Council are very fragile, they are a fragile basis on which to work. We have a habit in this country of operating on the assumption that everyone knows the rules, but I think it is better not to take that for granted with an important institution and to do what we can to make sure that the basic values, principles and rules governing its operation are part of the law.

Q415 Chairman: Is that a view shared by you, Lord Turnbull?

Lord Turnbull: I too am happy to see these clauses in this Act. In my view, it does not change the fundamental relationship between the Civil Service, Ministers and Parliament. It puts certain values on to a statutory basis and provides certain safeguards, particularly to the Civil Service Commission, and I welcome that. In office, I was less enthusiastic about it, particularly the Bill which was drafted by the Public Administration Select Committee. There was a particular clause which I thought stayed much too far into Parliament trying to manage the Civil Service. That clause is not in this Bill, and as it is not in this Bill then I can support the inclusion of these clauses.
Professor Hennessy: I am very pleased it is part of the wider Constitutional Renewal Act, but part of me regrets the need for it to be there. I think it is an indication of what is a fact, that the relationships in the last 15 years, but starting earlier than that, probably 20-25 years, between what I call the two and a half governing tribes, that being the Ministers and the permanent Civil Service, the half being the special advisers, has got to the point where in certain specific instances, but also in general terms, particularly Treasury and No.10 where there has been a large cluster of special advisers in recent years, the relationships have got scratchy, to put it no higher, to the point where you do need to spell out the delineations of functions between the two and a half governing tribes. That is a matter of regret for me because part of me remains with Mr Gladstone in 1879 when he said “That there is no other constitution in the wide world that depends so much on the good sense and good faith of those who work it”. Note the verb “work it”, good sense and good faith. Clive Priestley, who we all remember fondly, christened this in modern terms the “good chap” theory of government. I am sufficiently of the ancien régime by temperament, training and background, although I have never been a public servant, to regret that, but I do think we have reached a position now where this is crucial. I was very concerned to discover that for the Prime Minister, who does deserve credit, as Richard said, for bringing all this forward, it was not in the original material he brought in with him as Prime Minister a year ago and Sir Gus O’Donnell got to work on him and persuaded him that the Civil Service Act element was vital, and Alistair Graham, of the Standards in Public Life Committee, went to see him privately and so persuaded him too. Not only are we talking about fragility in terms of Orders in Council and status quo, with which I agree with Richard, we are talking about fragility in this element of the Bill finding its place in the sun in the first place. When Andrew was Cabinet Secretary, and I think Richard too, there was a palpable lack of enthusiasm around the Cabinet table for this. I do not think it had a single ministerial champion. Richard will remember the day when one of the senior Ministers had a great outburst against all of this, Northcote-Trevelyan, as an ancient Victorian relic. Of course, I am such a throwback that I think the Indian Civil Service model as transplanted to the UK has served us well and will continue to serve us well and that the specialness of Crown service, as we have always conceived it, is absolutely critical to the good government of this country and, although I regret it has got to be in this Act, I am relieved that it is there, paradoxical though that may sound, Chairman.

Q416 Chairman: Does it have to be in the Act or is it important enough to have its own title? Does anyone have a view about that?

Lord Wilson of Dinton: My own view, Chairman, is that it is more important to get it on the statute book than to worry about the title and whether it is on its own or part of another Bill. The important thing is to get it on the statute book while you have got the opportunity. It has taken 150 years to get here and I would not want to spoil the ship for a ha’p’orth of tar.

Q417 Lord Armstrong of Ilminster: Are there any drawbacks? You have all quite reasonably pointed out the advantages and reasons for doing it, but are there any drawbacks other than those that Professor Hennessy described?

Lord Wilson of Dinton: I do not think one should claim too much for this, it is a fairly modest measure but one that I think is valuable. Also, it is important not to get into a position where you put so much into the Bill that you make the management of the Service more difficult. You must only put in the Bill those things which are of last importance and not going to change. What you must not do is get in the way of flexibility to manage the Service as the world changes around it.

Professor Hennessy: Could I add to that, Chairman? I think one of the factors we have all got to remember, and I am sure you do really because you have all been in the business of government one way or another for a long time between you, is that whatever the bits of paper say, it is the human relationships that matter. We had Questions of Procedure for Ministers for years, which John Major, to his credit, declassified. We were the only country in the world where the guidelines for proper ministerial behaviour had a 30 year disclosure on them, which was extraordinary really. But, once we got them, we noticed from some of the old declassified ones that the requirements of Cabinet government are spelt out in paragraphs one and two—that Cabinet should handle all those matters that are of sufficient public interest and those where there is serious disagreement between departments or concerning the country. You will remember, Lord Armstrong, indeed my friends, the two Cabinet Secretaries, will remember, that it is the last thing in the world that ever happens in a Cabinet if a Prime Minister is wanting to take shortcuts with the process that somebody speaks up from the end of the table saying, “May I quote you, Prime Minister, paragraphs one and two of Questions of Procedure for Ministers”. It does not work like that. So we get back to Gladstone, the good sense and good faith of people, and without that working well all these scraps of paper can be absolutely meaningless. But they do raise the hurdle against deliberate tearing up of the conventions. If it is in primary legislation, you could not politicise the Civil Service wholesale without it being noticed, whereas you could slip through Orders in Council, as indeed has happened once or twice,
with hardly anybody, apart from me and Peter Riddell, who is behind me, noticing it.

Q418 Mr Linton: I just wanted to ask Peter one thing. You mentioned that Tony Blair had relied so heavily on importing special advisers into Downing Street implying that was a bad thing. If it is a failure, do you think it is a failing of the Civil Service or a failing of the last two Prime Ministers?

Professor Hennessy: I do not think it is a failing of individuals actually. I think you can have too many special advisers. The special advisers I have always preferred are those you hire because they know things rather than because they believe things. I do not want to be unkind but—

Q419 Chairman: Can I say we are going to ask you about special advisers later on.

Professor Hennessy: Okay, I will come back to it. No, Mr Linton, is the answer to that.

Q420 Lord Morgan: I would like to ask all three witnesses, if I may, whether you are concerned that Ministers are failing to respect the political neutrality of the Civil Service and, if so, whether there are provisions you would like to see in the draft Bill. Could I particularly ask Professor Hennessy, who is the Attlee Professor who lectured last night splendidly on Attlee’s consensus, whether things were different in the past.

Professor Hennessy: It is very difficult to be sure because when the archive comes up you occasionally find even Olympian figures like Norman Brook, who I think was a most remarkable man, slipping in what we would now regard as something frankly “viewy”.

Q421 Chairman: What do you mean by that?

Professor Hennessy: For example, advising the Cabinet on his views on the abolition of capital punishment, as I remember it, being premature. Conscience matters. Just occasionally it is slipped into it. What is remarkable about it is the scarcity of it, the rarity of it in the old files but, of course, the old files only capture the audit trail, they do not capture the conversation. I think the great virtue of Crown service as we conceive of it, the so-called Victorian relic, means that most public servants right through to today are shot through with the unspoken requirements of this and when lines are really seriously about to be crossed they not only know about it, they say it. It is in the Tom Tiddler’s area, the rush of political and governing life, that you might get some people whose alarm bells do not ring. Also, you cannot keep going to the stake, can you, with particular Ministers who are tone deaf on this. Indeed, we have some spectacular examples of Ministers who have been tone deaf on that in recent years because it has emerged, it has erupted. If you are in the position of my two friends here, you cannot five days of the working week say, “Really, that is not quite consonant with the conventions, Prime Minister or Secretary of State”, because they think you are a fusspot and they will not listen to you on anything else. Human nature being what it is, I think people go sotto for a while except when you get some almost unarguable case that you are confronted with. I have every sympathy with people in the position of Cabinet Secretaries in recent years having to put up with that kind of working climate. I have always been reeking with sympathy for you, although you may not have realised it!

Lord Turnbull: On this question of neutrality, a lot of people come to me and they say, “Isn’t the Civil Service being politicised?” and I say, “What do you mean by that?” It can mean one thing, which is that people who have political sympathies are being appointed to the Civil Service. I would say there is no evidence whatsoever that is happening. The Civil Service Commissioners are involved in more senior appointments now than they were in the past. The second meaning could be civil servants behave partially, they get sucked in and say and do things, behave in a way which looks as though they are party supporters. It happens from time to time and people get pulled up on it. The more serious problem, I think, has been that the work of civil servants has been politicised in the sense that more of it goes through the minister’s special adviser channel than used to be the case. I think Ministers still respect the political neutrality of the Civil Service but they do not use it to the extent that they used to or should do. What can you do about it? There is an important question which maybe later on we need to come back to, which is the Civil Service has a duty to give impartial advice. In the Ministerial Code, but not anywhere in this Act, is a duty on Ministers to give proper weight to that. A very significant question is whether that should be made a symmetrical duty.

Lord Wilson of Dinton: May I give support to what Lord Turnbull said there and, indeed, Peter Hennessy. Very often, in practice the issues arise in relatively small cases, relatively small instances, and you have a decision about how often do I make a stand and where do I make a stand. It is not a deliberate wish to make a wholesale assault on the impartiality of the Civil Service, it may either be ignorance of the conventions or an impatience with them, a wish to get from here to here more quickly than, say, the selection on merit would permit. This is a very personal thought. I think what it very often boils down to is the duty which I believe there is on Ministers not to use the resources which Parliament has voted for government purposes for things which are primarily party political or partisan. I see both Sir George Young and Mr Tyrie sitting over there and some decade ago had the experience of them, quite
rightly, raising issues in that area. Very often what one is talking about is where the boundary is, but at least it is important to know what the principle is which one is talking about so that people know what Ministers are under a duty not to do. I would like to see that in the law myself.

Q422 Lord Armstrong of Ilminster: Should that duty be included in the provisions of a Civil Service Bill or the equivalent, or is it really rather different from the provisions which cover the Civil Service and should be provided for in other kinds of guidance?

Lord Wilson of Dinton: When I was thinking about what I would say to you, it seemed to me there ought to be a duty on Ministers which is a corollary, as Lord Turnbull was saying, of the civil servant’s duty. One of these earlier statutes had a duty on Ministers not to impede civil servants in their performance in accordance with the Code. I would like to see that, I think it is rather a good idea. That may cover what it is I am wanting because the Code itself requires civil servants to behave with impartiality, but there is a bit of me that would like to go a step further. I am airing the thought, I am not putting it to you that strongly. Professor Hennessy: Is it not the accounting officer’s note country though if money that Parliament has voted for a particular purpose is being siphoned off for something else? That is when the accounting officer system steps in. Maybe I was being naive, but I always thought that the Cabinet Secretary of the day, if we had ever had anything like it, would have stopped a Watergate here if he had been told that money voted for other purposes was being used by the secret world to bug the opposition campaign offices, he would have just stopped it that way. The accounting officer’s mechanism is ancient, 1866, and I still think as an outsider that it is a tactical nuclear weapon. It makes everybody without exception in all political generations sit up and think if there is the slightest whiff of an accounting officer’s note, and I think that covers what Richard is worried about. Lord Wilson of Dinton: Except the Cabinet Secretary is not always the accounting officer for the matter under debate.

Chairman: That is certainly an area to look at. Let us move on.

Q423 Lord Williamson of Horton: I think I did declare earlier that I was, for what seemed like years and years, a civil servant. I come on to the question of ministerial power to manage the Civil Service. There is a rather important clause in the Bill, clause 27, where the minister has a general power to manage the Civil Service covering, “among other things, appointment and dismissal and the imposition of rules on civil servants”. That is a bit different from what was in the draft Bill. In the draft Bill it was a list of certain specific things and now it is a general power in this text. I wonder if you would like to comment on that and let us know whether you think the ministerial power to manage the Civil Service is appropriate as they now put it into the draft Bill?

Lord Turnbull: I think it is absolutely appropriate that this power should rest with the minister on the Civil Service. I have some doubts about the particular drafting of this clause. It says that sub-sections (1) and (2) “cover, among other things, appointment and dismissal”. Ministers should not get within a million miles of appointment and dismissal of any particular civil servant. What they should do is deal with the framework under which people are reported and managed generally. This particular drafting gives the impression wrongly and it is not what is intended. I just think it is an infelicity and we can find ways of dealing with it.

Q424 Chairman: Does anyone else have a view?

Lord Wilson of Dinton: I go along with Lord Turnbull. I do not know the background to this provision and, therefore, I am unclear quite why it is in this form. I sympathise with what Lord Turnbull said.

Q425 Lord Armstrong of Ilminster: What is concerning me is if this general power is conferred on Ministers then they become accountable to Parliament for the exercise of the power even if the actual exercise of power is delegated to somebody else, to the Head of the Civil Service or whoever. I wonder if we should want to creep into a situation where a minister could be called to account for the appointment or dismissal of individual civil servants.

Lord Wilson of Dinton: I think we are already in that position, are we not? For instance, when Michael Howard was the Home Secretary and decided on the dismissal of Derek Lewis, the head of the Prison Service, it was he who took the decision and it was I who issued the letter as his Permanent Under-Secretary at the Home Office which did the sacking, but it was Mr Howard who accounted to Parliament for it. I know that was formally under the law at that time because I consulted Sir Robin Mountfield. That was formally the correct decision. I am not sure this is doing more than a transposition of the position as it already is. I am obviously unsighted on it.

Q426 Lord Tyler: How far do you think that Parliament should be involved in scrutiny of the operation of the Civil Service, either through approval or monitoring of the Civil Service Code or, indeed, the other codes, or in some more intervention in the way in which Ministers manage the Civil Service? That is the general question and then I have a specific. You may have noted in the recent Public Administration Select Committee report there was particular attention drawn to the fact that the whole architecture of Whitehall can be changed on a Friday
afternoon in the middle of a recess and no-one in this building has any sort of oversight or scrutiny of it and, indeed, within the Civil Service there may be no foreknowledge of what is going to happen. Do you think that is an area where there should be more effective parliamentary scrutiny of the whole machinery of government?

Lord Turnbull: First to start on the Code. There is a slightly strange wording which says Government will lay the Code before Parliament; it does not say what happens thereafter. You might as well just say, “Put it in the Library of the House of Lords or Commons”. There is this question of whether there should be some sort of approval. Personally, I do not think that Parliament should try to draft the Code for the Civil Service, although the original Treasury Select Committee was instrumental in drafting the very first version of it. One solution might be that there is a negative procedure which signifies that Parliament warrants that the principles of impartiality have been put into the Code. That is all it needs. That is not trying to say what it should be, it is simply saying, “We think or don’t think you have encapsulated the things you were required to do under the Act”. Most scrutiny, I think, should come through the form of select committees and the PAC. I think we would regret it if no change to ministerial boundaries or the architecture of the Civil Service could be made other than through legislation. There have been some changes that have not been successful, but many that have. People come to me from other countries saying, “It is so helpful to be able to respond to some situation and make a change without waiting your place in the queue for legislation”. Again, the correct scrutiny of that is through the normal processes by which Ministers are interrogated by Parliament. I would not put the structure of the Civil Service and structure of departments on a statutory basis.

Lord Wilson of Dinton: I agree with that. I think that the ability to organise or restructure government is inextricably linked up with the power of the Prime Minister to advise the Queen on the appointment of his Cabinet and his Government and the shape of the Government. If you imagine a minister coming in with a large majority for the first time bursting with new ideas, it is very hard to think that it would be acceptable for him or her to have to go through an elaborate process of parliamentary sanction to get that first big burst of energy through and implemented. I was deeply involved in 2001 with the very large reshuffle, I think one of the largest reshuffles for many decades, which Mr Blair carried out. I knew that he was going to want to do it, he and I talked about it at some length beforehand. I gave him a huge variety of options and I talked very closely on a very confidential basis to my colleagues in the departments concerned. None of it leaked and we put together a very big exercise to make it work, and it worked very smoothly and very effectively. I think it is entirely proper afterwards for Parliament to show an interest in it and select committees to examine it, but I do think it is an integral part of the Prime Minister’s ability to shape the Government that he wants both structurally and in terms of personalities.

Professor Hennessy: There is one great exception, Chairman, the Ministry of Defence is a statutory ministry. The Ministry of Defence Act 1946 created it. If that was changed you would have to have primary legislation. I cannot remember now why it was, but it is the anomaly. There is one example already. I agree, in practical terms it is very difficult to do. Can I come back to the Code? I really do think the Code has to have some kind of affirmative process through Parliament because that is the key to it. Andrew has put his finger on it when he says that values have to convert into the Code. The Act can make it plain that, from time to time, the Government of the day will want to refresh the Code, but the House of Commons must have an affirmative resolution. The problem that we have in this draft Bill is an interesting problem because it reflects the difficulty we have had as a country over the last 20 years of moving from a back-of-the-envelope constitution to a front-of-the-Code constitution to a face-of-the-Bill constitution, and some of the key bits keep being left behind. It is partly because Ministers have this terrible fear of judges. You will have noticed Mr Miliband’s evidence to the Public Administration Select Committee that we cannot have a fragment of the Ministerial Code in this Act because the judges might be able to involve it in a judicial review. They are running both angry and fearful of the judiciary, which is a fascinating phenomenon. It is a great misfortune in our country that we have a set of Ministers who regard the judges as a kind of enemy.

Q427 Chairman: Is that not because they usually find against them?

Professor Hennessy: Yes, it is. When members of this Cabinet were young, when they were on the wild left frontier going through their difficult adolescent phase, they used to denounce the judges because they did not understand the working class, with a short “a. They all used to recite John Griffiths’ classic work, Politics and the Judiciary, because the men—they all were men in those days—in wigs not only did not understand the working class, they did not like them. They now dislike the judges for an entirely different set of reasons. I think it is something in their genetic make-up, they cannot help themselves.

Q428 Chairman: It is not wholly party political though, is it?
Professor Hennessy: No, but this particular Government has been the worst that I have ever known in terms of getting at the judges. The judges are now regarded as a bunch of liberal left softies who are fusspots. The way this Government has run against the Human Rights Act 2000, which it passed, is extraordinary. Mr Blair seemed to run against it every week towards the end of his tenure. It is a remarkable human phenomenon. I think this is distorting the function. It is not distorting your function because you are there to make it better, but it was distorting Mr Miliband’s evidence to the Public Administration Select Committee. If you cannot have that crucial bit of the Ministerial Code about respecting the impartiality and political neutrality of the Civil Service, and giving due consideration to their advice even if you reject it in the end, if that cannot be transferable into the key statute which is going to last for generations governing this side of our system, what does that tell you about them? This is a very funny business. They seem to want to give Parliament powers and the moment they have sort of done it they caveat it away again. This whole Bill is shot through with that phenomenon.

Chairman: That is a fascinating perspective. Let us move on to another area with Lord Hart.

Q429 Lord Hart of Chilton: This is a question about definitions. The 2004 draft Bill listed those parts of the Civil Service that were covered by the Bill as well as those that were not, but this Bill in a generalised form simply applies to the Civil Service of the State excluding those parts listed as the Security Services and the staff at GCHQ. My question is, are you content with the definition that approaches it along those lines? Do you support the exclusion of the Security Services and GCHQ from that definition?

Lord Turnbull: The answer is yes, I think the previous solution was the wrong one. GCHQ has much more in common with the other two agencies than it does with the Civil Service as a whole. That is where it belongs and it needs the same kind of apparatus for dealing with complaints on a confidential basis. I would group those three. They are grouped in a kind of budgetary sense as well. We have come to a better definition than we had in 2004.

Lord Wilson of Dinton: I agree with that. It is sensible to deal with the three agencies together and in separate legislation because they are not exactly the same.

Professor Hennessy: They all have their own primary legislation. They were put on a statutory footing before the rest of public service. GCHQ has always been an anomaly because it came out of MI6 and, indeed, the Chief of the Secret Intelligence Service in name was on top of it all until as late as 1956, but they were unionised after the war which caused Robert a great deal of trouble when he was Cabinet Secretary and they were treated separately. I do not think in those days that people seemed to have thought about these anomalies, it was in the era when the tacit understandings about the British constitution were not questioned and very few people bothered about anomalies. In fact, we used to take pride, did we not, in being an anomalous and asymmetrical nature when it came to constitutional matters. The problem we are experiencing now, as I was saying a moment ago, is the difficulties you always find when you want to tidy up, and only then do the anomalies become noticeable. The three secret agencies are best treated separately.

Q430 Lord Hart of Chilton: Does it follow from that that we do not have to worry ourselves about the staff not having access to the Civil Service Commissioners and having a requirement to recruit them through fair and open competition on the same basis as applies to other civil servants?

Lord Turnbull: I do not think that premise actually follows. They can have those provisions provided by different means.

Q431 Lord Hart of Chilton: And do they?

Lord Turnbull: If they do not they should do. I think they do appoint on the basis of merit and they do have a complaints procedure. They should not be shared with the Civil Service because there are a number of differences in the way those services operate.

Professor Hennessy: The senior ranks go through the Civil Service Selection Board. They did not always, but since the late 1970s MI5 started going to the Civil Service Selection Board. The Secret Intelligence Service had for years, and so have GCHQ for the senior ranks. At the practical level, the valve through which you have to pass into the senior grades, or in the fast track promotion to senior grades, is the same as everybody else. Everybody has slightly different sets of recruitment around it but they all have to go through that valve, which I think is the key question.

Lord Wilson of Dinton: My recollection is there are clear channels, ways of dealing with any grievances or worries that people have which I think are appropriate for the character of the agencies, which is a better way of dealing with it.

Q432 Martin Linton: I just wanted to explore the meaning of the word “impartiality” because it has already been mentioned. The Bill does put a duty on civil servants of “objectivity and impartiality”, though not on special advisers. First of all, it seems to me the word by itself does not mean anything unless you explain what you are being impartial between. Presumably this is intended to mean political impartiality?
Lord Wilson of Dinton: Yes. Can I say, Chairman, there is one improvement in the Bill which I hope the Committee will feel able to recommend. Paragraph 32(2) says: “The Code must require civil servants who serve an administration to carry out their duties for the assistance of the administration as it is duly constituted for the time being whatever its political complexion”. It took me some time to work out what that meant. If it is intended as a guarantee of impartiality I do not think it serves the purpose because the key thing is that the Civil Service should retain the ability and the confidence of other parties to serve future administrations of whatever political complexion, and I would think that should be on the face of the Bill because that is one of the more fundamental tests of the impartiality of the Service, it does not get caught up in the partisan politics of any particular party it is serving in power and it retains the ability to serve future governments.

Lord Turnbull: We really need two clauses here. One is impartiality between Mr A and Mrs B in dealing with members of the public; and impartiality between parties. I agree with Richard’s point about retaining confidence. I have not brought my copy of the Civil Service Code, but there is a provison in there which says you have to behave in precisely this way, that if you are seen as very closely cavorting and backslapping, getting too pally with the administration of the day, you will fail that test of giving reassurance to whoever might come in next that they would get the same degree of commitment.

Q433 Martin Linton: That is almost saying if you are a very good civil servant at carrying out the desires of one government you are by definition a bad civil servant because you are not retaining the confidence of the opposition that you would be as good for them.

Lord Turnbull: It is absolutely essential that when appearing before a select committee, for example, you do not say, “I think this is a really good policy”. You recognise the fact that you are there to represent the minister and you are saying, “The minister thinks this is a good policy because it will do X, Y and Z” and you must avoid over-personalising and buying into it too overtly. If you do that then I think you will realise that whoever comes next is buying into (a) your professionalism and (b) a belief that you will work as hard for them as you have worked for the previous administration.

Q434 Martin Linton: The opposition might think that if a civil servant is very effective in putting the case of the government they serve that they would also be effective in putting their case if they were in government.

Lord Turnbull: Absolutely. One would hope so.

Professor Hennessy: There are three strands to this, are there not, and they are mutually reinforcing. One is that you do not get sucked into the partisan purposes of the government, and we will come to special advisers in a minute, but they are the safety valve for that, or they should be. Secondly, you are a professional who is appointed and promoted on the basis of merit because you mobilise evidence with great care. The political class gets where it is and beats the competition because it mobilises prejudice more successfully.

Q435 Martin Linton: I do not agree with that.

Professor Hennessy: That is absolutely different. You have got to respect people who can be very interested in politics and government but are not partisan. It is very good sometimes for new Ministers to accept that. That is the second strand. The third strand is the crucial one, which is evermore crucial because the electorate seems to want quite long periods of one-party government these days, that after ten, 12 or even longer years you can always assume that they have gone over. Even Churchill with his vast experience was taken into No.10 by Norman Brook in October 1951 and he gazed across the private office, which was full of stalwarts like David Pitblado and David Hunt, and said, “Drenched with socialism”, which of course was crackers. Even he was a bit prone to that. In 1964, and I remember people telling me about it afterwards, there was a profound conviction on the part of some Labour Ministers that he must have gone native and a fair number of this Government had read The Guardian and believed what they read that Mrs T had “Thatcherised” the senior Civil Service. Well, I do not want to be unkind to my two friends here, but to get a permanent secretary over the age of 51 to believe in anything except vague notions of decency is almost impossible. If they think they are going to fall for anybody’s manifesto they cannot have met any of them. A lot of people read The Guardian and believed they had “Thatcherised” them because. There were two officials politicalised under Margaret but they did it themselves. One was called Charles Powell and the other was Bernard Ingham. That is two out of 620,000.

Q436 Martin Linton: Surely that is making my point, is it not, that what governments and oppositions want is an effective Rolls-Royce machine that the government can drive and if the opposition wins the election they can drive?

Professor Hennessy: Absolutely.

Q437 Martin Linton: The word “impartiality” could mean somehow an encouragement to civil servants to hold back on helping the government.
Lord Turnbull: I do not think it should be holding back. Ministers should see the Civil Service as a public asset and they have to hand it over in as good a condition to whoever comes next and also they in turn, if they are on the losing end of a general election, want the protections that gives.  

Chairman: We probably have to move on in a moment.

Q438 Martin Linton: I think clause 2 actually describes very well how I imagine the situation to be, whereas I just do not know about the word “impartiality”, whether it means to hold no views or to show no favours, to take the middle course or whatever, it is a meaningless word.  

Lord Wilson of Dinton: Can I just say in support of Lord Turnbull that the Civil Service Code, which I hope all members of this Committee have seen and have copies of, spells out political impartiality very clearly and amplifies the reference to impartiality in a way which I would find entirely satisfactory.

Q439 Baroness Gibson of Market Rasen: Perhaps we can turn from impartiality to independence. Concern has been expressed to us about the degree of independence given to the Civil Service Commission under the model that is proposed in the draft Bill. I would like to ask your views on that. Will the Civil Service Commission have enough independence? If not, how would you improve its independence?  

Lord Turnbull: I think the Civil Service Commission has a very strong underpinning which was the undertaking that the leader of the opposition should be consulted. Should that be not just consultation but an agreement? I think probably consulted is the right word and in the end the Prime Minister has to make a recommendation to the Queen. The other is the point put by Robin Mountfield that the budget of the Civil Service Commission appears to be set by the regulated, and that is the position with every financial institution in the country who pay for the FSA. I can see that there is an issue here but there was a particular solution recommended which was that Parliament sets it budget, which I think is a very bad idea. Parliament should not get involved in a way which I imagine the situation to be.  

Professor Hennessy: I would give it to the NAO.  

Lord Turnbull: Would you?  

Professor Hennessy: Yes, I would. When you consider the pressure that the Standards in Public Life Committee budget was put under, and all that lot that you put in Great Peter Street or wherever it was when you had to deal with cuts a few years ago, I am not confident that ring-fencing will hold. I do not see what is wrong with Parliament, the sovereign body of the land under the Crown, doing it on the same basis as the Exchequer and Audit Office Act of 1886. It is a well-tried procedure which nobody has ever abused. The Civil Service Commissioner answers to the Queen, not the Prime Minister, and you cannot put it on the Civil List. I have no confidence in the Cabinet Office in all circumstances doing the decent thing. I really have not any more.

Lord Turnbull: The C&AG and NAO are Officers of Parliament, helping Parliament do its work, the Civil Service Commissioner is about keeping the Civil Service doing its work, and I think you mix them up if you put one of them half in Parliament.  

Professor Hennessy: This Act will make Parliament the guarantor of all the key values that make the British Crown Office. This is making Parliament the guarantor because we cannot rely on the prerogative any more, which is why we are all here. I cannot see why, as part of that new settlement, it should not come to Parliament.

Lord Wilson of Dinton: It would import into the role of the Civil Service a relationship which is completely different from the one which we have had for 150 years which has worked well. I believe the first Civil Service Commissioner who felt that his or her budget was being squeezed, if they were worth their salt, would make a special report to Parliament and make a fuss, and I would like to think Parliament would take that as a cue to make life difficult for the Government. The present relationship with the Commission is not something that is being set up for the first time, it builds on a long cultural tradition which I think has worked well in the interests of the country and I would want to build on that rather than suddenly switching them into the NAO which has a much more adversarial role and one that I would not want to import into the relationship.

Baroness Gibson of Market Rasen: Thank you, those were very interesting answers. That gives us some food for thought.  

Chairman: Unfortunately, we have seven minutes to deal with three questions, so what we are going to ask you, if you would be generous enough to do so, is we have got questions about the right to initiative investigations by the Commission and questions about fair and open competition, and we wonder if we can put those to you in writing and ask you to respond to those so that we can deal with the more
interesting one which is about special advisers. I am going to ask Sir George to ask that question.

**Q440 Sir George Young:** Thank you very much. Professor Hennessy, earlier on when you were talking about special advisers you referred to the numbers at No.10 and the Treasury and you said that as a result of the numbers the relationship had become “scratchy”. Was this a function of the numbers or was it to do with the functions of the special advisers?

**Professor Hennessy:** It is a mixture of things, Sir George. I think having so many around the Chancellor and the Prime Minister when we were governed by two rival courts—you need a medieval historian, not me, to explain this to you—it was the only time in history the medieval monarch had a treasurer who controlled his budget in the same kingdom who wanted to topple him every other week, and it led to some very bizarre relationships. The amount of nervous energy that was displaced by these two rival courts badmouthing each other, it is going to be extremely difficult for any historian to make sense of that. The No.10 and No.11 problem under Blair and Brown made it much worse. There was the one regrettable, spectacular outburst in the Department for Transport which will always be remembered for how it should not have been done. Everybody else seems to work it very well. Again, I think it is a combination of human factors and clustering. The other problem which is at the root of it is if I was a secretary of state I would want two types of special adviser probably, and I would want them to be distinguished. One type would be the people I recruited because they knew things and could help me with my legislative programme and my policies, and the other type would be the bag carriers who I recruited because they believed things. Victor Rothschild was extremely offensive about these bag carrier types when he was head of the CPRS, he said they reminded him of those ambitious young men who used to lurk around the court of medieval monarchs and so on. I do not think that your profession needs reinforcing by special advisers believing things, that is why you are here. You do not become a politician if you do not believe things. I would distinguish between the two types. Indeed, I think Richard tried to run that when he was Head of the Civil Service and he could not get it there, so that feeds the problem as well.

**Q441 Sir George Young:** Would you go along with Lord Wilson, who has suggested there should be a cap on the number of special advisers?

**Professor Hennessy:** Yes, I would. The Ministers of the Crown Salaries Act since 1937 has put a cap on Ministers, I do not see why there should not be a cap on special advisers because they are an extension of the Ministers. That is all they are.
Lord Wilson of Dinton: Yes, I entirely agree. I am on the record repeatedly, and I say it again, as saying the role of special advisers can be very valuable to civil servants in the way that you have described as an avenue to the minister reading his mind, but there ought to be clarity about the boundaries of what they can and cannot do.

Q444 Lord Fraser of Carmyllie: All the emphasis of what we are looking at is how in one way or another the role of the special adviser ought to be corralled. Is there not some opportunity for there to be a clearer boundary between what is the role of the impartial civil servant and the special adviser?

Lord Turnbull: First of all, I do not accept the first part of the question that we see these as rivalries, that there is a kind of job demarcation, job protection going on. Good special advisers are worth their weight in gold, partly for the reason you gave in the second part of your question. I have always seen them as being three parts of a triangle with traffic going round all three sides, special advisers interacting well with officials, attending the same meetings, sharing a lot of information, not playing games with each other. The problem arises when the balance of the relationship with the minister gets distorted.

Q445 Mr Tyrie: Andrew Turnbull and I worked closely together, when I was in the Treasury as a special adviser, on public expenditure control. I thought I should declare that interest. I want to ask two questions. The first is what the sanction is if special advisers overstep the mark. When I was in there, if I overstepped the mark I knew very well it would go to the Permanent Secretary, the Permanent Secretary would have a word with the Cabinet Secretary and I would be out on my ear. My impression under this administration is that it is not like that, that the political culture has been to protect special advisers to an enormous degree and, therefore, the whole of the system is very dependent on prime ministerial willingness to act on Cabinet Secretary advice. What sanctions are required to ensure that these arrangements work?

Lord Wilson of Dinton: It depends on the situation. Mr Tyrie will remember one occasion when he complained to me that Mr Alastair Campbell had used excessively partisan language in an attack on William Hague. I investigated it at his request and confirmed that I agreed with that view and published a letter. That was excessive activity by a special adviser with an appropriate response. There are a variety of ways depending on the complaint and some of them are quite difficult for Parliament to hold people to account for because they do not see what goes on. I think you can take steps effectively.

Mr Tyrie: I know we are short of time, but I would be interested if the witnesses could put on a piece of paper any suggestions they have because there is not very much in the Bill, even implicitly, on the sanctions aspect of this. May I ask one other question?

Chairman: It will have to be very, very quick.

Mr Tyrie: I am looking at the list of things that advisers should not do here, but do you think advisers, as they have started to do since 1997, should be permitted to present and advocate government policy in public? Do you think that they should be permitted to engage in negotiation on behalf of this country abroad?

Chairman: Can I say there may be a short answer and a long answer, if you could give us the short one and perhaps put in writing the long one.

Q446 Mr Tyrie: Two new functions which were not performed in my time by advisers.

Lord Turnbull: No to the second, that is undesirable. Yes to the first, provided that there is still an official spokesman. The system we had in the Treasury for some time was that there was an official spokesman who spoke for the Treasury and someone who spoke politically for the Chancellor. They needed quite a subtle demarcation between them. If the only voice that is coming out is through a politically appointed special adviser then I think we have an unhealthy situation.

Lord Wilson of Dinton: Chairman, I sense that you are about to draw us to a close. I agree with what Lord Turnbull said just then. May I volunteer one comment on the Bill before you close us down, which is that I am not clear that I am happy with the exceptions to the requirement that people be recruited on merit. In particular, I am not clear why appointment to the Diplomatic Service as head of mission or governor of an overseas territory should be exempted from the requirement for merit on the basis of fair and open competition. I am also not clear why some appointments by Her Majesty, such as the Head of Inland Revenue and Customs, should be exempted from the requirement. Those seem to me run, or odd.

Professor Hennessy: Could I just answer Andrew in two words? No and no, unless it is a press spokesman who also is a special adviser because they are temporary civil servants, they come under Civil Service discipline, and you cannot have sheep and goats in that area, you either are or are not a Crown servant.

Chairman: Thank you. The trouble with star witnesses is that they have so much that is useful to say and so many questions are raised. We are grateful to you. Can we ask that we write to you with the
questions we did not get round to and perhaps invite you to add anything else that you feel perhaps we should have heard but did not have time for. Thank you very much indeed.

Supplementary memorandum by Lord Wilson of Dinton (Ev 60)

I covered my main concerns in oral evidence to the Joint Committee on 11 June 2008. The Committee has however asked for my views on their questions 8 and 9 and on a recommendation from Lord Butler.

Q8. *Should the Civil Service Commission have the right to initiate investigations without receiving a complaint from a civil servant?*

The Bill already provides in Clause 37(1) for the Commission to initiate reviews of recruitment policies and practices to establish whether selection on merit on the basis of fair and open competition is being complied with.

By extension I think the Commission should similarly have a power (not a duty) to initiate a review of matters relating to the operation of the Civil Service Code and the Special Advisers Code in cases where no complaint had been made. The purpose would be to establish whether the Codes were being complied with, including cases where it was possible that a breach of the Ministerial Code might also be involved.

I note that the First Civil Service Commissioner has expressed concern that this might open the floodgates and lead to the Commission being asked to investigate all sorts of issues many of which might have nothing at all to do with the Civil Service Codes. The problem would be reduced if the power was limited to matters relating to compliance with the Codes. It might also be useful to require the Commission to consult the Head of the Civil Service before initiating a review, to allow the latter an opportunity to make representations about the advisability of the proposed review. But the government should not be given a veto over the conduct of such a review.

Q9. *Do you agree with the exceptions to the requirement to select on merit on the basis of fair and open competition set out in clause 34(3) of the Draft Bill?*

The first exception seems much too broad. It would be reasonable for appointments to the Royal household to be outside the remit of the Civil Service Commission (I do not believe they are civil servants anyway), but the drafting of clause 34(3)(a) goes much wider than that. It would seem for instance to cover appointment of the head of HM Revenue and Customs which should be subject to the rules of the Civil Service Commissioners.

I do not understand the rationale for the second exception. Senior appointments to the Diplomatic Service should be made on merit on the basis of fair and open competition as much as in the Home Civil Service. To retain patronage for heads of mission and governors of an overseas territory would be an odd reversion to the world before the Northcote-Trevelyan Report, and I am not aware of arguments for it.

I agree with the exception for special advisers.

*Should special advisers be non-civil servants funded by an extension of Short money?*

There are attractions in this approach but on the whole I would prefer to keep special advisers within the corporate body of officials who support the Minister rather than outside it. They can be valuable members of the team which supports a Minister and it is better to have them working alongside the officials of the Department rather than as outsiders.

If the “Short money” approach were to be adopted, it would have to be on the basis that no other funds could be deployed to finance special advisers. There would otherwise be an obvious loophole which would allow any number of advisers to be appointed without any Parliamentary oversight.

I support the concept of expert special advisers, appointed under the supervision of the Civil Service Commission for their expertise but not playing a political role. It is a concept which has worked well in the past and I see no reason why it should not be reintroduced.

*June 2008*
Supplementary memorandum by Lord Turnbull (Ev 59)

Q8. Do you agree with exceptions to the requirement to select on merit on the basis of fair and open competition set out in clause 34(3) of the Draft Bill?

Not as drafted. There will always need to be provision for exceptions but these must be authorised by the CS Commissioner. I see no need to need to include staff in the Royal Household as I have never regarded them as civil servants (though they do, as a matter of good house keeping, keep salaries in line with the civil service). Nor should merit be excluded for those appointments which are formally made by The Queen on the recommendation of the Prime Minister such as the Head of the Home Civil Service or the Commissioner of HMRC. I am opposed to the diplomatic exemption which has been as abused as an old peoples’ home for retiring politicians. There are cases where appointing a politician is justified but they should be justified on merit.

Q9. Should there be provision on the face of the Bill restricting the functions that a special adviser can exercise in relation to civil servants?

Yes. It has previously been recognised that special advisers should play no part in decisions about the recruitment, promotion or reward of civil servants; nor should they be able to commit public money. This should be in the Bill.

There is a separate issue of whether it would be better for special advisers to be a separate cadre funded by a kind of “Short money”, or whether they should be civil servants with certain derogations. The arguments are finely balanced. Keeping them separate avoids any risk of taint to the behaviour of the civil service and the Short money idea provides an alternative control to a limit on numbers which I think would be a mistake as it would entrench whatever number was chosen.

I prefer, however, to keep special advisers as civil servants. This emphasises that they are part of a common enterprise and must adhere to the same standards of behaviour. Although the method of their appointment makes it impossible for the Permanent Secretary to dismiss a badly behaved adviser, keeping them in the civil service does mean he has some locus in reporting any misbehaviour to the Minister. I also think it is essential to retain the provision in the Special Advisers’ Code that they should not “suppress or supplant” the advice of civil servants.

I do not agree with those who want to make a clear distinction between expert and political advisers. In my experience, experts are rarely entirely impartial, and political advisers entirely without expertise.

May I also make some comments in addition to those I was able to make at the hearing.

On the issue of whether the Civil Service Commissioners may undertake inquiries on their own initiative, I share the concern that has been expressed that this might provoke attempts by third parties to pursue their grievances by trying to suck in the Commissioners. An alternative approach would be to allow the a right of initiation but requiring the Commissioners to seek the agreement of the Head of the Civil Service or as minimum consult him. Whichever way I would cut out the veto of the Minister which is implicit in c 40(1).

The PASC has recommended that the term of Commissioners should be 5 years. I prefer 7 which would also make it possible to promote an existing Commissioner to First Commissioner and still leave time for a viable term of office.

I believe that the Civil Service Code should include references reciprocal to the obligations of civil servants, ie that Ministers must not encourage civil servants to undertake actions inconsistent with the Code. In return for the duty to offer impartial advice, civil servants should have a right to expect Ministers to give due weight to it.

June 2008
Demonstrations in the Vicinity of Parliament

Introduction


2. While intending to repeal sections 132–138 of SOCPA so that “people’s right to protest is not subject to unnecessary restrictions”, the Government has also indicated that it believes “Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order to ensure that Members are able freely and without hindrance to discharge their roles and responsibilities”. To that end the Government “invites the views of Parliament on whether additional provision is needed for the purpose of keeping passages leading to the House free and open while the House is sitting, or to ensure, for example, excessive noise is not used to disrupt the workings of Parliament”.

3. This paper focuses on what might be considered necessary by way of additional provision to the Bill in order to ensure Members” free access and for excessive noise to be controlled.

Background

4. Some background to the present situation may be helpful in putting into context what additional provision Parliament might seek by way of the legislation. That involves considering the genesis of the SOCPA provision and the role of the historic sessional order.

5. Parliament Square has long been a focus for public interest. In the nineteenth century there were frequent demonstrations for trade union rights; suffragette protests culminated in the Black Friday riot of 1913; in the 1970s anti-apartheid and other demonstrations were staged, and more recently pro- and anti-hunting protests. Since June 2001, Mr Brian Haw has staged a “permanent peace protest” opposing US and UK actions against Iran and Afghanistan.

6. Acts of Parliament intended to prevent large numbers of people approaching Parliament include the Tumultuous Petitioning Act of 1661 and the Seditious Meetings Act of 1817, both now repealed. The orderly control of public protest nationally is now governed by the Public Order Act 1986. This requires organisers of marches to give six clear days’ written notice to the police and permits the police to impose conditions on a march if they believe there is a risk of serious public disorder, damage or disruption.

7. Since 1713 the House passed a series of Sessional Orders at the beginning of each session. The Order relating to the Metropolitan Police was passed in its most recent form in every session from 1842–2006. It required the Commissioner of the Metropolitan Police to ensure that “the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House during the Sitting of Parliament, or to hinder Members by any means in the pursuit of their Parliamentary duties in the Parliamentary Estate”. The Order was transmitted to the Metropolitan Police Commissioner with the intention of the Commissioner giving directions to constables under powers contained in the Metropolitan Police Act 1839.

8. In November 2003, the Procedure Committee undertook an inquiry into Sessional Orders and Resolutions. In evidence to that committee, the Metropolitan Police drew attention to the limitations of the Order. The Commissioner’s directions, for example, did not include a power of arrest. They noted that no prosecutions had been brought under the 1839 Act for many years, and that its provisions “lacked teeth”.

9. The Procedure Committee concluded that the introduction of fresh legislation was needed to ensure that the police had adequate powers in this area. They recommended that the Sessional Order should only continue until such legislation was in force. The Government accepted this recommendation. In the current session, no Sessional Order was passed in the Commons (though the Lords passed their equivalent order).

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1 The Governance of Britain—Constitutional Renewal, Part I, para 30.
2 Ibid, para 28.
3 Ibid, para 29.
4 www.parliament-square.org.uk
6 Managing Protest around Parliament, Cm 7235, p 9.
7 Sessional Orders and Resolutions, Ev 42.
8 Ibid, p 2.
9 HL Minute, 6 November 2007.
10. The Serious Organised Crime and Police Act (SOCPA) 2005 placed on a statutory basis the framework for dealing with static demonstrations in the vicinity of parliament (the intention being that marches would be dealt with under the Public Order Act). Sections 132–138 of the Act provide that:

— Any person who demonstrates, or organizes a demonstration, in a designated area (specified by regulation) without prior authorisation by the Commissioner is guilty of an offence subject to penalty of imprisonment or fine or both.
— Six days' written notice is required if authorisation is sought.
— The commissioner may impose requirements on any one seeking such authorisation to prevent “hindrance to the proper operation of Parliament”, or other disorder or disruption.
— No loudspeakers may be used other than by the emergency services.

11. SOCPA received Royal Assent on 7 April 2005. As preparations were being made to implement its provisions, Mr Brian Haw won an application for judicial review on 28 July. He argued successfully that the creation of an offence triggered by the absence of prior police authorisation “when the demonstration starts” did not apply to him since his demonstration had “started” before the enactment of the bill.¹⁰ The Government successfully appealed against this judgement on 8 May 2006 when the Court of Appeal found that it was clear that the intention of the Government was that the provisions of the Act should apply to all demonstrations regardless of when they began.¹¹

12. Mr Haw had by this stage obtained authorisation under SOCPA for his protest, but the police imposed a number of restrictions on him, including one that limited his placard display to a maximum width of three metres. Mr Haw refused to comply with these with the result that the police removed his placards on 23 May 2006. On 22 January 2007 Mr Haw successfully contended in the Westminster district court that he had not breached police conditions. The judge ruled that the conditions were unclear and had not been imposed by the Metropolitan Commissioner himself but by a more junior officer. The judge ruled that the Commissioner had no powers to delegate such actions to a more junior officer.¹² CPS has now successfully appealed against this point.¹³

13. In July 2007 the Government published its Green Paper The Governance of Britain. The issue of protests in the vicinity of Parliament was dealt with under the chapter “Re-invigorating our democracy”. The Government noted that “strong views” had been expressed both in terms of the principle and practical application of sections 132–138 of SOCPA.¹⁴ It acknowledged that the right to peaceful protest was an essential civil liberty and was also protected by Article 10 of the European Charter of Human Rights. Consultation has been undertaken; the results are set out in Part 3 of the Constitutional Renewal documents.

### Parliamentary needs

14. One difficulty in finding a solution suitable to Parliament is the Government's assertion that it “will not pursue harmonisation of the sorts of conditions that can be placed on marches and assemblies in the Public Order Act 1986”¹⁵ (set out in para 6 above).

15. This conflicts with the views of the Metropolitan Police Service (MPS) which, in its response to the consultation document argues for prior notification of assemblies “in the close proximity of Downing Street and Parliament itself.”¹⁶ While considering the area defined by SOCPA to be too large, the MPS states its view that “prior notification is necessary to allow it to effectively manage the very large number of protests that take place in this small area.”¹⁷

16. I am advised that the Serjeant at Arms agrees with the MPS's view that prior notice should be given but that the area affected should be limited to comprise:

— that area of Abingdon Street adjacent to or opposite the Palace of Westminster;
— St Margaret’s Street;
— Parliament Square;
— Bridge Street;
— Parliament Street;

¹⁰ R (on the application of Haw) v Secretary of State for the Home Department and another (All England law report).
¹¹ R (on the application of Haw) v Secretary of State for the Home Department and another (All England report).
¹² http://news.bbc.co.uk/1/hi/england/london/6287091.stm
¹³ Note from Home Office.
¹⁴ The Governance of Britain, Cm 7170, p 48.
¹⁷ Ibid, p 3.
— Whitehall, south of Horse Guards Avenue;
— Downing Street (if Parliament decides not to prohibit protest in this street);
— King Charles Street;
— Victoria Embankment adjacent to Portcullis House; and
— Thames adjacent to Palace of Westminster.

17. The rationale for prior notice relates to the two principal requirements for Parliament, namely;
— unimpeded access to the Parliamentary estate for Members of Parliament (especially during times of sittings of either or both Houses); and
— control of intrusive sound systems (loudspeakers etc) disrupting the work of parliament.

18. The two principal requirements do, of course, need to be met in the case of demonstrations whether or not subject to prior notice. In particular, pavements and roadways adjacent to Carriage Gates, St Stephen’s Entrance, Peers Entrance and Black Rod’s Garden Entrance where there have been incidents involving Members trying to access the Houses either by vehicle or on foot, need to be kept clear of demonstrators.

19. The problem is that with the repeal of SOCPA provisions and in the absence of police powers of arrest in cases of offences of the sort given in the Public Order Act 1986, there would be little effective control of these areas, nor would there be any means of controlling intrusive noise from loudspeakers. As was acknowledged by the MPS and the Procedure Committee in 2003, the Sessional Order is insufficient an instrument to achieve this end.

20. A further point, supported by the Serjeant at Arms, is that overnight or permanent demonstrations should not be allowed on Parliament Square. Given recognition of the right to demonstrate legitimately, there seems no rationale for permanent demonstrations which are unsightly and may cause additional difficulties as more pedestrians are attracted to Parliament Square as a result of proposals on World Squares.

Conclusions

21. While understanding the democratic right to bring protest to Parliament, the House authorities responsible for order and security support the view of the Metropolitan Police Service that there should be a stipulation for notification of demonstrations within the area defined in paragraph 16 above in the interest of maintaining public order and safety.

22. Whether or not such a provision is made, the House authorities consider that Clause 1 of the Bill should include provisions giving the police powers of arrest similar to those given in the Public Order Act in respect of demonstrators in the immediate vicinity of the Palace of Westminster so that free access to both Houses is maintained. They should apply to individual as well as to group demonstrators. They also consider that powers to control intrusive noise should be written into the Bill.

23. The House authorities see no justification for overnight or permanent demonstrations in Parliament Square once new regulation governing orderly and legitimate expression of opinion is in place, particularly in view of the likely use of the Square as a World Square.

Malcolm Jack
May 2008

Memorandum by the Clerk of the Parliaments (Ev 12)

The Clerk of the House of Commons has submitted a memorandum on demonstrations in the vicinity of Parliament. I support the broad thrust of this memorandum and Black Rod supports the view taken by the Serjeant at Arms on the need for prior notice of demonstrations in the limited area described in paragraph 16 of the memorandum; and on the need for Police powers of arrest in the immediate vicinity of the Palace of Westminster.

I should point out, however, that demonstrations in Parliament Square have been the subject of considerable debate and exchanges in the House of Lords during which a wide range of views have been expressed. I have provided the Clerk to the Joint Committee with links to some of these debates.

I endorse, in particular, the analysis by the Clerk of the House of Commons of the limitations of the Sessional Orders. The House of Lords has continued to pass its usual Order on Stoppages in the streets and last did so at the beginning of the current session, on 6 November 2007. The Order requires that the Metropolitan Police Commissioner “do take care that the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Lords to and from this House during the sitting
of Parliament”. The Order was duly communicated to the Commissioner by Black Rod. The Commissioner’s ability to implement it rests on the Metropolitan Police Act 1839. As the Clerk of the House has noted, the Commissioner has indicated that the provisions of this Act lack teeth.

The force of the Sessional Orders derives ultimately from the privilege of Parliament—the fundamental right of Members of both Houses to go about their Parliamentary business, and therefore, from the unlawfulness of any attempt to interfere or molest them in the course of this business. Parliament cannot itself enforce the Orders, so without effective Police powers, this fundamental right could be challenged.

I should perhaps add that demonstrations on Parliament Square, and the noise associated with them have a more immediate impact on the Commons than on the Lords. The key for the House of Lords is that the passages leading to the House should be kept open, and that Members should not be obstructed from entering or leaving Parliament.

Michael Pownall
3 June 2008

Examination of Witnesses

Witnesses: Dr Malcolm Jack, Clerk of the House of Commons, Mr Michael Pownall, Clerk of the Parliaments, Lieutenant-General Sir Michael Wilcock, Black Rod and Mrs Jill Pay, Serjeant at Arms, gave evidence.

Q447 Chairman: Can we thank you for sparing the time to come and see us as a Committee. Of course we do not have to explain very much about what we are doing because you know, but I do have to still say that Members have declared interests relevant to this inquiry and these are available today and on the Committee’s website. If there are any additional declarations that need to be made, they should be made now. Can I also say that we are conscious of the time and that everyone wants to be out by quarter to six, and so if we could go through the questions as quickly as is proper, and if there is anything left to be asked at the end perhaps we could ask you to respond to writing. The first question is about the Serious Organised Crime and Police Act 2005 and perhaps we could ask if you feel that there have been any problems with sections 132 to 138?

Dr Jack: Shall I begin, Chairman, and then I am sure that my colleagues will come in. I think you have had evidence already from the police on the workings of these sections of the Act and I think they have given you various views about their difficulty in enforcing them. If I can approach it from the other point of view, I think the two things that we are really concerned with as the House authorities are access to this place, principally, and noise. I think that if the sections of the Act that you have mentioned were repealed and not replaced by anything, we would be in a very difficult situation on those matters particularly, so I think that is the way we would rather approach the subject.

Q448 Chairman: So do you think it is proper for you to have a view as to whether there should be a repeal or would you rather leave things as they are?

Dr Jack: I think I have gone as far as to say that we think that if the Committee wishes us to give the level of access that we are told is necessary then there should be something in the Act. I would go as far as that. If those sections of the Act are repealed and nothing is put in their place, then I think we return to the situation outlined by the House of Commons Procedure Committee in its report of 2002-2003 in which the Committee said: “We believe that legislation on demonstrations is the only way to ensure that the police have adequate powers to achieve the results intended by the Sessional Order”. So a Committee of the House of Commons said that. That view was echoed by Ministers not surprisingly when the Bill was introduced. I will not go on too long but I have got a very short extract from 7 February 2005 Commons Hansard where the Minister Caroline Flint at that time said: “We need specific legislation that recognises the unique position of Parliament and its surroundings. The Government recognise that existing legislation has not provided the police with all the powers they need to control protests and demonstrations.” I think our view is that if the powers are removed and nothing is put in their place we would be back to this situation.

Q449 Chairman: Is that a view shared by other colleagues on the panel?

Mr Pownall: Could I just say that I agree with much of what Dr Jack has said. Perhaps I should just say, as I said in my short memorandum, that the problems of demonstrations in Parliament Square and the noise problems are more matters for the House of Commons than they are for the House of Lords, although we certainly have an interest in the House of Lords. I should also say that the SOCPA powers, and the whole question of demonstrations in Parliament Square, specifically the requirement to give advance notice of such a demonstration, have been the subject of quite a lot of exchanges and debate in the House the Lords, including a quite lengthy debate on a
private Member’s bill early in 2007, so inevitably I have to be somewhat cautious in what I say because very strong views have been expressed in the House the Lords. I agree with Dr Jack, the key thing is access to the immediate vicinity of the House. Black Rod may want to add a little to that.

Lieutenant-General Sir Michael Willcocks: If I may, I will come in slightly later when you get on to more operational matters which are more of my concern.

Dr Jack: Could I just amplify one thing as well which I think is very important and that is access of course not only for Members of both Houses, which is itself important, but for the large numbers of other people who have to come to and fro to the Palace during the course of any sitting day, and indeed even on non-sitting days, and I mean people who work here, civil servants who come to brief Ministers, witnesses before select committees.

Q450 Chairman: Did you want to add to that?

Mrs Pay: Only to say that I agree very much that the concern for Black Rod and myself is about maintaining access in all of this so that there is no disruption to parliamentary business, which in our view does not only happen on sitting days, there is parliamentary business all the time, and I think what we need here is some clarity so we know exactly which are the areas where we need to have access and that we have that same regulation, if you like, all the time so there is no confusion.

Q451 Lord Tyler: Even accepting the point that has just been made about non-sitting days, the emphasis on access clearly is particularly important on sitting days. Is it implicit in what you are saying that we should have a different regime for days when both Houses are sitting, at weekends, the recess, or are you saying we need the same controls throughout?

Mrs Pay: I believe we need the same controls throughout because the access is very important for visitors who come to Parliament, a lot of Members and Peers I am sure work through the recesses now, and all of that is parliamentary business as much as formal sittings in the Chamber and committees. A lot of committees sit through the summer recess as well and I do not think we can differentiate and still maintain clarity.

Lieutenant-General Sir Michael Willcocks: We really do need clarity and having an Act which has different provisions for different days of the week, which may change of course when the House sits or when, we suddenly call an extra sitting and so on, I think it will need a regime that is absolutely standard and understood by all the public, police and everybody.

Q452 Lord Norton of Louth: It is really to follow and pick up a point Dr Jack made and allow him to expand it because the quote he gave mentioned seeing Parliament as a unique institution and that was the justification for action. Why should Parliament be separated out and treated separately from other bodies up and down the country? There are other public bodies and they have got elected members and there may be demonstrations and they need access to the building, so what separates Parliament out that would justify treating it separately in this way given that it sends out possibly the wrong signals about Parliament’s acceptance of the willingness to demonstrate?

Dr Jack: I suppose because Parliament is the sovereign body of the country and it is in a unique position. I will not start talking about the privileges of both Houses this afternoon, I will keep that for another occasion, but I think that is the case and I do not think one should apologise too much for that. The point about the negative message is that—and I am careful to say, by the way, that we have no view about demonstrations of course or their merits or whatever—it is the nature of people who demonstrate that they think their demonstrations are the only important thing that is going on. Parliament Square is a very confined area and the Houses are very near the road. This is one difference incidentally with some of the Commonwealth parliaments where they are physically set back much more than we are. And so it is a balance really of ensuring the democratic rights of people—and we understand why people want to come and demonstrate in front of Parliament—but other people have legitimate concerns and at the same time; and it is managing all that really; it is getting a balance.

Lieutenant-General Sir Michael Willcocks: If I may Lord Norton, there was a presumption there about willingness. We are not talking about demonstrations yet. You are merely asking us whether there should be special provisions to allow access; we have not got on to whether or how we would restrict demonstrations or anything else. There is no presumption that we are striving to limit demonstrations at all. We have not actually approached that point yet.

Q453 Lord Norton of Louth: The position is that the 2005 Act covers the area around Parliament and in that sense it is the fact that it is specific to Parliament and I think that is what we are getting at. Dr Jack is right constitutionally but why should the same provisions not apply, say, to other public buildings where you have got confined access, people living locally subject to disruption or whatever? Why is it that this is a public general Act but applies only to the area around Parliament?
Dr Jack: We are the authorities responsible for Parliament and I think really that is as far as we can go, we could not really comment.

Lieutenant-General Sir Michael Willcocks: We have the figures now from Transport for London that 34 million pedestrians use Parliament Square annually and we now have one million visitors to this Parliament a year. You then have all the Members and members of the public who want to get in. I do think, quite apart from Dr Jack’s presumption with which I totally agree, it is a sovereign body, it is in a unique position of being a very small area with literally millions of people into which you then put the sort of scale of demonstrations. I do not think any council building in the north of England has had half a million people marching past it for rural rights and things. I do think that we are a very special a) position, b) institution and c) circumstances around us.

Q454 Lord Norton of Louth: Just a quick point on your point about numbers, of course the National Assembly for Wales in terms of number of visitors there, they are not actually that much that lower than the Palace of Westminster so should there not be similar considerations?

Lieutenant-General Sir Michael Willcocks: Thirty-four million tourists as well to Wales?

Chairman: Okay I think we will leave that one. Martin Linton?

Q455 Martin Linton: Dr Jack mentioned Commonwealth parliaments: do you have any information about other countries, European as well, and how they manage protests? Do they have special regulations on protests, on noise? Do they have Sessional Orders or anything like it?

Dr Jack: Yes I have got some information for the Committee which we can obviously follow up and I am sure that the Clerks can do that. I picked out Australia and Canada for perhaps fairly obvious reasons. In Australia there is actually an Act, the Parliamentary Precincts Act, which dates from 1988, and that actually defines the precincts quite specifically. It says that the precincts shall consist of “the land on the inner side of the boundary of a ring road which surrounds Parliament House, and all buildings, structures and works on, above or under that land,” and that is actually quite a wide area. Then another section of the same Act gives the responsibility for maintaining those precincts to the presiding officers to manage as they wish. There I would pick up again the point about negative publicity. Australia and Canada—and I will come on to Canada in a minute—are mature and respected democracies and I do not think anyone thinks that that gives out a negative message in those countries. That is the situation in Australia. Some of the other jurisdictions, the provincial parliaments have similar arrangements. By and large, I think the powers are always invested with the presiding officers, the Speakers of parliaments and then delegated to officers of the House. In Canada although there is a background law, which I have not yet been able to establish, I am told by my source there, that there is a committee called the “Use of the Hill” Committee and the Use of the Hill Committee consists of the Speakers of both Houses, officials, and it is advised by the police, and everyone who wishes to demonstrate, or do anything else in the precincts must apply to the Use of the Hill Committee and get permission. No installations of any sort are allowed within the precincts. Other jurisdictions in Canada have roughly followed that route. Some have legislative definition of precincts, others leave it to a more common law approach. I will just leave it at those two examples of Australia and Canada.

Q456 Martin Linton: These are much more recent parliaments. Do you not have any information on the Assemblée Nationale or the Bundestag which are in city centres like us?

Dr Jack: I am trying to recollect my attachment to the Assemblée Nationale which was very many years ago. I think actually the Assemblée Nationale is right on the street rather as we are and therefore no doubt has immediate problems, but—and this is rather anecdotal—I get the sense that the police in France act fairly forcefully when they wish.

Q457 Martin Linton: It is what their powers are that we need to know.

Dr Jack: We could find that out and supply the Committee with that information.

Chairman: Thank you for that. Lord Hart?

Q458 Lord Hart of Chilton: This question of clarity of what we are talking about for access is obviously a very important issue and the police have asked us to consider clarifying and being quite clear what we are talking about when we are talking about access. If we gave you a plan, I suspect you would all agree, would you not, as to the precise location of the points at which access was to be maintained at all times? Would that be helpful?

Dr Jack: It would.

Mrs Pay: Yes and we would take that from Carriage Gates, down past St Stephen’s Entrance, past Peers’ Entrance, right down as far as Black Rod’s Garden.
Q459 Lord Hart of Chilton: I rather suspected that.
Mrs Pay: It is that side of Abingdon Street and also for the Commons in front of Portcullis House on the Victoria Embankment. Those are the access points that we would like to keep clear of protest.

Q460 Lord Hart of Chilton: Against that some of those who have spoken on behalf of those wanting to demonstrate without restriction think that Members and officials should really put up with it and use side entrances, but I rather think that you would not approve of that?
Mrs Pay: That is correct.
Lieutenant-General Sir Michael Willcocks: But perhaps if I could put a rather more serious slant on it, and forgive me, I do not know the background of the Committee and before one says anything as an expert you find someone who is far more expert than you are, but I do have great experience in handling demonstrations, riots and everything else, and the point is here you must legislate, I think, for the whole panoply of possibilities. There is no possible way you can control a demonstration which turns ugly on you if they are allowed on this side of the road. Therefore in pure security terms it would justify a very small—it only goes from Black Rod’s Garden to the Carriage Gates and Portcullis House, as Jill says—exclusion zone for demonstrations on security grounds, and, by the way, that also ensures you have access to Members, and (I think we ought to keep saying) that it is for the public who want access to their Parliament, which is very important, it is not just for the rights of Members. If you then add in the factor of course of the huge numbers of tourists, you solve the police’s problems and make it quite clear, I think.

Q461 Lord Williamson of Horton: If we assume, because that is what is being proposed the draft Bill, that sections 132 to 138 of the Serious Organised Crime and Police Act 2005 go, the question is what additional police powers would be needed, in your view, to ensure that access is maintained? Specifically, what do you think about reintroducing the Commons Sessional Orders and the Lords Stoppage Orders? We have to assume that it is a blank sheet, if I can put it like that.
Lieutenant-General Sir Michael Willcocks: If I could follow on from my answer before asking Dr Jack to comment. It is no good having an exclusion area if the police cannot enforce it and therefore hand-in-hand with this very small restricted area I would submit that you must give the police the powers to enforce it. Before Dr Jack speaks, the problem with the Sessional Order is that it gives the police no powers whatsoever to enforce it, and therein lies the problem.

Dr Jack: I think that puts it in a nutshell. I mentioned the Procedure Committee’s report of session 2002-2003 and the phrase that they put in the report is “without such legislation”—that is legislation to introduce these powers—“the Sessional Order is misleading”; misleading in the sense that it appears to secure access but does not.

Q462 Sir George Young: Can we go back to noise. Again assuming, as Lord Williamson has said, that SOCPA goes, Dr Jack, you made it clear that you want the power to control noise in the draft Bill. The demonstrators have told us that they have got to make some noise, the stewards have to control the people who are demonstrating, and the object is to get a message over. What is the right legal framework to get the balance that we are all after between on the one hand the right to protest and on the other hand the right of people who work here to carry on working without being harassed?
Dr Jack: Perhaps I will bring in my colleagues on this one. I think this is quite a difficult problem actually, the problem of noise, for the very reasons that Sir George has just set out. I think the problem at the moment appears to be that the police have no powers at all to deal with it. If any individual is being excessive in using loudspeakers and so on, the police suggest that the powers are very restricted indeed, unless that person is causing an obstruction on the highway; that is how I understand it. Inhabitants of 1 Parliament Street do find noise levels quite insufferable at times and although I am rather set back in New Palace Yard on the front of the House of Commons, I must say it is quite disturbing even there, so it is a problem.
Mrs Pay: I think there are issues about noise. It is very difficult to set a level because at 6 o’clock in the morning something is very loud but by 2 o’clock in the afternoon you cannot hear that noise because of the background traffic. We have a lot of complaints from Members obviously in 1 Parliament Street, in meetings in Westminster Hall, in the Chamber sometimes, and in committee rooms, and it is more about the persistent offender with the loudhailer than it is for a two-hour demonstration in the afternoon where there is a message being got across. The incessant use of a loudhailer just by an individual causes so much disruption and I think talking to the police—

Q463 Sir George Young: What is the answer?
Mrs Pay: I think the answer is that if there is repeated complaint by people being disrupted and harassed, that the police have some powers to either seize the loudhailer after due warning or to move the person away. I do not think it is the noise level that should bring those powers into action; I think it is when there
is sufficient complaint for people who in one way or another are being harassed. I have some examples where a lady who resides on Parliament Square but is frequently now coming over to Carriage Gates and is using a loudhailer and is harassing Members as they come through Carriage Gates; that is intolerable for them. I think that is the sort of occurrence where the police need powers to move her on or, if she refuses to do that, to seize the loudhailer. I do not think it is about two-hour organised demonstrations. I think it is more about the incessant use by an individual.

Dr Jack: Can I add on that point, it is slightly at a tangent but I thought it might be worth recording, that we do have quite a long list of harassments of various sorts of Members of the House.

Q464 Chairman: Perhaps we could have a copy of that; that would be good. Is the problem the same at the House of Lords end or is it not a big issue for your colleagues?

Mr Pownall: I would say the problem of noise, Chairman, and there are Members here who can advise as Members of the House, is less of a problem for the House of Lords. We are conscious of it but it does not permeate itself in the same way as in the Commons.

Q465 Lord Armstrong of Ilminster: Have you ever explored the possibility of civil remedies for noise disturbance, taking out an injunction against individuals who are causing noise disturbance?

Lieutenant-General Sir Michael Willcocks: People apply to use loudspeakers in demonstrations and we have objected to the council on the grounds of that, but that is not the same as an injunction of course, and you will find that the council rules in our favour, but that is not the real problem. I do not think we have ever sought an injunction because I do not think it is practical; they just ignore it, and the problem is the police have no sanction even under those circumstances.

Q466 Lord Armstrong of Ilminster I had the impression that the police did not feel that the noise was their problem, they are concerned with access and noise is somebody else’s problem and not theirs. Do you think that you and we are dependent upon the police authorities to control the noise?

Mrs Pay: I think if the police had some powers then we would be dependent on them but at the moment they do not have any powers to stop the noise, and all that has happened is when serious complaints have been made they then go through a due process and can be perhaps considered four months later when what we need is somebody to be able to take some action on that day. The noise levels are controlled by Westminster City Council and other authorities and I do not think the police would ever want to have any control over noise levels or giving the kind of permissions that Black Rod was talking about. They are looking for some powers to be able to deal with the problem on the day.

Q467 Lord Armstrong of Ilminster: Who enforces Westminster City Council’s powers to deal with noise? Is there any enforcement of that?

Mrs Pay: It is the planning authority, I believe, through the planning authority at Westminster City Council.

Lieutenant-General Sir Michael Willcocks: But I think then it is unenforceable, frankly, and that is the problem.

Q468 Lord Armstrong of Ilminster: Do they send out inspectors? If someone rings up and says there is an awful noise going on, do they send somebody out to try and stop it?

Lieutenant-General Sir Michael Willcocks: Not to try and stop it. I think they go and check it and monitor it but they, again, do not intervene, and this is the nub of the problem.

Q469 Baroness Gibson of Market Rasen: My question is actually to Dr Jack and Mrs Pay and it is about the proposal on the banning of overnight and permanent demonstrations. I wondered if you would like to talk to us about that and particularly in the context of whether it would be compatible with the ECHR.

Mrs Pay: I think there is a security risk with having permanent and overnight demonstrations. They are an obvious target for a terrorist to secrete any kind of weapon or mechanism that could have a time delay on it. I think the condition that was placed upon Brian Haw to reduce the size of his encampment has reduced the risk but, nevertheless, the police would really have to check it every hour all through the night to ensure that nothing has happened, so I would be more comfortable not to have permanent encampments and permanent overnight demonstrations.

Dr Jack: I take the reference to Article 11 of the European Convention and I think we are not really the right people to ask for legal opinions about its application but, once again, I think I am expressing views of many Members of the House who have spoken to me directly, and once again of the Procedure Committee in its report of 2002-03 where the Committee said that “demonstrations should be limited in duration and well-organised to avoid long-term occupations which would limit the number of demonstrations and undermine the aesthetic and
environmental value of Parliament Square as an important heritage site, so I think the Committee gave those two or three reasons for not having long-term demonstrations or overnight demonstrations, and I think that, as this Committee knows very well, with the further plans for development of the Square as a World Square there may be even stronger reasons for that. I think that we take our cue from the Procedure Committee.

Q470 Lord Tyler: Can I ask Dr Jack whether he therefore rejects the view of the Joint Committee on Human Rights that there may be an issue here? Dr Jack: No. I certainly would not. I have far too much respect for the Joint Committee on Human Rights. If that is their view I am sure that it is a view that needs to be taken account of.

Q471 Lord Norton of Louth: We have covered the issue of access but there is also the issue which both the Serjeant at Arms and Black Rod have touched upon which is obviously that of security. When there is a demonstration, issues arise there and the police would like to have some power to impose conditions on demonstrations on the grounds of security, and it is really to ask whether the House authorities actually have a view on that. Is that something you think is necessary?

Lieutenant-General Sir Michael Willcocks: I think first of all, it is interesting, as Dr Jack said, in all the other parliaments I can come across, demonstrators have to notify an intent to demonstrate, and although it is a matter for the police, I sympathise with their view on demonstrations, in a much smaller area than the SOCPA provisions, (we are only talking about the front of this building, the riverside, Bridge Street and round here) on the grounds of pure operational practicality to know the size and so on of demonstrations because, as I say, it is one of the busiest focal points certainly of the capital and probably of the country with millions of people there and everything else. The first thing is that I would sympathise with their wish to have notification but I would not die in a ditch about that. The problem is to give them powers to ensure access; that is the real thing we are looking for. On the other hand, I think it would be foolhardy not to allow some judgment to be applied by the police in matters of security to give them powers. As ever, the law balances the rights of people to demonstrate with the rights of those people who need access and security and the law has to balance it. I sympathise with the Police’s wish to have notification of demonstrations but I absolutely totally support them in having some power to restrict what goes on. Allow the demonstrations of course, but it would be foolhardy to have a complete carte blanche.

Q472 Lord Armstrong of Ilminster: I think that touches the heart of the thing, the need to balance the right to protest with the need to protect parliamentarians and the Houses of Parliament. Do you have any thoughts about the best legal framework with which to do that? We are told that the SOCPA has failed us in many respects such that the Government is prepared to repeal it. I get the impression from what you are saying that you do not want to leave a vacuum when that goes, but you do not really believe that the revival of Sessional Orders would do the trick because they give no powers to the police.

Dr Jack: Yes that is it.

Q473 Lord Armstrong of Ilminster: What legal framework would you look for, as it were, to try to preserve this balance effectively?

Mrs Pay: If I could just give it from my point of view, I support the police’s view to have prior notification because that helps them to plan, and I think they know the size of the problem they are going to have the next day or the day after, and therefore they can plan their resources accordingly, and they facilitate demonstrations, they do not try and stop them. I am terribly sorry but I do support their requirement to have notification.

Q474 Lord Armstrong of Ilminster: So it would be an offence to have a demonstration without giving advance notification; is that right?

Mrs Pay: Yes.

Dr Jack: That is the case in the Australian Act which I quoted; it is an offence.

Mrs Pay: I think the police need the right to put some conditions on. Examples we have are when you have protests from opposing sides, as we had with the Human Fertilisation and Embryology Bill recently. We had demonstrations by opposing sides and they were kept apart and they both got their message across but without any clashes between them. We often have opposing sides for religious debate and for the same reason I think it is important that the police are able to put conditions on as well. My third point is if we can get the access identified clearly, as you suggested my Lord, on a plan we can be absolutely clear where we need access and give the police some powers to ensure that that happens.

Q475 Lord Armstrong of Ilminster: And you think that is really keeping the pavements clear along Abingdon Street and Parliament Square and Bridge Street so that people are kept off those pavements?

Mrs Pay: Along Abingdon Street from Carriage Gates to Black Rod’s Garden and in front of Portcullis House on the Victoria Embankment. They are the key access points.
Q476 Lord Armstrong of Ilminster: So that all the tourists that walk down those pavements would have to walk the other side?
Mrs Pay: No.
Lieutenant-General Sir Michael Willcocks: Demonstrations in that small area should be banned. It is to allow the tourists, it is the opposite, to allow the public access to their Parliament and, by the way, allow Members to get in to do their business; that is the point. I am not a lawyer so I am not sure of the precise legal framework but certainly if one accepts that the real balancing act is to balance the right to demonstrate with the right to protect Parliament and its visitors and access, then you require, under whatever legal framework you have, to designate that little area and then give the police powers to enforce it. It so happens at the moment that demonstrators apply to the police and the police say, “Well, go across the road, opposite Old Palace Yard, by the George V statue,” and they are all terribly well behaved, but if they were not and they swarmed over, the police cannot do anything about it. They do not have powers at all, they do not have any powers of arrest unless the people were starting to threaten and so on. So they could completely jam up Parliament and stop it working and the police could do nothing about it at the moment. We are very lucky, demonstrators are jolly accommodating, but what we need I think is a framework which allows us to insist upon the fact that that small area is kept free for tourists, the public coming in and witnesses to committees like this and yourselves to carry out your business.
Dr Jack: If I may just pick out of that the powers of arrest within the vicinity of the Palace is one thing that needs to be in the framework.
Mr Pownall: Could I just say that I thought the Serjeant at Arms put her finger on it when she said that the purpose of the prior notification should be to facilitate rather than to stop demonstrations. I say that in the knowledge that in the debate in the House of Lords last year prior notification was not particularly welcomed, so I am sure if it is to be done it should be with a light touch and to facilitate demonstrations rather than the opposite.

Q477 Chairman: It was put to us by some of those that sought to demonstrate that prior notification was good practice and that it may be that prior notification would grant certain rights that did not exist if there was no prior notification. Would that be an approach that you would support?
Mrs Pay: Yes, we would support that.
Dr Jack: Yes, and I think it works well in other places, Trafalgar Square for example.

Q478 Chairman: It has just been mentioned that the police do not have powers of arrest, but they would have powers of arrest if they were causing an obstruction?
Dr Jack: That is so but I think that is the problem that it is very difficult to establish that. That is what the police told you in their evidence.

Q479 Chairman: Can I ask one other question of you, Dr Jack, you several times prayed in aid the report of the Procedure Committee which called for legislation, which of course it got, and the legislation it got was SOCPA. Are you effectively saying that you think SOCPA is okay? I know you were reluctant to say that a moment or two ago but is that effectively what you believe?
Dr Jack: I will stick my neck out and say yes I do. I would not say there have not been difficulties with it of course, and the whole business is one of balance, as we have been saying this afternoon, so whatever legislation you have, it is going to be difficult to enforce, but I do not think that it has been unduly oppressive, if that is the question you are asking.

Q480 Chairman: So it is SOCPA or SOCPA II, something like that?
Dr Jack: I think so, yes.

Q481 Sir George Young: But SOCPA has left us with Brian Haw and the whole point of the Procedure Committee was to stop that, so surely SOCPA has not worked?
Mrs Pay: It is elements of SOCPA that we would prefer to have repealed and other things put in place to strengthen the access and the police powers that we have talked about.
Lieutenant-General Sir Michael Willcocks: It is well-intentioned but did not quite achieve what I think it set out to. For a start, speaking entirely personally, casting the net so wide in terms of notification was a mistake. The size of area is not needed. A much, much smaller area, much more focused and, as Jill said, with specific provisions in there to stop the sort of thing, that I think most Members would feel—
Chairman: Lord Norton wants to come in quickly.

Q482 Lord Norton of Louth: Is SOCPA adequate though to deal with the issues of security that you have mentioned?
Lieutenant-General Sir Michael Willcocks: No.
Mrs Pay: No.
Lieutenant-General Sir Michael Willcocks: No, that is the point. Having permanent encampments directly opposite the entrance that all MPs, the Prime Minister, heads of state and so on use is a major security risk.
Mrs Pay: And there being no powers to remove the protesters that we have evidence of here at Carriage Gates; that is a huge difficulty.

Q483 Martin Linton: This is the last question I think and it is just to ask you to be more specific about powers of arrest and powers of seizure. Should they just apply on the pavement on this side of the Embankment and should they be with Sessional Orders or without Sessional Orders? Should they not apply to the pavement on the other side of Parliament Square where the encampment is now?

Dr Jack: As far as location is concerned, in the memorandum which I have sent to the Committee in paragraph 16 we define fairly clearly which areas we think should be covered.

Mrs Pay: This is a much reduced area for SOCPA and for clarity I think it would be very difficult to say the powers apply to some of these and not others, so I think we would say that in that reduced area we would wish those police powers to apply.

Q484 Martin Linton: And seizure powers as well, the loudhailers and such like?

Mrs Pay: Yes, absolutely, the two together.

Q485 Martin Linton: Those would be localised powers that applied?

Mrs Pay: Absolutely.

Dr Jack: Within the area defined in paragraph 16.

Q486 Martin Linton: Would there be signage to make it clear to unsuspecting members of the public that this was so?

Mrs Pay: I think it probably would be quite sensible for when notification was given that then that information was sent to the organisers, because otherwise we would have signs on every tree.

Q487 Martin Linton: One last point, I witnessed a demonstration I think in September 2004 by the Countryside Alliance which was quite violent and where at one stage it looked as though they were going to break through the police barriers and effectively storm Carriage Gates. This was actually on Parliament Square itself. Do you think that this is still a security risk and do you think these powers would address it?

Lieutenant-General Sir Michael Willcocks: I think the police would come at it, by saying, what they would require is the powers of arrest in this limited area for access that we want and I think the police would say that they would like the Public Order Act sorted out so that it does not just apply to processions, it applies to static gatherings as well, and if you did that they would have all the powers they need. Yes, a demonstration can always turn violent, but if it does the police there have the powers to deal with it once it becomes a threat to life and so on. I think the police would probably argue that they would deal with it, which they did on that occasion.

Q488 Martin Linton: But if people did storm Carriage Gates one would be able to arrest them?

Lieutenant-General Sir Michael Willcocks: Absolutely.

Chairman: Thank you very much. I know that we have rushed through a little because I think we have all got other duties quite shortly, so thank you very much indeed for helping the Committee this afternoon.

Supplementary memorandum from the Clerk of the Commons and the Serjeant at Arms (Ev 02a)

ANSWERS TO FURTHER QUESTIONS FROM THE JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL ON ACCESS AND CONTROL OF PRECINCTS

(a) General

1. Further information on arrangements in France and Germany are as follows:

France

Further evidence supports the Clerk of the House’s remark to the Committee about strong policing, viz: If massive disruption is expected, the Senate closes to the public the Jardin du Luxembourg (which belongs to the Senate). They have no special legislation. Inside the Senate, a general commands the small detachment of quasi-military Republican Guard stationed in the precincts, and the President of the Senate has the (theoretical) right to call on the armed forces for assistance—not exercised for the past 50 years or so. The Prefect of Paris would not normally give permission for the route of a major demonstration to go past the Senate. When demonstrations are expected, massive force is deployed on the streets nearby: approximately
three officers per expected demonstrator, with armed and armoured CRS police standing by in vans, prominently parked.

Spontaneous demonstrations, for example from the nearby Sorbonne, can occasionally catch the authorities by surprise, but normally political intelligence is very good and the access for the Senators and the public to the Senate is not impeded, while demonstrators are kept about 50 to 100 metres from the Senate entrances. Similar arrangements apply to the Assemblée Nationale in the Palais Bourbon. So there is no specific legislation, but heavy policing in the republican tradition enables the work of deliberation to continue in all circumstances.

Germany

The German Basic Law guarantees the right to peaceful assembly, but also allows for limitation on assembly in the open air (unter freiem Himmel). There is a statute, the equivalent of a Public Order Act which gives to Federal and Provincial legislatures the power to establish and define areas around their seats where public assembly is forbidden—a so-called “Bannkreis” or “befriedete Bezirk”, a peaceful district or zone, colloquially known as the “Bannmeile”.

In August 1999, on its move to Berlin, the Bundestag defined such a zone by reference to an area within a number of specified streets in a law—Gesetz über befriedete bezirke fur Bundesorgane des Bundes, or BefBezG—which also covered the Bundesrat and the Federal Constitutional Court in Karlsruhe. Gatherings and marches are only allowed under specified conditions, principally that there is no fear that they are intended to influence the Bundestag’s ability to function, and that they do not hinder free access. This means that there is a presumption in favour of allowing such assemblies on non-sitting days. Permission must be sought at least seven days in advance, from the Ministry of the Interior, who takes a decision in consultation with the Bundestag President. The second statutory Report from the Interior Ministry to the Bundestag on the operation of the law, covering 2002–06, 16/6877, suggests that it operates effectively, and records that several hundred demonstrations etc were allowed over the period, and only seven (unspecified) turned down. There is no reference to encampments.

It may be worth emphasising in the context of Parliament Square and the Supreme Court building on the west side that the statutory power to establish such a zone extends not only to Land legislatures but also to the Federal Constitutional Court.

Incidents at Carriage Gates

2. A table is provided at Annex B [submitted but not printed]; also see paragraph 5 below.

Provisions Needed

3. The Parliamentary Authorities agree with the police that sections 132-6 and 138 should be repealed and replaced by legislation that would provide clarity to demonstrators, police, local authorities, parliamentarians and civil liberty groups. (Section 137 provides provision for local authorities to grant licenses for loud hailers and should be retained.)

Provisions needed are:

(a) a ban on protests in the area indicated at paragraph 4.
(b) the powers of arrest and seizure, the latter particularly in relation to noise disruption;
(c) prior notification; and
(d) provision to be able to act against misuse of loud hailers.

(b) Access

4. The attached plan of the Parliamentary Estate [Annex A] [submitted and printed as Appendix 4 of the report Volume I] has been marked up to highlight the access points from Carriage Gates to Black Rod’s Garden where it is recommended that protests are banned. The area in front of Portcullis House is included in this recommendation, as indicated. The areas include both the pavement and the roadway.
5. The table at Annex B [submitted but not printed] contains examples of occasions during which protests have disrupted access to the Parliamentary Estate. Disruption is often made worse due to the fact that whilst police have the power to report protesters, current legislation does not allow them to detain offenders for continuing to commit the offensive behaviour.

6. Yes, the introduction of an area (as discussed in paragraph 4 above) where protest is prohibited will be more effective in ensuring access.

The police will be able to distinguish between protestors and other members of the public through intelligence, observation and behaviour.

Yes, protestors could temporarily end their protest, enter the strip and behave acceptably, but that would be policed.

The strips as indicated on the attached plan cover the pavement and the roadway. Beyond that, protest will be prevented by the natural barrier of traffic. At the far side of the roadway lawful protest will be facilitated as at present.

The Parliamentary Authorities believe it is a proportionate response to ban protestors from using the designated areas because by their presence protestors will disrupt access for Members, staff and the general public (some on specific parliamentary business) using these busy thoroughfares.

**Sessional Order**

7. If legislation provides adequate controls along the lines proposed in paragraph 3 above, the Sessional Orders would be otiose. If there is no legislation, they would be misleading in that they are not sufficient to guarantee unimpeded conduct of parliamentary business.

(c) **Permanent/Overnight Protests**

8. Permanent and overnight protests around Parliament are considered to be a security risk. The Parliamentary Authorities support the continuation of the power for police to impose conditions on assemblies and protests whether it be under SOCPA or through the introduction or amendment of new or current public order legislation.

9. Yes, tents are viewed as the main security risk. The Parliamentary Authorities support the police viewpoint that the conditions currently applicable to “demonstrations only” through the Public Order Act, 1986, be extended to also applying to static protest. Additionally, the conditions should be available to be applied where there is a considered risk to security. Whilst the security consideration is specifically mentioned in SOCPA, it is not included in the 1986 act.

(d) **Prior Notification**

10. To clarify proposals made by the Parliamentary Authorities relating to prior notification:

Prior notification should apply to all assemblies of two or more individuals.

A voluntary notification scheme would prevent the planning and facilitation of protests by the police.

Ideally, to allow police to plan resources and an effective operation response, six days notice as at present, but with an impromptu protest the police should have the power to impose immediate appropriate conditions to mitigate against security risks (see paragraph 9. above) in the reduced SOCPA area that is recommended:

— That area of Abingdon Street adjacent to or opposite the Palace of Westminster.
— St Margaret’s Street.
— Parliament Square.
— Bridge Street.
— Parliament Street.
— Whitehall south of Horse Guards Avenue.
— Downing Street (if Parliament decide not to prohibit protest in this street).
— King Charles Street.
— Horse Guards Road between King Charles Street and Horse Guards parade ground.
Further supplementary memorandum by the Clerk of the House of Commons and the Clerk of the Parliaments (Ev 65)

INTRODUCTION
1. The Joint Committee has asked for a memorandum describing the procedural implications of the Government’s proposals:

(a) To provide for parliamentary scrutiny of the Executive’s powers to commit Armed Forces to conflict by means of a Resolution of the House of Commons.

(b) To include in the draft Constitutional Renewal Bill provisions intended to give statutory effect to the existing convention that most treaties are laid before the two Houses at least 21 sitting days before they are ratified (the Ponsonby rule).

This memorandum addresses each of these matters in turn.

WAR POWERS
2. The Government proposes that the House of Commons should be asked, except in certain defined circumstances, to approve in advance any decision to deploy forces into conflict (referred to in the White Paper as a “conflict decision”). The approval process would be initiated by the Prime Minister laying before the House a report setting out the terms of the proposed approval and such information about the deployment itself as the Prime Minister thinks appropriate in the circumstances. The House would give approval by resolving to approve the terms set out in the Prime Minister’s report. The House of Lords would debate the conflict decision, so as to inform the deliberations of the House of Commons, but would not hold a vote.

3. The White Paper includes a “draft detailed war powers resolution.” This is set out in the form of a humble Address to Her Majesty and is in five parts. The first is a statement of principle that a conflict decision requires the approval of the House of Commons. The second sets out the process by which the House would give its approval. The third and fourth describe exceptions to the requirement for approval and what should be done in those cases. The fifth describes what should happen if the conflict decision is made during a dissolution.

4. The White Paper does not include any proposal for a parallel House of Lords resolution. Instead it states that the best way forward is a “House of Commons resolution which sets out in detail the processes Parliament should follow.” This implies that new House of Lords procedures should be governed by the terms of a House of Commons resolution. In reality the two Houses are wholly independent, so thought needs be given not just to the Commons resolution, but to the procedures that will apply in the Lords. We comment on this in more detail below (paragraphs 15 to 21).

5. The draft resolution runs over several pages. It contains statements of major constitutional significance alongside detailed procedural rules. Some elements are prescriptive; others are in effect expressions of intent (eg that the Prime Minister should, if feasible, consult the chairmen of the relevant select committees).

6. The Committee may feel that those parts of the draft resolution which relate to the House’s conduct of its own proceedings would be both unnecessary and inappropriate in a humble Address to Her Majesty, being part of its exclusive cognizance. If that were so, the contents of any humble Address might be limited to the first part of the current draft together with the descriptions of the exceptions in the third and fourth parts.

7. The House of Commons customarily defines and regulates new procedures by means of standing orders. There would therefore be good reason to propose that much of the remaining content of the draft resolution should be set out in a new standing order. It is the case that the House regulates some of its proceedings by means of resolutions, for example the resolutions relating to sub judice and the scrutiny of European business. However, when a new procedure is introduced, implementation by standing order is generally to be preferred.
because standing orders are better suited to the detailed description of how the business is to be conducted and have more obviously the character of rules which are amenable both to interpretation in the light of particular circumstances and if necessary to challenge.

Should the provision be statutory?

8. The Government has decided against including the war powers provisions in the current draft bill for reasons set out in the White Paper. There may also be parliamentary reasons for preferring a non-statutory route. The first is that the House has less control over its own procedures when they are set out in statute. The result is that they cannot easily be amended to take account of experience or of new developments; nor is there the flexibility to adjust them in the light of particular events. In some circumstances this lack of flexibility is seen as a benefit, as for example, in the inclusion of detailed provisions in respect of the parliamentary scrutiny of draft legislative reform orders in the Legislative and Regulatory Reform Act 2006. But in respect of conflict decisions, the Committee may feel that flexibility in the face of the potentially unpredictable and very grave circumstances which might give rise to a decision to deploy the Armed Forces would be desirable.

9. The second reason relates to the importance which both Houses have traditionally placed on preserving the historic separation between the functions of the legislature and of the courts. This separation is enshrined in Article IX of the Bill of Rights which states:

“the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

The inclusion of the terms of the draft resolution in statute could risk blurring that separation in ways which neither the courts nor Parliament would welcome.

Exceptions

10. The draft resolution includes several exceptions to the requirement for parliamentary approval. These are that:

(a) The conflict is necessary to deal with an emergency so that there is insufficient time to secure approval in advance.

(b) Public disclosure of information about the conflict could lead to a security risk either to the operation itself or to members of UK forces or others assisting them.

(c) The operation involves only special forces and other UK forces directly or indirectly assisting them.

(d) The decision is made when Parliament is dissolved.

This memorandum does not address the substance of these exceptions, but there are a number of procedural issues raised by them which the Committee may wish to consider.

11. The emergency exception is engaged if, in the opinion of the Prime Minister, there is insufficient time to secure parliamentary approval. The approval process in the draft resolution includes a provision under which the House of Commons may seek the opinion of the House of Lords on the decision (see paragraphs 15–22 below). If that provision is engaged, approval may not be given by the House of Commons less than an unspecified number of sitting days after the request is made. The Committee may wish to seek assurances from the Government that the length of time required to obtain approval under this procedure would not itself be considered sufficient to justify the Prime Minister determining that the emergency condition had been met.

12. The security exception is expressed in very broad terms. It is at least arguable that any public disclosure of any conflict operation could prejudice the security of the operation or of the forces involved. The Committee may wish to explore why the Government has not felt able to propose a more restrictive definition.

13. The draft resolution states that in reaching a decision as to whether the emergency or security condition is met the Prime Minister should consult if feasible the chairman of any committee the Prime Minister thinks appropriate; and that if the Prime Minister determines that either of the conditions has been met he should inform the chairman of any committee he thinks fit as soon as feasible. In both cases the implication seems to be that the Prime Minister would consult or inform the chairman of a committee who would then be expected to withhold that fact from other members of the committee. Committees have occasionally agreed that certain sensitive information should be disclosed only to their chairman or to a limited number of their members, but there is no precedent of which we are aware for either House in effect requiring committee chairmen to act in this way.
14. Although at first sight there may seem to be good grounds for providing an exception for when Parliament is dissolved, it is in practice not easy to see in what circumstances other than a pressing emergency a government could decide that it would be constitutionally appropriate to deploy forces into conflict during a dissolution. The Committee may therefore wish to explore whether in the context of a procedure governed by a resolution of the House, it is necessary to make special provision for deployment during a dissolution.

The role of the Lords

15. As already noted, the White Paper proposes no equivalent draft House of Lords resolution, and envisages that a debate will be held in the Lords to inform the Commons deliberations. New procedures will have to be developed in the Lords if this is to be achieved, covering such matters as a Government undertaking to lay the Prime Minister’s report before the House of Lords (not mentioned in the White Paper, but presumably a precondition for a Lords debate) and the precise terms of any motion to take note of that report. Such procedures would probably not require new Standing Orders, but they would have to be agreed formally by the House. This could be done in one of two ways:

— A resolution of the House, setting out the Government’s commitment to place a report before the House and the procedures which will follow. This would be moved by the Leader of the House.

— A proposal from the Leader of the House to the Procedure Committee. The Committee would then report to the House with recommendations, and if the report were agreed the procedure would be set out in the next edition of the Companion to Standing Orders.

16. The only specific indication in the White Paper of the procedures to be followed in the Lords comes in the draft resolution, which proposes that the House of Commons should be able to seek the opinion of the House of Lords on a proposed conflict decision before deciding whether to approve it and that it should request that opinion by means of a Message. However, whereas the remainder of the draft Resolution is prescriptive and clear in its intent, the phrase “may send a message to the Lords” does not indicate the circumstances in which this provision would or would not apply.

17. Messages are commonly used for the transmitting of bills and amendments to bills from one House to another, for the appointment of joint committees and occasionally for other matters, for example to request the attendance of officers of one House before a committee of the other. The substance of such messages normally requires a decision to be taken by the House concerned.

18. If a message were to be sent to the Lords, the only way in which the Lords could reach a decision that could be communicated to the Commons by way of reply would be if their debate on a conflict decision took place on a substantive motion. This might, for instance, be a motion “that this House takes note with approval of the Prime Minister’s report on the use of force by United Kingdom forces in [xxx]”. But with any substantive motion, the House’s tradition of self-regulation means that there would necessarily be a possibility that members opposed to the decision could table amendments and/or force a division. This would undermine the Government’s intention that “the House of Lords should hold a debate … but they should not hold a vote”.

19. The only way to ensure that the House of Lords does not vote would be to debate the report on a neutral “take note” motion (which is normally agreed to at the end of the debate). In the words of the Companion, this formula “enables the House to debate a situation or document without coming to any positive decision”18. But of course in the absence of a decision there would be nothing to communicate to the Commons by means of a message.

20. The Committee will be aware that the rules formerly applying in both Houses, that speeches made in the other House in the same session could not be quoted in debate (although they could be summarised) were abolished in June 1998.19 There is therefore no bar on any Member of the House of Commons quoting from debates in the House of Lords. One might expect that the business managers in both Houses would usually be able to ensure that the Lords debated a proposed conflict decision before the Commons was asked to approve it. If that were so, Members of the House of Commons could draw on the Official Report of that debate without restriction.

21. There therefore seems to be no need for any reference to be made in the draft Commons resolution to the exchange of messages or the role of the Lords. The Committee may feel that it would be more consistent with the independence of the two Houses for procedures to be developed in parallel in the House of Lords, along the lines suggested above, in such a way as to allow business managers in both Houses enough flexibility to achieve the best result in very specific—and unpredictable—circumstances.

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18 Companion to Standing Orders, p. 78.
The draft resolution proposes that the House of Commons should approve a conflict decision by resolving to approve the terms set out in the Prime Minister’s report. It is not clear whether those terms and the motion which the House will be asked to agree to will be the same. The motion, whatever form it takes, will presumably be amendable. It will be of the utmost importance that the effect of the motion and of any proposed amendment is clear to the House when they are debated. Any question over whether the approval of the motion (whether amended or not) was also the approval of the terms set out in the Prime Minister’s report would clearly be very damaging.

Treaties

Codification in statute

23. The Government proposes that the present arrangements for the parliamentary scrutiny of treaties should be put on a statutory footing. The minimum 21 sitting day period for which treaties must be laid before Parliament before ratification would be unchanged. If the House of Commons resolved within the 21 day period that the treaty should not be ratified, but the Government nevertheless wished to pursue ratification, it would have to lay an explanatory statement before both Houses and the 21 day period would start again. If the House of Lords were to vote against ratification in the original 21 day period, the Government would also have to lay an explanatory statement before both Houses, but if the Government so wished the process of ratification could continue regardless. A vote by the Lords against ratification would thus in effect be purely advisory.

24. We have already noted (paragraphs 8 and 9 above) that attempts to place parliamentary procedure in statute may reduce flexibility as well as risk blurring the constitutional separation between the courts and Parliament described in Article IX of the Bill of Rights. Similar points were made in 2006 by the Joint Committee on Conventions, which was appointed “to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament”:

“In our view the word ‘codification’ is unhelpful, since to most people it implies rule-making, with definitions and enforcement mechanisms. Conventions, by their very nature, are unenforceable. In this sense, therefore, codifying conventions is a contradiction in terms. It would raise issues of definition, reduce flexibility, and inhibit the capacity to evolve. It might create a need for adjudication, and the presence of an adjudicator, whether the courts or some new body, is incompatible with parliamentary sovereignty” (paragraph 279).

25. There are thus strong arguments of principle, which both Houses have endorsed, for showing caution in seeking to codify parliamentary procedures and conventions. These apply all the more strongly if that codification is to take statutory form. It is essential therefore to consider carefully both the practical benefits and the risks of codification.

The Ponsonby Rule

26. The present arrangements for the parliamentary scrutiny of treaties, including the 21 day minimum period between laying and ratification, were introduced by Mr Arthur Ponsonby, then Under-Secretary of State for Foreign Affairs, in a speech to the House of Commons proposing the second reading of the Treaty of Peace (Turkey) Bill on 1 April 1924. In explaining the reasons for this innovation, he stated firstly that:

“It has been the declared policy of the Labour party for some years past to strengthen the control of Parliament over the conclusion of international treaties and agreements, and to allow this House adequate opportunity to discuss the provisions of these instruments before their final ratification.”

And secondly that:

By this means secret Treaties and secret clauses of Treaties will be rendered impossible.”

20 HC Deb (1924) 171, c2001.
He justified introducing the new arrangement by the “inauguration of a new custom” rather than in an Act of Parliament or a formal Resolution of the House as follows:

I would . . . remind the House of the paradox that, under the British Constitution, it is rules that depend solely on practice and usage which are the most immutable. A change effected by Acts of Parliament is not likely to last so long as one effected solely by Ministers as a change of practice and dependent only on the will of the Members of the Legislature for the time being.\(^{22}\)

27. It is clear from Mr Ponsonby’s statement that Parliament was expected to exert its control over treaties by debating them. He stated that in the case of important treaties “the Government will, of course, take an opportunity for submitting them to the House for discussion within this period.” In the case of other treaties, “if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for discussion of the Treaty in question.”\(^{23}\)

28. In July 2000, the House of Commons Procedure Committee published a report on Parliamentary Scrutiny of Treaties\(^{24}\) in which it set out how the Ponsonby rule had developed in the intervening years:

> Over time the requirement for a treaty to lie on the table for 21 days has hardened into a requirement for all treaties to be laid for at least 21 sitting days before ratification. The FCO interprets the Ponsonby Rule as applying to acceptance, approval and accession as well as to ratification, and since 1998 the FCO has also applied the Rule to treaties subject only to the mutual notification of the completion of necessary internal procedures by each contracting party.\(^{25}\)

> The Committee did not recommend substantive changes to the Ponsonby Rule, but it did conclude that “the appropriate role for the Commons in relation to the scrutiny of treaties is to draw upon the established expertise of the departmental select committees.”\(^{26}\) It went on to note that when the Rule was introduced “the House had no departmental select committee structure and it was sensible to specify the usual channels as the sole means for determining the level of demand within the House for a debate. However the Rule as set out in 1924 no longer fully reflects parliamentary realities.”\(^{27}\) The Committee recommended that the Government should give an undertaking that:

> if a select committee requests that a debate should be held on the floor of the House before ratification of a treaty involving major political, military or diplomatic issues … and if that request is supported by the Liaison Committee, then that request should normally be acceded to.\(^{28}\)

The Government agreed that “the departmental select committees have demonstrated their expertise in examining treaties falling within their remit and that it make sense to draw upon this” and accepted the Committee’s recommendation as “a useful development of the Ponsonby Rule.”\(^{29}\)

29. If the procedure now proposed in the draft bill is to work, the House will need a mechanism to provide for a debate on a treaty to which there is opposition within the 21 day period. The undertakings given by Mr Ponsonby, as the Procedure Committee noted, related only to requests for debates through the usual channels. The undertaking given by the Government in its reply to the Procedure Committee’s report has not been tested since no joint request from a select committee and the Liaison Committee for a debate on a treaty has been made since then. The Committee may wish to consider whether these undertakings will be sufficient if other aspects of the procedure for scrutinising treaties are made statutory.

30. Arguably, however, the procedures in the draft bill provide the House with a mechanism for expressing its views on treaties which runs against the grain of present scrutiny activity. As noted above, both the Procedure Committee and the Government recognised that departmental select committees now play the key role in the parliamentary scrutiny of treaties. This role is not recognised in the draft bill. It could, however, be reflected in amendments to standing orders which might provide that select committees should have the power, perhaps through the filter of the Liaison Committee, to ensure that the House debated treaties to whose ratification they were opposed. Because the provisions in the draft bill are engaged only if the House resolves that the treaty should not be ratified, such debates would presumably need to be held on substantive motions.

31. Both recent experience and the Procedure Committee report suggest that select committees would only in exceptional circumstances wish to press opposition to a treaty to a vote in the House. Instead scrutiny has generally been undertaken through the conducting of inquiries and publishing of reports, a process which

\(^{22}\) Ibid, c2003.
\(^{23}\) Ibid, c2003–04
\(^{25}\) Op cit, para 5.
\(^{26}\) Op cit, para 31
\(^{27}\) Op cit para 33
\(^{28}\) Ibid
might be followed on occasions by a general debate. A significant obstacle to the effectiveness of this approach under the Government’s proposals would be the difficulty of fitting it into a period of 21 sitting days.

32. The Procedure Committee made no recommendation as to whether, in the light of the central role now played by select committees, 21 days remained an appropriate minimum period. It did however receive evidence on that point from the then chairmen of the Foreign Affairs and Defence Committees. Both chairmen agreed that it would be difficult, if not impossible, for a select committee to respond and conduct effective scrutiny of a treaty within that time frame.30 The Government recognised this problem. As the Committee’s report noted, the Minister stated that the FCO aimed to “apply the Ponsonby rule and apply it Ponsonby-plus” and would be “willing to show flexibility in regard of timing, for instance if a select committee wished to conduct an inquiry that was likely to take more than the 21 days specified under the Ponsonby Rule.”31

33. The Government’s White Paper states that “the minimum 21 sitting-day period . . . should remain unchanged,” but gives no reason for reaching this conclusion. The accompanying Analysis of Consultations32 suggests, while there was general support for continuing flexibility on the part of the Government, there was relatively little appetite for a formal or statutory mechanism for extending the period.33 The Committee may wish to consider firstly whether 21 days remains the appropriate period, particularly in the light of the agreed role of select committees in ensuring parliamentary scrutiny; and secondly whether it is appropriate that the arrangements for securing extensions where they are agreed to be necessary should remain informal when other aspects of the procedure are to be made statutory.

34. Clause 22 of the draft bill would allow the Government to ratify a treaty without fulfilling the statutory conditions, if the Secretary of State is of the opinion that “exceptionally” that is the right course to follow. No definition of exceptionally is given. The Committee will note that, as a consequence of this provision, both the definition of “exceptionally” and its application in individual cases may, in certain circumstances, become a matter for the courts as well as for Parliament.

CONCLUSION

35. This short account of the evolution of the Ponsonby rule highlights a number of specific areas of concern within the statutory framework proposed in the draft bill. Taken as a whole it also demonstrates that, like other parliamentary and constitutional conventions, the Ponsonby rule has evolved and continues to evolve.

36. Similar points are touched on in paragraphs 164–165 of the White Paper, which state that the Government “would welcome any institutional change which would enhance the capacity of Parliament to contribute to the scrutiny of treaties”. The Government then qualifies this welcome with the proviso that such change should be “within the statutory framework proposed”. It expresses willingness “to engage in dialogue with the committees concerned”, but concludes that it “does not consider that a formal mechanism for the scrutiny of treaties prior to signature is practical or workable”. The question for the Committee, in light of these comments, is whether the statutory framework proposed in the draft bill in fact enhances Parliament’s scrutiny role.

July 2008

31 Op cit, paras 5 and 9.
32 Eleven responses were received to the consultation on treaties but the document does not reveal from whom.
33 Cm 7342-III, paras 238–240.
TUESDAY 17 JUNE 2008

Michael Jabez Foster, in the Chair

Present
Armstrong of Ilminster, L
Campbell of Alloway, L
Gibson of Market Rasen, B
Maclellan of Rogart, L
Morgan, L
Norton of Louth, L
Plant of Highfield, L
Tyler, L
Williamson of Horton, L
Mark Lazarowicz
Martin Linton
Emily Thornberry
Mr Andrew Tyrie
Sir George Young

Memorandum by The Home Office (Ev 57)

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

Policing Protest Framework

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

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

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

3. Sections 12 & 14 of the Public Order Act give the police the power to impose conditions on public processions and public assemblies, as appear necessary to prevent:
   — serious public disorder;
   — serious damage to property;
   — serious disruption to the life of the community; or
   — the intimidation of others with a view to compelling (see paragraph 31) them not to do an act they have a right to do.

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

5. In the case of assemblies, conditions which can be imposed are limited to those governing:
   — the place where the assembly may be held;
   — the maximum duration; and
   — the maximum number of participants.

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

7. By way of example, if two competing demonstrations occurred around Parliament, the police could impose conditions to prevent serious public disorder on the organisers or those taking part in either demonstration if they had good reason to think that the demonstrations might result in serious public disorder etc and where those directions appeared necessary to prevent it.
8. Equally, if a protest started becoming violent or a crowd of protestors decided to storm Carriage Gates, the police would have powers to impose conditions on the basis of preventing serious public disorder. In addition to powers to impose conditions, the police would be able to arrest a person involved in the commission of a criminal offence if there were reasonable grounds for believing that the person’s arrest was necessary for ascertaining the person’s name and address (where they cannot otherwise readily be ascertained), or preventing either physical injury, loss or damage to property, public indecency or an unlawful obstruction of the highway.

(b) *The Metropolitan Police Act 1839: Section 52*

9. Additionally, the Commissioner has powers under section 52 of the Metropolitan Police Act 1839 to make regulations from time to time, and as occasion shall require, for preventing obstruction in the streets during public processions etc and to give directions to the constables for keeping order and for preventing any obstruction of the thoroughfares in the immediate neighbourhood of her Majesty’s palaces and the public offices, the High Court of Parliament, etc and in any case when the streets or thoroughfares may be thronged or may be liable to be obstructed.

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

Section 54 —Prohibition of nuisances by persons in the thoroughfares

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

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

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

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

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

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

(c) *Local Authority Byelaws*

14. The byelaws which apply to Parliament Square Garden under the Trafalgar Square and Parliament Square Garden Byelaws 2000 would continue to apply as they do for Trafalgar Square. These byelaws require prior notification and permission by the Mayor for assemblies on the Garden [see paragraph 35 for details].

**Other Potentially Applicable Legislation**

15. As well as setting out the powers the police have to manage protests, the Public Order Act also includes a range of criminal offences associated with public disorder that would apply on repeal of SOCAP as they currently apply. There is also other legislation that can potentially apply to criminal acts committed in the course of a demonstration.
(a) Sections 1 to 5 of the Public Order Act 1986

16. Section 1—offence of riot where a group of 12 or more people use or threaten unlawful violence for a common purpose and the conduct of them taken together is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. It’s rare for a charge of riot to be brought.

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

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

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

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

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

(b) Protection from Harassment Act 1997

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

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

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

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

(c) Breach of the Peace

26. There is a breach of the peace wherever (even on private premises):
   — harm is actually done, or is likely to be done, to a person, whether by conduct of the person against whom a breach of the peace is alleged or by someone whom it provokes; or
— harm is actually done, or is likely to be done, to a person’s property in his presence; or
— a person is genuinely in fear of harm to himself or to his property in his presence as a result of an
assault, affray, riot or other disturbance.

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

(d) **Obstructing police officers**

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

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

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

— to use violence, intimidate a person or his family or injure his property;
— persistently follow him;
— hide tools or other property;
— watch or beset his house or other place where he is;
— follow him in a disorderly manner.

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

30. The behaviour must be “wrongful” ie it must amount to a civil wrong such as nuisance, intimidation or
trespass.

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

**Issues Arising from Permanent Demonstrations**

(a) **Unlawful Obstruction of the Highway**

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

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

34. Article 10 cannot be used to circumvent highway regulations, but it is a significant consideration when
assessing the reasonableness of any obstruction to which protest gives rise. Courts also account for the
duration, place, purpose and effect of obstructions.
(b) **Byelaws—Trafalgar Square and Parliament Square Garden Byelaws 2000**

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

5. Unless acting in accordance with permission given in writing by:
   (a) the Mayor, or
   (b) any person authorised by the Mayor to give such permission

no person shall within the Squares:

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

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

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

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

**Powers to Manage Security Risks/Risks to Public Safety**

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

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

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

   — serious public disorder;
   — serious damage to property;
   — serious disruption to the life of the community;
   — the intimidation of others with a view to compelling them not to do an act they have a right to do.

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

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

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

(a) **Trespass on designated sites**

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

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

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

45. Section 60 (1) contains a power under which if a police officer of or above the rank of inspector reasonably believes:
— that incidents involving serious violence may take place in the locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence; or
— that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason;

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

(c) *Section 44 of the Terrorism Act*

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

**Noise Nuisance**

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

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

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

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

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

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

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

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

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

June 2008

Examination of Witness

Witness: Mr Tony McNulty, a Member of Parliament, Minister of State, Home Office, gave evidence.

Q489 Chairman: Good afternoon and thank you for coming along. We, as a joint committee, are looking at a whole range of the constitutional renewal issues, but within those is the question of protests and the operation of SOCPA and the extent that some changes may or may not be needed. We are grateful in particular in your role in the Home Office for coming along to advise us on that. Can I first ask you what you consider the main problems with sections 132 to 138 of the Serious Organised Crime and Police Act 2005 may have been? Were any of them foreseeable?

Mr McNulty: I think we are where we are now because of a range of other things above and beyond the legislation; principally, as I think everyone here will know, the security provision now outside the House, the Parliamentary estate, and I think that connected with a kind of growing concern, summoning a version on mythology that SOCPA was all about banning entirely any demonstrations remotely close to the House of Commons. The combination of those two principally, which I do not think were foreseen—I think SOCPA has broadly worked in its own terms very well—but we do feel and the Constitutional Renewal Bill was a chance to revisit this and consult in the end with the House authorities and then see what the appropriate way forward would be. I do not think it was a case of, as some would have it, SOCPA being some huge sledgehammer to crack a very small nut and now we have changed our mind or there is a massive government u-turn. I do not think things in those terms are appropriate at all. I think time has moved on and it is right and appropriate that we reflect on both the legislation and other circumstances, including the security provision now around the building and that is why we are here now. I do not like the notion of the mythology and I think the Government, as all these papers have made clear, do start very strongly from the presumption of freedom of expression in Parliament Square as well as everywhere else.

Q490 Lord Norton of Louth: The 2005 Act was brought in to deal with what were perceived as problems and inadequacies in the existing situation. As the 2005 provisions go, presumably those problems will still be there, so to what extent will the police lack the powers to deal with those problems? The Home Office provided this very helpful memorandum on policing protests framework and there is clearly a lot of legislative provision extent that would deal apparently with most of the problems, so where would you say the gap remains?

Mr McNulty: I am not sure there is a gap that remains save for the concerns that we do quite properly need to raise with the House authorities around noise and access to the House. In extremis in terms of a broad security threat the counter-terrorism legislation will suffice. As the memorandum tries to make clear, we think now that there has been this huge improvement, as everyone will know, in terms of the security paraphernalia around both Houses, that in that context all that is outlined in the memorandum around public order and everything else do prevail and we are on strong territory in terms of the legislative powers.

Q491 Lord Norton of Louth: The gaps that are remaining from your point of view are relatively narrow gaps in legislative terms.

Mr McNulty: I would say so but it is very important that in partly handing over the responsibilities encapsulated in SOCPA to the House authorities to review and partly through starting from a very strong premise, I think both the legislative powers and the security paraphernalia will work in future and with a third assumption in favour of rather than against freedom of expression and protest in the Square I think things will be pretty much covered, save for those two small points about noise and access that it is quite proper to raise directly with the House authorities.

Q492 Chairman: Were the Procedure Committee wrong then in suggesting that there were gaps that needed to be filled by new legislation?

Mr McNulty: No, I would not say entirely wrong because I have yet to take the view from the House authorities about whether they think there is still something lacking in terms of legislation around...
particularly those two issues of noise and access. I have my own personal view on that. I think it is probably premature to say they are entirely wrong in terms of something lacking, but quite properly we need to consult with them as part of this process having determined which way forward the Government wants to go.

Q493 Chairman: Have you had the chance of seeing the evidence yet that was given to us by the House authorities just recently?
Mr McNulty: I have had a summary of them but I have not read them in absolute detail. We obviously can, and we will, because the last element for us is quite properly to talk to the House authorities about what outstanding concerns they have.

Q494 Chairman: If we were able to provide you with the transcript as soon as possible you would be happy to provide a written response to that?
Mr McNulty: Absolutely.

Q495 Lord Armstrong of Ilminster: I had the impression that the police thought that the Public Order Act 1986 gave them the powers they needed to police marches but did not give them the powers they need to police static demonstrations. The first paragraph of the Home Office memorandum seems to take a different view of that.
Mr McNulty: I am not sure that that is entirely right. I think they think there are potentially more problems with static demos rather than marches, but I thought that revolved more around the power of arrest when the individual was known. Correct me if I am wrong, but I think that almost goes in part to the notion that you cannot continually arrest an individual having clearly established who that individual is save, for example, because he has been on a static demonstration for some time and that quite properly you can only arrest that individual on evidence or suspicion of an offence, whereas in the normal context in terms of demonstrations and processions, if you have a suspicion that someone may commit an offence, you can quite properly arrest them to ascertain name, address and other details. I thought their difficulty revolved around that rather than more generally.

Q496 Lord Williamson of Horton: In this Committee we start from the position that the Government has simply proposed to repeal sections 132 to 138 and when I read that I was very pleased myself but that is en passant. Can I follow up two points: the first one is what about maintaining uninterrupted access for Members of Parliament to get into Parliament? It might be possible to get in but if it is very difficult for them to get in and in the mean time we have had to vote on something or something difficult has happened, that is a rather tricky point. My second point is that the Serjeant at Arms has proposed to us that there should be a ban on protests on the whole of the strip of pavement outside the main entrance to Parliament. I do not know if you would like to comment on that? That was a rather drastic solution I think but if you would like to comment on it?

Mr McNulty: On the second point, if I may, we start from the premise of free expression of protest outside the immediate environs of the estate, so I am not sure that I would be at one with the Serjeant at Arms on that second point. On the first point, the last piece of the equation for us is that we do need to quite properly talk to the House and the House authorities about their view on what uninterrupted access means. I have only been here about ten or 11 years and I think even with the new paraphernalia in place we could still be afforded proper and full access. I know at the Lords' end there is provision to get in. Under normal circumstances you do not go in and out that way but that is certainly the way I used during one or two of the rather larger demonstrations that were taking place. I am sure the countryside Alliance people are wonderful people but I just did not feel like walking through them to try and make my way in, so it is quite proper that we do have that engagement with the House authorities to see if we can establish, no doubt with the Metropolitan Police, what access there should be for particularly large demonstrations. I would say that they are relatively so few and far between that we do need to start from the premise of there being that clear right to demonstrate.

Q497 Chairman: Do you think that the police have sufficient powers in their right to arrest for obstruction to ensure unimpeded access? Do you think that is a sufficient sanction or do you think more is required?
Mr McNulty: I think there is an argument that I know the Metropolitan Police have put forward that some of that does rely on really rather antiquated legislation—back to the 1830s in one case—and I would be very happy in the broader sense, not specific to either the policing of demonstrations or in terms of Parliament Square, to look at that in further detail with the police to perhaps update all that. In the broad sweep of things I think the answer is yes.

Q498 Lord Tyler: In your very helpful memorandum you differentiate between the Metropolitan Police Act 1839 and the Sessional Orders, but from what you were saying just now should we take it that you think access for parliamentarians is of critical importance and therefore that we should be differentiating between when either or both Houses are sitting, or whether, for example, there should be a different regime
applying during the long recess, or for a march on a Saturday? Access, as you have emphasised, is something that we all take very seriously and you obviously do too.

**Mr McNulty:** Access is important in both circumstances. Clearly there are others who will want to access the House during periods of recess, either to visit, or in many cases to carry on with their business. You will know that the Select Committee sit in September, et cetera, so recesses do vary, but I think the House authorities main concern will be around the uninterrupted access for Members and people employed gainfully to work here during times that the House is sitting. My comments were directed at both. I think there has been a mythology around Sessional Orders in the sense that they are struck and signed and this means that, come hell or high water, the Commissioner of the Metropolis must make sure there is unfettered access. The reality is not quite like that, either in legal terms or more generally, but I do think that the broad point about uninterrupted access, yes, matters in terms of recess, but clearly matters more in terms of when the House is sitting, but I would still start from the premise of trying to come up with a regime that did not differentiate the two because that goes to the broader point of differentiating this place from all other places in the context of policing protests. I do not think that is a way we want to go.

**Q499 Lord Tyler:** As paragraph 10 in your memorandum makes clear, Sessional Orders are actually very limited, are they not?

**Mr McNulty:** Absolutely.

**Q500 Lord Tyler:** There is also a hiatus of course when they have not actually been passed so we should not be falling back on them as a reliable set of regulations.

**Mr McNulty:** That is absolutely right. What we do get to in terms of the broader regulatory architecture rather than legislative between the House authorities and the police is important and that is why we need to consult them, but it partly goes back to what I was saying about mythology: the notion that we can rely upon Sessional Orders to clear up all the difficulties around unrestricted access is precisely that—mythology.

**Q501 Chairman:** Should we drop Sessional Orders altogether then?

**Mr McNulty:** No. I think the relationship between the House authorities and the metropolis does set out a reasonable framework but, as Lord Tyler has said, I think it quite instructive that they have not been utilised by the Commons for some time. What I was trying to say was if there is either a different form of Sessional Order, or some other regulatory architecture that can prevail between the House authorities and the Metropolitan Police to achieve the same goal, then I am quite relaxed about that. Whether that involves dropping them or not, I do not know until that discussion has been had.

**Q502 Emily Thornberry:** If the provisions of the 2005 Act are abolished there has been some concern raised that the police and other authorities would not have sufficient powers to prevent noise disturbance, particularly the use of loudspeakers. Do you think that they would be left with sufficient powers, or do you think it does not matter?

**Mr McNulty:** This is not meant to be facetious but I was going to say their powers would be sufficient as they are now, notwithstanding SOCPA; i.e. not terribly strong anyway, but there are regulatory frameworks and legislation and some bylaws that could indeed prevail around the issue of noise disturbance. Equally that is a reason why I highlight noise as well as access as the two areas that we do need to talk to the House authorities about in some more detail. I do not think it is any better or worse with the removal of SOCPA and I do not think even if it was that noise disturbance should be the reason why we do not start from the presumption that there should be as free and unfettered right to protest and demonstrate in the Square as possible.

**Q503 Emily Thornberry:** Section 134 gives the police a general power to impose conditions on the maximum permissible noise levels to prevent hindrance to the proper operation of Parliament, although I think it has been confirmed that the police do not tend to use it.

**Mr McNulty:** No. Equally I would underline the question in part is not simply noise disturbance level the larger the crowd; there can be noise disturbances when the crowd is very small, as we have seen.

**Q504 Emily Thornberry:** One of the things that we have been particularly exercised about is the lone protestors with loudspeakers for long amounts of time. What is your view about whether or not there should be some powers in place to allow there to be some control over that?

**Mr McNulty:** That is why I have set aside noise as well as access to discuss further with the House authorities in the first instance. On a purely personal view, which is deeply courageous of any Government minister, I would say it is an irritant but no more than that, and certainly has not impeded in any way shape or form my ability to do what I do in my little way inside the estate, but it is a pain.

**Q505 Chairman:** Did the Government have discussions with House authorities before bringing in the 2005 Act?
Mr McNulty: I notified the Speaker’s Office that this was the route that we were seeking to go and would value at some stage wider discussion around areas, particularly like noise and access, with the Speaker and, through him, the House authorities before we came to any long term conclusion around some of the issues we have been discussing, but that the principle of repealing these particular sections of SOCPA relating to Parliament Square was something that the Speaker’s Office, and I think the wider House authorities, welcomed.

Q506 Chairman: I was wondering if there were those discussions before we legislated for SOCPA?
Mr McNulty: No, because I think we were very clear that the House authorities’ views were not going to impact on whether we should repeal SOCPA or otherwise, but clearly, as I have said, there was a role for the House authorities, particularly around noise and access, when looking at what will prevail if SOCPA does not.

Q507 Lord Campbell of Alloway: What are your views? Could you give us any information about whether you are going to remove all the placards, the erection of tents and one thing and another in Parliament Square on environmental grounds? People come to this country and see this muck lying around all over the place. Is anyone thinking about it, is anyone doing anything about it and is there any prospect that anything shall ever be done about it?
Mr McNulty: Plenty of people are thinking about it or have thought about it. I would say given where we have got to, and where particularly Westminster City Council has got to, it is their little strip of highway, as you will know, then the prospects of doing much about it are very limited and I would not want to give anyone the impression that repealing SOCPA and those proposals that are before us is going to do anything about that particular display because I do not think it will.

Q508 Lord Campbell of Alloway: How do we do something about it? How do we get onto this? Whose responsibility is it?
Mr McNulty: As I understand it, that strip of highway is Westminster City Council’s. Westminster City Council have tried variously through planning laws, unauthorised advertising hoardings and other such attempts to get much of the display taken down but without success. The difficulty in the broader sense under the law is that whilst it might be public highway, given the current configuration of Parliament Square you could not honestly say that it is an imposition on people’s right to walk the public highway unfettered, given that nobody walks on that particular strip. I suspect—it is again only a personal view—that if the Mayor and the Greater London Authority move forward with their plans for a World Square and pedestrianise much of what is immediately in front of Parliament between where the display is and block off that bit of the road, and the equivalent bit on the other side in front of what I think we now have to call the Supreme Court, then the traffic configuration there and the broadening up of that particular stretch of highway may mean that things can be done to that display that cannot be done at the moment whilst the Square is configured in the particular way that it is. I am sorry not to offer much hope in that regard but I do stress that nothing that we are proposing here in terms of SOCPA and discussions with the House authorities will do anything at all to that particular display.

Q509 Mark Lazarowicz: On the issue of noise, like yourself I tend to regard the noise as an irritant and that is all, but on the other hand I have an office which has a window over an internal courtyard, whereas colleagues who have offices at the front clearly take a different view as to the effect of the disturbance. Is it not right to think of having some coherent framework of regulation to cover the control of noise in this location because otherwise we are going to keep coming back to this every couple of years with people just not being able to cope with the level of noise? Is it not better to have a clear framework which tries to control the level of noise while at the same time trying to minimise the impact and the right to protest?
Mr McNulty: It may well be but I think that is more properly done between us, the Metropolitan Police and the House authorities to see, quite rightly, what that coherent framework should be. It might depend more readily on local bylaws. It might well be—who knows—something for a broader and perhaps more efficacious set of Sessional Orders or it might be something in between. What I do not think it is is something that is absolutely germane to a national legislative framework that treats this place, however sensitive, as much like any other place as possible in the context of protests and demonstration. I do not disagree but that is what the discussion with the House authorities in the first instance will be about along with the point about access.

Q510 Lord Morgan: We have dealt with more permanent protests and we have heard calls from the Clerk of the House and the Serjeant at Arms for a ban on permanent protests. On the one hand what would you think about the human rights aspect of that? On the other hand, what do you feel about the point that long term protest, which make protest a way of life, prevents other people from protesting?
Mr McNulty: It is a novel manifestation, that is very clear, and I think we would start from the presumption of not trying to impede protest in the
Square at all and whether the authorities at large, like it or not, there is almost, to use the planning lexicon, an established use there; ie the particular individual has been there for some time. Until we do get some sort of reconfiguration of the public highway and the traffic around the Square, we are stuck with that particular instance. I would not like to go down the notion of other suggestions too where perhaps a little bit of the Square can be put aside for static and more long term demonstrations or that they can be controlled in other fashions. I do not say it lightly but we do start from the premise that free and unfettered access for demonstration and protest should be the norm.

Q511 Lord Morgan: Would residence and the fact that people would be sleeping overnight there and so on in the long term, would that give—

Mr McNulty: I think that is problematic and as and when things in the Square move in terms of its current configuration, I think that should be looked at. Part of the difficulties as I understand it is that because it is such a narrow strip there, because it is public highway and Westminster City Council’s rather than the rest of the Square which is the Greater London Authority’s, that is part of the difficulty. I would not support an outright ban and I do not think much is going to change unless the configuration of the whole Square is going to change, but we do need to seriously reflect not just there, but elsewhere, on the conflict between a static and permanent demonstration and this weekend’s demo of whatever description. I think you will have heard that the individual concerned got on terribly well apparently with the Countryside Alliance and that all went tickety-boo, but that is not always going to necessarily be the case. Whatever form the static is may well conflict with whatever the wider demonstration is and we do have to balance all these competing rights and responsibilities that go with them.

Q512 Chairman: I was a little concerned about your reference to reliance on bylaws. What if bylaws did impose complete bans that may even be non-compliant with human rights? How would the Government respond to that?

Mr McNulty: As I understand it, I do not think they would be lawful if they were going for outright bans that contradicted the broader national legal framework. My point about bylaws was simply they can and have been used more generally in the planning world for things like noise abatement and the reduction of noise where noise is a nuisance; so just in that narrow element in terms of how to deal with noise around a loudspeaker, for example, rather than the noise of considerable thousands in the Square. It was just in that very narrow focus. I am not saying that we are going to rely on the wonder of City of Westminster bylaws for the policing of protests in Parliament Square.

Q513 Chairman: You are aware that Westminster Council, the Mayor’s Office and indeed the police are in close co-operation; in fact they appeared here together. Does that extend to consultation with government and indeed House authorities so far as you are aware? Do you have a relationship with them that allows these things to be looked at in the round? Mr McNulty: I think we do have that broad relationship. Had we had those discussions specifically on Parliament Square, no, I do not think so, or I certainly have not, but I am sure officials did.

Q514 Lord Tyler: I think many of us share your basic premise and welcome it but I wonder whether you therefore would be sympathetic to the view that has been put to us in evidence that when the Square is re-planned to make it more accessible for pedestrians, that might be a moment to make it even more evident that this is the right place for people to demonstrate their democratic right to support as well as to oppose what may be happening in their Parliament and therefore we should be looking towards something that would in a sense give self-discipline to the Square by relocating Speaker’s Corner in the Square. Do you think that would be a good way to be looking at this situation?

Mr McNulty: I think it may well be. The starting premise that if there is to be the development of the Square into pedestrianised zones and part of this World Square type concept that the last Mayor had, and which I do not think the new one has resiled from and hopefully endorses, that should be an opportunity to do both what you have suggested, which I would broadly endorse, and try with all the assorted authorities to deal with issues around noise, access and all the other elements all at once and maybe even static demonstrations I think would be a splendid idea.

Q515 Lord Tyler: Is it your view that if everybody had a right to express a view in Parliament Square on an equal basis this would put in context the one and only lone permanent protest which would then be rather diluted?

Mr McNulty: I am not sure that that is my view. I am not sure I would want 15 static long term demonstrations in the Square newly transformed as a World Square with pedestrianised areas or otherwise, but I do think the essential premise that this is quite appropriately a place that people come to air views to MPs and peers of the realm is absolutely right. Most people would accept that starting premise and accept that that should happen within the context of the law, quite properly, and your point that all these matters should be explored if we are transforming it into a
World Square, including I would say noise access and other elements, is absolutely right.

**Q516 Lord Norton of Louth:** I am merely coming back to an issue I think you may feel that you have already answered. Certainly when we had the Serjeant at Arms and Black Rod before us they took the view that, from the point of view of a security risk, the existing legislation was not sufficient, but the independent reviewer of terrorism legislation, Lord Carlile, takes the view that now with the anti-terrorism legislation in place it is sufficient. I take it from what you were saying in opening that you would side with Lord Carlile that the legislation is adequate?

**Mr McNulty:** I would absolutely, alongside the other significant change since 2005 which is the assorted security paraphernalia around the estate, I think that is right. That, of course, in terms of the paraphernalia and how secure the site is is always kept under review, but I think I would absolutely side with Lord Carlile on that and think things are appropriate. As I have said, in terms of broader security issues as and when there are demonstrations and protest, I think ultimately in terms of impact and effects on security then much of that security and counter-terrorism legislation can, if need be, be brought to bear.

**Q517 Baroness Gibson of Market Rasen:** Can we look at the public safety risk because, if SOCPA is repealed, the police will lose their powers to impose conditions on a protest on the grounds of the public safety risk. What do you think the implications would be and do you think there are other powers that we can rely upon to address public safety at the moment?

**Mr McNulty:** I think the police can, when a demonstration or protest is happening, have due right under the law to constantly review that public safety risk. But if we start from the premise, as many of the consultees said, that the very notion that, under SOCPA, you have to ask in advance for the right to demonstrate that is probably anti-democratic and runs against the vein of spontaneous protest. Even in that context I think there is still sufficient provision for protecting the broader public safety realm under public order and various other elements of legislation. Even on the day of an event, it is still incumbent on the police to bear in mind broader public safety concerns and risks in terms of too many people in too small an area and various other aspects. The broader public safety and welfare of the wider public on an ongoing basis as they are policing a demonstration or protest are core powers which do not diminish or go because of the repeal of sections 132 to 138 of SOCPA. It is still a very strong duty.

**Q518 Baroness Gibson of Market Rasen:** You would agree with Liberty and Baroness Mallalieu, who actually maintain just what you have said, that in fact even if SOCPA is repealed there are already in existence the laws for the police to be able to act.

**Mr McNulty:** Yes, I would broadly.

**Q519 Chairman:** What core powers are you talking about when you say there are sufficient in place? You mentioned obstruction simply for access and so on, but what other powers do you think?

**Mr McNulty:** I think broadly many of those outlined in the memorandum. Even under the public order legislation there is broad provision to maintain the wider public safety and risk to the public and that is germane to the very core of policing a protest and demonstration wherever it happens and that public safety and public risk that I mention is as important to arresting or picking someone up on public order offences as the fact that they may well be able to commit some subsequent offence. That is absolutely central to policing in the broadest sense.

**Q520 Chairman:** Is that not rather suggesting that one could repeal SOCPA and put nothing in its place because it is all there already?

**Mr McNulty:** The only narrow difference, as I think I said right at the start, is what the House authorities feel they need above and beyond a situation without SOCPA for uninterrupted access, noise and other elements. I am saying that we have come to the view with the asserted security paraphernalia, the security police and everything else that now prevails on the estate where SOCPA is no longer necessary. We can work from a presumption of freedom to protest and demonstrate in the Square within the wider legal framework. I am saying that but only save for those two narrow dimensions that it is right and proper that the House authorities are brought in to discuss further.

**Q521 Lord Armstrong of Ilminster:** Would you like to see a compulsory prior notification scheme to allow protests to be managed in an effective way?

**Mr McNulty:** Broadly it will be in the interests of both the police and the other party, if there were prior notification, but I do not think we start from the premise of it having to be, as with SOCPA, compulsory.

**Q522 Lord Armstrong of Ilminster:** Would you apply that only to groups over a certain size or would you make that a general requirement?

**Mr McNulty:** I think general and one would hope that the larger a demonstration the more rather than less goodwill would prevail and things will be done by prior arrangement and notification, which notwithstanding demonstrations around Parliament
is, as I understand it, what does prevail more or less in non SOCPA areas, if I can use it that way.

Q523 Chairman: It was put by some of the protestor witnesses that we had that it was a good idea to give notice but a principal objection to doing so as a matter of law. Would you see room for legislation which gave different rights to those that gave notice as opposed to those that refused to do so?

Mr McNulty: No, I do not think so. I think the distinction should be between those who would duly act and behave within the confines of the law and those who do not. I think that is the important distinction and that the framework within which people have the right to protest or demonstrate outside this very building should, as much as possible, notwithstanding what I said about discussing noise and access with the House authorities, be as much the same as people's rights to demonstrate or protest outside any other building. Those are the two things that govern us, I think.

Q524 Chairman: Are you aware of any problems before SOCPA by the non-giving of notice? I appreciate that in most cases notice is given as a matter of common-sense, but where it did not happen are you aware of any examples where there were problems when notice was not given?

Mr McNulty: No, I do not think so. I think the matter of common-sense, but where it did not happen are you aware of any examples where there were problems when notice was not given?

Q525 Sir George Young: Can we go back to the answer which you gave to Emily Thornberry when she asked you about noise. I wrote down what you said about the powers and I think you said these are not terribly strong anyway. This confirms what we heard from the police, that if somebody repeatedly makes a lot of noise that does not score under the conditions under PACE for actually taking any powers. Do I take it from what you said earlier that you would support more powers for the police; for example, to confiscate a loudspeaker if they repeated went on making an excessively loud noise?

Mr McNulty: Where it is absolutely repetitive and a positive nuisance, then I think there is something worth looking at. We are fairly close to the end of our PACE review but that is certainly something I shall take back. My broader point about planning, bylaws and the noise reduction side of things is that I think there might be potentially more mileage in that side of the law rather than through PACE, but I do take the point and will take that away and look at it.

Q526 Sir George Young: This will apply everywhere, not just outside the House of Commons.

Mr McNulty: Surely, yes.

Q527 Lord Norton of Louth: Surely a follow up to that on the base of your own memorandum because part of the problem on the base of the memorandum appears to be the Noise and Statutory Nuisance Act because it actually exempts, as I understand it from the memorandum, political demonstrations. One way might simply be to remove that from that Act.

Mr McNulty: Yes, or indeed I would certainly look at the notion of maybe utilising PACE, but in the broader sense of everywhere, not specific to the gentility of Members of these Houses and the noise outside it.

Q528 Chairman: Thank you very much for helping us this afternoon. I have one final question. Whilst this area has been covered by the Constitutional Renewal Bill, do you have a view as to whether it should be contained within the other areas that Constitutional Renewal deals with, or should it be part of a Criminal Justice Bill when the next one comes along?

Mr McNulty: We are trying not to make the next one come along with the same rapidity as perhaps in the past. Given the importance of protest, given the symbolism and I would say potentially at least mythology of the impact of SOCPA and demonstrations outside this House, for now at least it properly belongs in the Constitutional Renewal Bill. I think any future look may well appropriately belong somewhere else in the context maybe a Criminal Justice Bill in the context of how we police protests and demonstrations in the broadest sense in the country rather than specific to Parliament. It is almost because it is looking at the context of Parliament Square I think it is more than proper that it belongs in the Constitutional Renewal Bill.

Chairman: Thank you for dealing with our questions so efficiently.
Supplementary memorandum by the Minister of State (Ev 79)

When giving evidence to the Joint Committee on repeal of sections 132–138 of the Serious Organised Crime and Police Act 2005 (SOCPA) on 17 June, I gave an undertaking to respond in writing to the evidence of the House Authorities, and to look at the Police and Criminal Evidence Act to see if more could be done about addressing the issue of police powers to stop noise nuisance associated with demonstrations.

Before commenting in detail on the House Authorities’ evidence I would like to reiterate the Government’s commitment, set out in my oral evidence to the Committee, to work with the House Authorities—as well as members of Parliament and Peers—to establish what, if anything, is necessary to secure the proper operation of Parliament in terms of managing access and noise.

I also refer the Joint Committee to the memorandum provided to the Committee setting out the main relevant legislation that would apply to policing protests around Parliament were SOCPA repealed (Ev 57).

ACCESS

The oral evidence from the House Authorities is helpful in clarifying what they think is required in terms of the areas that need to be secured to guarantee access. And I would agree with them that if special provision is required it should apply to a much smaller area than that currently set out in SOCPA.

The House Authorities’ position that special provision is needed has to be balanced against the point repeatedly made by respondents to our Consultation, and the point teased out by Lord Norton in the House Authorities’ evidence session, which is what distinguishes Parliament from other public buildings? It seems that this is the key question that needs to run through consideration of the issue of managing protest around Parliament.

Evidence from the House Authorities mentioned the sheer volume of visitors to Parliament Square. I am not sure footfall is grounds enough for a distinct regime; a more powerful argument, submitted in the House Authorities evidence, is the need to secure Parliament’s exercise of its sovereign functions.

I do not necessarily think this means that different regimes should apply at different times depending on whether the House is in session. The argument for one system which provides clarity for police, protestors and users of Parliament about the boundaries of lawful protest, put forward by the House Authorities and the police, is a strong one. This could be achieved through, for example, a simple power for police to impose conditions on demonstrations to prevent obstruction of access to Parliament.

Such a power would be far more proportionate, and I think acceptable, than the idea of an exclusion zone advanced by the House Authorities. An exclusion zone in effect amounts to a ban on demonstrations in a certain area which is far more draconian than anything in SOCPA. Two people conducting themselves peacefully at carriage gates would not impact on access; two hundred people could.

There is of course the wider issue on whether the police already have the powers to secure access. Again, I would agree with the House Authorities that Sessional Orders are not a source of legal authority for the control of access to Parliament—they are a statement of the House’s expectations on the Commissioner and do not confer any powers on the police. However the Metropolitan Police Act 1839, I think, does provide relevant powers when considered alongside powers to prevent unlawful obstruction of the highway.

NOISE

The issue of noise is more complicated but it is important not to lose sight of the issue continually raised in responses to our consultation of what is special about Parliament? Again we will listen to House Authorities, and to MPs and Peers on whether noise really does disrupt the business of the House or whether it is simply an annoyance.

I do think that generally evidence to the Committee has confused offences with police powers of arrest to prevent or stop a person committing those offences. This applies to noise in particular. Section 137 of SOCAP creates a very explicit offence of using a loudspeaker within the designated area around Parliament (subject to a number of exceptions). But the existence of that offence has not been effective in dealing with the House Authorities’ concerns about noise since SOCPA was introduced.

What I think the House Authorities are concerned about is not so much the absence of an offence, but that the police do not have a power of arrest (in certain circumstances) if people persist in using the loudhailer. This centres on the far wider issue of the purpose of an arrest power which I will deal with separately under our proposed review of PACE.
Repeal of section 137 will remove the general offence for using a loudspeaker in a designated area. However, if action involving use of a loudhailer amounted to harassment, alarm or distress then the police may consider that an offence under section 5 the Public Order Act 1986 had been committed. And of course bye-laws pertaining to noise would also continue to apply.

Lord Armstrong raised the issue of civil injunctions in respect of noise. All I would say in that regard is that the University of Oxford has taken out injunctions which relate to use of loudspeakers which have worked well.

**PERMANENT DEMONSTRATIONS**

On the issue permanent demonstrations, I would argue that it is not the permanence per se that is a potential issue, but rather the paraphernalia associated with a particular permanent demonstration. So to disagree slightly with the House Authorities’ evidence, it is not a permanent or overnight demonstration that causes a security concern but rather the presence of semi-permanent structures in the immediate vicinity of Parliament. The question then is should semi-permanent structures be permitted as opposed to should permanent demonstrations be permitted? My position is that there are adequate bye-laws to deal with encampments, and that as a point of principle demonstrations should not be limited simply on the basis of their duration. Quite apart from ECHR concerns, from a practical policing perspective I am not sure how a series of consecutive temporary demonstrations that amounted to a permanent demonstration could be prevented.

And we again have to address the central issue that runs through this exercise—why should the position in Parliament Square be different with regards to permanent demonstrations than anywhere else in the UK?

**NOTIFICATION**

The House Authorities consider that prior notification would be helpful to allow the police to plan more effectively for demonstrations around Parliament. The Government looked at this option in considering responses to our Consultation and the majority view was that prior notification could not be justified around Parliament.

The corollary of having a compulsory notification system is that you create an offence for protesting without notification thereby potentially criminalising protest. Once again we need to be conscious that the central aim of this Bill is the reinvigoration of democracy.

Evidence to the Committee has noted that it is in everyone’s interest to notify in advance—protestors, police and public. Working with police and campaign groups to promote the advantages of advance notification, and pursuing a voluntary notification scheme, would seem to strike the right balance.

There is of course the additional safeguard that a prior notification system would continue to exist for the garden area of Parliament Square under GLA byelaws—as for Trafalgar Square. This would allow advance planning for any large demonstration which would necessarily encroach on the garden.

The Committee will want to note that under the Public Order Act 1986 the number of people that constituted a public assembly on which, in certain circumstances, conditions can be imposed was formerly 20. Protest groups made a point of demonstrating in groups of 19 to get around this limitation and as a result the Government reduced the number of people who constitute a public assembly in the Public Order Act to 2.

Those groups who want to work with the police will voluntarily notify. Those groups who don’t want to work with the police could easily work around such a restriction on numbers by claiming, if the limit for notification was 20 people, that they constituted say five different protests of 19 people.

There is a risk that a prior notification scheme of any sort is likely to increase the numbers of protestors unwilling to work with the police so that the provision becomes counter-productive.

**POWERS OF ARREST**

To return to the issue of arrest powers, I think it is important to be clear about the purpose of arrest powers:

Under PACE a lawful arrest requires two elements:

- A person’s involvement, suspected involvement or attempted involvement in the commission of a criminal offence.
- Reasonable grounds for believing that the person’s arrest is necessary. Under s24(5) PACE.

The necessity criteria is set out in paragraph 2.9 of the PACE Code of Practice on arrest.
The criteria provides for arrest in order to enable the prompt and effective investigation of the offence or of the conduct of the person, to prevent the person or others suffering harm or property being damaged, to enable the person’s name and/ or address to be ascertained and to protect a child or other vulnerable person.

In applying the criteria, the arresting officer has to be satisfied that at least one of the reasons supporting the need for arrest is satisfied.

Paragraph 1.3 of PACE Code G also states that “the use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used.”

The issue of so called “ongoing offences” has been raised in the current PACE Review. There is confusion around whether an officer can apply the arrest powers where an individual continues or persists with the breach after an officer has issued a warning.

Whilst we believe that the officer can exercise his or her power of arrest, we intend to remove that confusion by putting forward proposals as part of the PACE Review consultation paper that the necessity criteria includes dealing with person who failed to comply with a request or warning by a constable. This should directly address a number of the concerns raised in the evidence sessions to the Committee.

Rt Hon Tony McNulty MP
July 2008

Further supplementary memorandum by the Minister of State (Ev 80)

Clarifying queries from the Joint Committee about byelaws to deal with encampments and injunctions to tackle noise from loudspeakers.

**Byelaws**

I understand that the Greater London Authority used the Trafalgar Square and Parliament Square Garden Byelaws 2000 to remove a number of tents from Parliament Square Garden in August 2007. It is a breach of the byelaws to camp, or erect or cause to be erected any structure, tent or enclosure without written permission. These byelaws do not extend to the pavement currently occupied by Mr Haw, which is under the control of Westminster City Council.

There are also provisions to deal with obstructions of the highway. Under section 137 of the Highways Act 1980, if a person without lawful authority or excuse in any way wilfully obstructs the free passage along a highway, he is guilty of an offence.

Westminster City Council’s claim in 2002 for an injunction to remove Brian Haw’s display of banners from the pavement opposite Carriage Gates was dismissed on the basis that his use of the highway was not unreasonable in the circumstances, having regard in particular to his right to freedom of expression under Article 10 of the ECHR. However, the courts will account for the duration, place, purpose and effect of obstructions and may well take a different view in relation to a protest obstructing a pavement or road somewhere else.

I believe it is more appropriate to deal with issue of encampments by ensuring that there are sufficient byelaws in place, rather than addressing the issue through primary legislation. In their oral evidence, Westminster City Council indicated that there was scope for further discussion with the Greater London Authority as to their responsibilities for managing the piece of pavement opposite Carriage Gates.

**Injunctions to Tackle Noise from Loudspeakers**

The injunction to which I referred was granted to the University of Oxford by the High Court in 2006 to protect staff, current and former students, and all contractors working for the University from intimidation, harassment, and potential violence from animal rights activists. Among other things, the order imposes restrictions on the use of megaphones, klaxons, sirens, drums, whistles and other noise amplification devices within the exclusion zone (the area where protestors are prohibited from entering except for permitted demonstrations) and bans all noise amplification devices within the exclusion zone along certain roads.

Rt Hon Tony McNulty MP
July 2008
Evidence of the Civil Service Commissioners (Ev 50)

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

Support for the Draft Bill

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

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

- enshrine the core values of the Civil Service and selection on merit on the basis of fair and open competition;
- require the Minister for the Civil Service to publish a Civil Service Code;
- set up the Civil Service Commission:
  (a) to regulate recruitment to the Civil Service; including, through the publication of the Recruitment Principles, the Commission’s determination of what selection on merit on the basis of fair and open competition means and when exceptions to the principle may be allowed; and
  (b) to hear appeals under the Civil Service Code.
- create the Commission as a corporate body so as to reinforce its independence from the government of the day;
- provide for the Minister for the Civil Service and the Commission to agree to the Commission’s taking on new roles; and
- formalise the current arrangement for Special Advisers.

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

Scope of the Bill

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

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

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

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

THE ROLE OF THE COMMISSION

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

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

— The Recruitment Principles—the Recruitment Principles will replace the Recruitment Code. The intention of both documents is the same, to publish a set of principles to be applied for the purposes of meeting the requirement of selection on merit on the basis of fair and open competition. However, the Commissioners are taking the opportunity of drawing up a set of Recruitment Principles to revise the Recruitment Code in order to adopt a more concise approach. This is work in progress.

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

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

— Additional powers—the Government has asked the Commissioners on occasion to take on additional tasks. The draft Bill provides for the Minister of the Civil Service and the Commission to agree that the Commission shall take on additional functions. This will provide flexibility to meet changing circumstances without the need to amend the Bill itself. The Commissioners would expect the Minister to agree that the Commission should continue to undertake the additional tasks which currently fall to the Commissioners. These are:
  — advising departments on the promotion of the Civil Service Code and monitoring appeals within departments; and
  — approving all appointments at Permanent Secretary or Director General level (the so called “Top 200” appointments) whether they are made following open competition, internal competition or a managed move.

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

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

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

The Right to Initiate and Carry Out Investigations under the Civil Service Code

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

12. We have reflected on this for the following reasons:
  — following the re-launch of the Code in 2006, civil servants are undoubtedly now more aware of the core values of the Civil Service and the Code’s provisions for raising issues under it;
  — we have worked with departments and agencies on the promotion of the Code, though there is clearly more to be done; and
  — we will be working with departments and agencies to ensure that the processes they have in place for handling appeals are user-friendly.

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

14. We also remain concerned—as we were in 2004—that if the Commissioners had the formal power to initiate inquiries under the Code, we would be swamped by disgruntled customers of the departments and agencies, members of the public or the media asking for investigations, many of which would turn out not to be Code matters. There would be a risk that the Commission would be diverted from its core tasks. We also note and have sympathy with the view expressed by the Rt Hon Ed Miliband MP, when giving evidence to the Public Administration Select Committee (PASC) on 29 April 2008, that this “cottage industry” might lead to the politicisation of the Commissioners’ role. The resource implications would also be significant.
15. We do, though, recognise there will be occasions in which it would be right for the Commission to carry out an investigation, if there were prima facie evidence of a significant breach of the Code. We, therefore, think that the approach suggested by the PASC in their report on the draft Bill that, in addition to the duty to consider complaints from civil servants, the Commission should have the discretion to investigate matters in other circumstances, might offer the right balance. We envisage that the Commission would want to exercise that discretion only in cases where the burden of suspicion was substantial.

**Special Advisers**

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

- excepts Special Advisers from the principle of selection on merit on the grounds that they are personal appointees of Ministers and in view of the personal and temporary nature of their work;
- excepts them from the provisions of impartiality and objectivity, thus recognising their allegiance to the Governing party and that they are not expected to retain the confidence of future governments of a different political complexion; and
- confirms that no Special Adviser will have executive powers over civil servants.

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

18. We have argued since 1997, when the provision was introduced, that no Special Adviser should have executive powers. We therefore welcome the confirmation provided by the draft Bill that the Prime Minister’s decision in 2007 to remove such powers will be enshrined in statute. We further argued in relation to the 2004 draft Bill that Special Advisers should not be able to commission work from civil servants. We now argue that they should not be able to authorise expenditure, nor exercise either management functions or statutory powers.

19. In line with the Government’s thinking over the last few years, the Bill does not propose a cap on the number of Special Advisers. The Commissioners have supported this approach and continue to do so, believing it to be more important that the boundary between the work of civil servants and that of Special Advisers is clear. To this end, we have supported the changes the Government has made to the model contract for Special Advisers and their Code. It is why we believe the removal of executive powers to be so important. We also recognise that in terms of the influence a Special Adviser can exert, a more appropriate comparison in purely numerical terms is not necessarily between 70 or so Special Advisers and the 4,000 or so members of the Senior Civil Service but between the 70 or so Special Advisers and the Top 200 or, possibly, Top 600 civil servants. We do not propose an answer, though we note the suggestion from others that, at the start of an Administration, Parliament should agree the number of Special Advisers that can be appointed.

**Setting up the Commission**

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

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

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

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

Conclusions

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

June 2008

Examination of Witnesses

Witnesses: Ms JANET PARASKEVA, First Civil Service Commissioner and SIR GUS O’DONNELL, Cabinet Secretary and Head of the Home Civil Service, gave evidence.

Q529 Chairman: Good afternoon, thank you for coming to assist our Committee. As you know we, as a joint committee, are considering the whole area of different aspects of constitutional renewal and some say oddly the issues of the Civil Service Bill has been contained within the area of consideration. Perhaps I could ask you both to begin with: the Ministerial Code currently places a duty on Ministers “to give consideration and due weight to informed and impartial advice from civil servants”. Should this requirement in the Ministerial Code be made statutory in the Bill?

Sir Gus O’Donnell: I am very glad to be here and delighted that you are doing this joint process. I think it is extremely good and I am very pleased that 150 years on from Northcote and Trevelyan that we are getting round to this. I hope very much that you will keep the legislation strategic and allow us to manage, as we need to do in the 21st century, so you will give us that flexibility as well. On your specific question about Ministers, I do not believe that we should put issues to do with Ministers in this legislation. I am very happy that we have a Ministerial Code and I think that is the right place for it in terms of accountability. I think Ministers have accountability to the Prime Minister, to Parliament and to the public and I think that is the right place for it.

Ms Paraskeva: Like Gus, thank you very much for the invitation to be here this afternoon. We too hope that this legislation will be kept relatively light touch, but nonetheless hitting on the very important principles that certainly, as Civil Service Commissioners, we have argued for for many years. The Civil Service Code that we hold very dear gives of course the right to a civil servant to say no to a Minister and we think that this is probably the right place to contain that. That gives any civil servant then the opportunity to come to the Civil Service Commissioners and to raise any issue if a Minister has asked them to behave improperly and we would think that this was probably the most appropriate place for this to remain. We think to put it on the face of the legislation might actually be unnecessary following the statements that Sir Gus has made.

Q530 Chairman: Should the Ministerial Code as a whole be subject to some form of parliamentary approval?

Sir Gus O’Donnell: I do not think it needs to be. It is laid before the House, there can be discussions about it, but I would not put it to parliamentary approval, just as I would not with the Civil Service Code. I think in the interests of transparency it is important we put
it there, select committees can cross-examine us on it, but I do not see the need for it to be put to Parliament.

**Q531 Lord Norton of Louth:** Sir Gus, you mentioned a few moments ago management of the Civil Service and there is a question as to who should head the management and be in charge. In the Draft Bill is a Minister. Some of the evidence we have heard suggested it really ought to be the Head of the Civil Service who is vested with that responsibility. Do you have a view on that?

**Sir Gus O’Donnell:** What the Bill does remember is that because we are removing the Royal prerogative then there has to be the powers vested with someone and, you are absolutely right, this legislation vests the powers with the Minister for the Civil Service which is the Prime Minister, which is actually where it is now, so I am very content with that. I think that is the right place. In practice what happens is the Prime Minister delegates that authority down through Ministers to permanent secretaries. Dare I say it, but the person two to your left, the Armstrong principle makes it absolutely clear that the Civil Service, whilst it is right it is impartial, it is not independent. It is there to serve the interests of the duly elected Government and to my mind consistent with that it should be the Prime Minister who is there, not the Head of the Civil Service.

**Q532 Lord Norton of Louth:** Given you accept that it should be legislating for what is the current situation, is the Bill as drafted adequate for that purpose? Does clause 27 define the Minister’s powers sufficiently?

**Sir Gus O’Donnell:** As far as I can see, yes. Obviously we would be happy to listen to what comes out of this process but I think it is perfectly okay as it stands.

**Q533 Lord Armstrong of Ilminster:** It appeared to give the Minister power to regulate appointments and dismissals of civil servants. That was not in the 2004 proposals and I wondered whether that was what we really wanted.

**Sir Gus O’Donnell:** We could certainly clarify the language there. As you will know, Lord Armstrong, that is the situation as is. In fact, Ministers do not get involved in those decisions and the Civil Service Commissioner can confirm that.

**Ms Paraskeva:** It is not the intention of clause 27 to be read as a stand-alone clause and, like Sir Gus, we would agree that some clarification might help. It really needs to be read in conjunction with the rest of the Bill which requires fair and open competition and appointment on merit based on the Civil Service Commissioner’s principles, and in those principles we actually define how Ministers can be involved in the process. If you do not clarify the actual clause of the Bill it could lead to confusion and could lead to a need on every senior appointment for us to re-explain the situation to a Minister, so therefore we would certainly seek, if possible, for some further explanation on the face of the Bill.

**Q534 Lord Armstrong of Ilminster:** I think what most likely troubled me is if the Minister is given explicit power in the Bill for appointments and dismissals then, quite rightly, the Minister is accountable, but perhaps the Minister could be required to answer questions in Parliament about individual appointments and dismissals. I would have thought that we did not want to go that far, but I would welcome comments on that.

**Sir Gus O’Donnell:** I would agree with you that the intention is to keep things as they are. Given that we are replacing the Royal prerogative, we need to have the powers vested somewhere. It is to my mind quite clear that what you would want is those delegated down to Permanent Secretaries.

**Q535 Baroness Gibson of Market Rasen:** We have heard from different witnesses differing views about whether or not the Civil Service Code should be subject to Parliamentary approval and you have just said, Sir Gus, that you believe it should not. Are you in agreement on this or would you like to say anything more about this point?

**Sir Gus O’Donnell:** If you look at the Code, this is a document about the management of the Civil Service. It incorporates the values and what to my mind is a great advantage of the legislation is that those values will be enshrined in legislation—that is tremendous—but it also covers areas other than the values and those are management areas to the Civil Service that at different times we might need to change. I think it needs to be a living document. We went through a very good process and I have to say that the Civil Service Commissioners were an important part of the process of amending the Code recently. Certainly we have turned it into much better English. I remember the first sentence used to be about a hundred words long and it had a footnote. I think you can read it and understand it much more clearly now and that to my mind is very important. We went through a detailed process together to revise it. I would not rule out the fact that we may need to revise it further. If technology changes the way we operate, for example, then you would want to keep this up to date so I would regard this as a living document that we put to Parliament and select committees can cross-examine both of us on it, but we both have quite a passion that this is something we need to get out and explain to civil servants so they understand it in their everyday occupations.

**Ms Paraskeva:** I would support that but have one thing to add and that is that we do need to be absolutely clear that the values of honesty, integrity,
impartiality and objectivity are defined and understood and that the meanings cannot be simply changed over time, and that is what we would need to see very clearly stated. It is interesting though, picking up a point that Sir Gus made earlier, that there is nothing in the Bill at present to secure the ability of the Civil Service to actually serve successive administrations and it is the point that Sir Gus was making about the Civil Service working to the Government of the day. We may revisit that when we talk about the importance of impartiality later on.

Q536 Chairman: What if a political judgment was made by a government that, for example, membership of the BNP was incompatible with public service, how would that be dealt with? The suggestion you are making is that the Code would be subject to parliamentary consideration but that be something which Ministers could properly impose in the Code or should that be for the Commissioners?

Sir Gus O’Donnell: I think that is something where we have to interpret it. Your question is not entirely new in the sense of this has come up with regard to prison officers, as I am sure you know, so it has been a live issue for us for some time. It gets us into some legal issues about whether or not it is appropriate to proscribe institutions. There are some legal issues that are really quite complex in the issue of BNP, so in general I would again keep this out because you are thinking about what are the possible combinations of different political parties as we go forward and there is a whole array of possible new parties. I just want to say the way round this is to keep that really clear view about impartiality and values. I have very strong views about values and having a very diverse Civil Service and I am very passionate about that, but once you get into the area of saying actually if somebody represents a certain political party that gets you into some very dangerous territory where the lawyers—Janet is very good on these sorts of things—would tell you about the ECHR and the like, so it is quite complex territory.

Ms Paraskeva: I would only add that it is the active participation of the civil servant in party political activity that one would be concerned about rather than de facto membership of any particular party.

Q537 Lord Maclean of Rogart: The issue of impartiality sometimes seems to arise when civil servants are called upon to make a judgment as to whether it is their duty to serve their ministers or, alternatively, to take a view that Parliament requires to be served, and these things are not always nicely aligned. For example, select committees may want to hear factual information from civil servants which have not necessarily been regarded as a matter of policy by the Minister, but the deferential attitude of the civil servant to the Minister sometimes seems almost to preclude the wider duty to Parliament. Would you not think that there would be some virtue in putting, on the face of a Civil Service Bill, the wider duty of civil servants to Parliament as well as to serving ministers?

Sir Gus O’Donnell: I think this gets to the heart of what you mean by the word “impartial” and, remember, it is one of the four values, so honesty, objectivity, integrity and impartiality, all of those four values which will be in the Bill and, therefore, in legislation, should guide a civil servant in all of their actions and, I would say, that would include your action in terms of giving evidence to a Select Committee, so, if you are asked questions by a Select Committee, it is your duty, as the Prime Minister in line with those values, not to mislead the Committee and to give them as much information as they require and ask for, so I think that is important. That is your overriding duty, to live with these values and that is being impartial in its broadest sense, not just its political sense. Ministers of course may have a view about wanting a particular policy, but it is our job to explain and give factual information to select committees, so I do not think they would contradict each other.

Q538 Lord Maclean of Rogart: So you would have no particular objection to there being a reference on the face of the Bill to the obligation of the Civil Service to Parliament?

Sir Gus O’Donnell: Well, I think that would get you into some dangerous territory as to what actually does that mean.

Q539 Lord Maclean of Rogart: So there is ambiguity about the values too, and what does that mean in practice?

Sir Gus O’Donnell: I think the important thing is that that is what we should concentrate on, what are the appropriate values that we want and what do they mean. I think it is fairly clear, and the Code lays out, what they mean: the honesty; objectivity; integrity; and impartiality. They certainly would not be consistent with misleading Parliament, for example.

Q540 Lord Armstrong of Ilminster: It may be oversimplifying it, but I have, generally speaking, taken the view that civil servants are accountable to ministers and ministers are accountable to Parliament and, when civil servants give evidence to parliamentary committees, they are doing so with the agreement, and approval, of their ministers and subject to any directions that ministers may give as to what they should, or should not, say, so there might be circumstances in which a civil servant would say, “I think you must ask the Minister that question, not me”. As to the matter of impartiality, the Code is
Select Committee.

servants to appear on particular subjects before a minister that usually decide who are the best civil servants that should change or, if not, how can democracy be better improved by individual Members having the opportunity to know what is going on beyond the barrier of the ministerial ranks?

Sir Gus O'Donnell: Well, again I would say it is ministers who are responsible to Parliament, it is the Armstrong Doctrine, and then it is for ministers to decide which civil servant should appear, assuming that they are competent to cover the areas required by the Select Committee.

Sir Gus O'Donnell: Well, in general, I would say ministers have always been quite happy to co-operate with select committees about who would appear, so, if it is a particular agency, the Chief Executive of the agency, so I do not think there has been a big issue here, but again ultimately I think it must be for ministers to say who is going to speak on their behalf.

Ms Janet Paraskeva and Sir Gus O'Donnell

Q541 Chairman: You were saying that the obligation is to ministers obviously, but ought it not also be to parliamentarians as well as to Parliament itself, and let me tell you what I mean by that. If you are in local government, as many of us have been, and the Chief Officer has an issue in your area, he will talk to the Member as well as to the Chair of Committees. Civil servants almost refuse to talk to parliamentarians about areas that are wholly consistent with their need to know relating to their areas because they have this stop at the point of the ministerial responsibility. Do you think that that should change or, if not, how can democracy be better improved by individual Members having the opportunity to know what is going on beyond the barrier of the ministerial ranks?

Sir Gus O'Donnell: Well, we have a duty, not just to MPs, but to the public as well to inform, so I think that is important, but I would go with Lord Armstrong, that this is through ministers, so, if MPs, for example, for a particular area wanted briefings on a subject, I would seek ministerial guidance. If the Minister has said, “Yes, go ahead, do that”, then you would do it, so I think there is the opportunity for that to happen, but I would just make sure, because we are serving ministers, that we have cover from ministers for that.

Q542 Mr Tyrie: Do you think that parliamentary select committees should have the power to call specific civil servants before them or do you think that the opportunity for the Civil Service to put somebody else up should be retained?

Sir Gus O'Donnell: Well, I think it is actually ministers that usually decide who are the best civil servants to appear on particular subjects before a Select Committee.

Q543 Mr Tyrie: I can recall occasions when we have wanted to speak to a particular senior Minister and, hey presto, we found ourselves with the Cabinet Secretary because this all looked far too interesting to cross-examine the slightly more junior person about.

Sir Gus O'Donnell: I am sure we would want to give the Select Committee the best and most experienced person to answer the questions on every occasion.

Q544 Mr Tyrie: Yes, okay, I think there is a serious question here. If we put the Civil Service on a statutory footing with accountability to Parliament, are we not then also not saying that Parliament can have before it whomever it wants to have before it? This is half-way to the “people and papers” point which of course distinguishes us from the United States’ form of executive scrutiny.

Sir Gus O'Donnell: Well, again I would say it is ministers who are responsible to Parliament, it is the Armstrong Doctrine, and then it is for ministers to decide which civil servant should appear, assuming that they are competent to cover the areas required by the Select Committee.

Q545 Mr Tyrie: So you think that, even after we have got this legislation on the statute book, ministers should be able to indefinitely prevent civil servants from giving evidence?

Sir Gus O'Donnell: Well, in general, I would say ministers have always been quite happy to co-operate with select committees about who would appear, so, if it is a particular agency, the Chief Executive of the agency, so I do not think there has been a big issue here, but again ultimately I think it must be for ministers to say who is going to speak on their behalf.

Q546 Lord Maclean of Rogart: Sir Gus, you are elucidating what has been the practice, and we are bound to consider what might be, or should be. A lot of the evidence that we have received has suggested that ministers are listening much less to civil servants than they used to, and it occurs to some of us to enquire why that might be because it seems highly desirable that they should. One thought has occurred in the context of the questions we have just had which is that we have had two long periods of government, in which first we had the Conservative Party, a series of ministers, and then we have had a long period of Labour ministers, as a result of which the civil servants have been, in the public mind and perhaps in the mind of Parliament and perhaps in the minds of political parties, very closely identified with their ministers. Indeed, phrases like “not one of us” have been heard to be mentioned. Is it not partly because of this, through ministers to Parliament, that civil servants are being so closely identified with the governments and would it not be much healthier for civil servants and for the perception of their
independence if they were in fact accountable, not solely through ministers, but as individuals, particularly when they have a clear responsibility and particularly when they are dealing with facts?

Sir Gus O’Donnell: Well, on the last point, let me be clear. As accounting officers, we all have individual responsibility, so we appear before the PAC, for example, in our individual role of accountability. It is an interesting point that you make and I think this is a change from the past in that, if you look back to a civil servant like me who joined in 1979, I have seen one change of administration in 1997, whereas Lord Armstrong, for example, would have seen many more changes of administration over an equivalent period through the 1960s and 1970s; it works both ways. The fact that I am here as a Cabinet Secretary, having been selected by Labour Prime Ministers and yet having served a Conservative Prime Minister, I think, shows you that actually the Civil Service is doing rather a good job and ministers in general are looking for the best people in the posts, and I am not saying, “Oh well, you worked with them, so you must be . . .” I did not get the impression in 1997 that the incoming Labour Government said, “Well, you’re all Tories”, and I wonder if, when we change, they will all say the opposite. I actually think that they, and there are people on this Committee that I have worked with, respect the fact that we operate to the best principles of the Civil Service and we operate with whoever is elected. The fact that there are long strings, I think, works in different ways as well. I think it is certainly the case that, when a party has been in opposition for a long time, when they come in, their special advisers may be rather influential for a while, but the most influential of those special advisers go on to become MPs and ministers and actually the power of the Civil Service as they go on longer, to my mind, gets stronger relative to the special advisers as you go further through a Parliament because the ones they have known best have actually left them and gone off and become ministers, so I do think that this idea of the influence of the Civil Service reducing is not one I would accept. I think we live in a world now, which I think is a very good thing, where, if you take the question of where does a minister get expert advice on a specific subject, back 20 years ago, it would have been your civil servants and then you would have looked at what is the outside world telling you about this. Actually, now we are in a situation where there are lots more think-tanks and we have access, at the push of a button, to all the information on the Internet, so actually the civil servants can provide that, but it is certainly true that they are providing information from a much vaster store of experience, so we are looking at international evidence and we are looking at what works in a whole range of different places, so I think ministers are getting much better advice and it is coming through the Civil Service, but it is not necessarily advice that has merely come from a monopoly called “civil servants”.

Q547 Martin Linton: It could be said, could it not, that you are trying to have your cake and eat it? After 150 years, the Civil Service wants statutory approval from Parliament, yet you do not want accountability to Parliament.

Sir Gus O’Donnell: What I would like, which is what Northcote and Trevelyan wanted, was to get those core values incorporated so that they will be there through changes of administration. I think that is what I would love you to provide for me, yes. On your point about accountability, I think we are very accountable. I have appeared before lots of select committees, before the Public Administration Select Committee, before PAC. I have appeared before other select committees, and it does not feel that I am short of accountability.

Q548 Martin Linton: Let me make the point that the Chairman made that, when a local councillor phones up a council officer and asks for some information, that council officer is legally obliged because that council officer is employed by the council and that person is a member of the council. If I phoned a civil servant, they may be very co-operative, but they may just refuse to talk to me because they work for the Government and I am a Member of Parliament, so I have absolutely no call on a civil servant’s time, unless they feel inclined to help, so that, at a small level, is an illustration of the fact that you have to decide really, if you are a creature of government, then why is it that you want the statutory approval of Parliament and, if you want the statutory approval of Parliament, why is it that you do not think civil servants should act with any sense of accountability to Parliament, as such?

Sir Gus O’Donnell: I think because it does go back to the Armstrong principle, that we are there to help the Government of the day as represented by its ministers. MPs may be pursuing an agenda which is a very different agenda, but it is our job to pursue the agenda set by Cabinet, so that is where we have to come from and we cannot be in a situation where we are trying to advise MPs who may be on a different tack. I am afraid.

Q549 Martin Linton: I did not say “advise”, I just said “information”.

Sir Gus O’Donnell: Well, I would hope that we make information available as much as we can on the website, through government offices, through ministers of the regions, all of those sorts of things.
Q550 **Chairman:** I think that what has been asked of you is: are MPs not special? I think really that is the point. I know that, whenever there is a sort of consultation or something like that, it always seems that MPs are just another member of the public. Maybe that is the case, but is that how the civil servants see it?

**Sir Gus O’Donnell:** No, Parliament is very special. Because of the fact that we are here, the fact that we lay all of our codes and we are ready to be scrutinised by select committees on all of these subjects, Parliament is certainly incredibly special.

Q551 **Lord Tyler:** The logical conclusion of your emphasis on the secretaries of state and ministers being responsible to Parliament and that is the line of accountability is surely that the secretaries of state should be subject to confirmatory hearings by the appropriate Select Committee?

**Sir Gus O’Donnell:** No, I think that is for the Prime Minister. It has to be the Prime Minister’s responsibility to select his ministers and then the ministers are certainly accountable to Parliament and appear before Parliament regularly, but I think it is the Prime Minister’s job to select his ministers.

Q552 **Lord Armstrong of Ilminster:** We have all tried to define the Civil Service and have all found that very difficult. Are you content with the definition of the Civil Service in the draft Bill in the sense that the definition, by exclusion, provides you with sufficient clarity, and are you happy with the exclusion of GCHQ specifically, with the security and intelligence agencies, from that definition for the purposes of the Bill?

**Sir Gus O’Donnell:** Yes, I am happy with the clarity that is there. I think that the alternative, which was put in the draft 2004 Bill, of listing the parts suffers from the problem that actually these things change quite rapidly as decisions are made possibly to privatise an area or change its status or create new agencies, so that would change and you would be talking about having to change primary legislation all the time, which I think would not be a good idea, so I am happy with the clarity. In terms of the exceptions, yes, I think it makes a lot more sense to treat GCHQ in the same way as we treat the other intelligence agencies. They have very special considerations, they are different, and I think it is really important that we lump the group together. It may be flippant, but I was thinking about precisely how you would, if you were an intelligence agency, meet the condition of fair and open competition when you were trying to recruit agents from another country, for example, and it strikes me that you would not put an advert in Pravda; that might not work.

Q553 **Lord Campbell of Alloway:** On a change of government, and I have seen this happen when the Conservatives went down and Labour came in, the civil servants came here and were taught everything that they could be taught to pick up for the purpose of helping the Labour Government. Now, is there really any need for any further machinery, as seems to be suggested by Ed Miliband, the Minister for the Civil Service, because, somehow or other, the Prime Minister could not do this in advance? You probably know the quotation. Do you see any need for any form of change as regards the conduct of the Civil Service on a change of government?

**Sir Gus O’Donnell:** No, the one thing I would say is that we need to be more careful this time for the reason that, I think, was brought out by Lord Maclennan, that actually the experience within the Civil Service of changes of administration is actually very limited. There are lots of people who are civil servants now who have never seen a change of administration, so it is important that we remind them of the rules, we remind them of the conventions, and I send out advice about what should happen around general elections, so I think there is a need, as we move to this situation where actually changes of administration have occurred more rarely, to actually remind civil servants of the rules. I think the reference you are talking to may have related as well to training for new ministers and I think that was an issue that the Minister was talking about as well.

Q554 **Lord Campbell of Alloway:** Well, actually, as I say, if you go back, we had been in government for about ten years and it was remarkable to see how the civil servants, who were at that disadvantage, came and were taught by civil servants here and by our own ministers how to deal with the new Government, so, as I saw it going on, if that is how it goes on, it will go on again and I see no need for change. Do you?

**Sir Gus O’Donnell:** No, I think the Civil Service is absolutely ready to live the values that are there about serving a government of any administration, and I think it is my job to make sure that they are ready, if ever there is a change of administration, to do that in the light of our best values.

Q555 **Lord Maclennan of Rogart:** Sir Gus, in answer to an earlier question from me, you spoke of the greater resources of advice and information that are now available. One of the ways in which that is tapped in government now is by the secondment of people from outside the Civil Service into the Civil Service and there is a much greater fluidity between the Civil Service and the private sector, and that is being positively encouraged. Does that not raise issues that we need to consider, when we are thinking about putting the Civil Service on a statutory basis, about these people and indeed about civil servants
who are going into the private sector perhaps quite early in their working lives? Should there not be some statutory provision imposing an obligation on civil servants not to accept subsequent employment or remuneration which exploits inappropriately their employment in the Civil Service?

Sir Gus O’Donnell: On your first point, yes, indeed we are encouraging people to move in and out of the Civil Service, we do have secondments, that is absolutely right, and we find ourselves at times with certain skills gaps that we need to improve. The Gershon Report, for example, recommended that we have professionally qualified finance directors in all departments, but you cannot grow them overnight, so we got a lot in from the private sector, some on secondment, and we are growing the next generation internally, so we will in time, as what the Civil Service needs to do changes over time, need to use secondments. I think it is important now, when it comes to the question of when they come in and go out again and what are they covered by, that we have the Business Appointments Rules and, absolutely, when somebody leaves, particularly of a senior grade, goes to the Business Appointments Committee who will say, “Actually, given what this person was involved in, we think they should have nothing to do with, say, company X” or a contract in a certain area, and they will impose conditions, for example, that you cannot be involved in lobbying the UK Government for any period, three months, six months, a year, so those sorts of conditions are there at the moment.

Q556 Lord Maclean of Rogart: I have to declare an interest in belonging to that particular Committee.

Sir Gus O’Donnell: Indeed.

Q557 Lord Maclean of Rogart: I am actually asking a slightly wider question, whether, because of the importance of this issue and the growing number of certain cases in which such moves both ways take place, it would not be appropriate to have statutory provision, when one is defining the Civil Service and all that, which makes it plain that certain jobs would be inappropriate and that there is a contractual obligation upon those who are entering the Civil Service to recognise a constraint on what they do subsequently, as perhaps is not entirely unknown in other spheres, such as non-compete clauses, for example?

Sir Gus O’Donnell: To be honest, I think in practice it would be incredibly hard to draw those up in advance in ways which would meet the requirements that I think you are after and, if we did set up a set of rules, I think it would take people about five minutes to find ways to get round them.

Q558 Lord Maclean of Rogart: It was not a rule I was thinking of, it was a principle and that is the principle of appropriateness. You talked earlier about the values. Should there not be a similar sort of recognition that this is a modern problem?

Ms Paraskeva: If I could say something about entry to the Civil Service. Certainly it is for the Commissioners to approve many secondments or short-term contracts from the private sector, for example, and we do this where there is a business need, the kind of need that Sir Gus has just outlined in relation to finance staff, sometimes IT or HR professionals where the Civil Service needed that, or where there is literally a short-term business need for a department to have expert advice. All of these people come into the Civil Service subject to the Civil Service Code and values and those values absolutely apply in exactly the same way as they do to any other civil servant, and it is one of the questions that we always make sure that we ask, when we are chairing competitions, of people who are joining the Civil Service perhaps later in their career, that they understand that, in becoming a civil servant, they adopt these values which are then effectively part of their contract of employment. So on the inward side certainly I think we make every effort to make sure that people understand that they are signing up to those Civil Service values.

Q559 Chairman: I think Lord Williamson has got some questions to ask particularly of Janet Paraskeva, but can I ask one question first, and it is this: within the reference to the GCHQ being excluded from the definitions, do you, Janet, have a particular view about that because in consequence they are also excluded from the Civil Service Commission?

Ms Paraskeva: I think our point here was to make sure that the civil servants at GCHQ were not disadvantaged in any way either in relation to appointment on merit or indeed the requirement, or protection, of the Civil Service Code, and I think that is the assurance that we are seeking. Because GCHQ, as part of the Home Civil Service, have been, as it were, within our remit and then suddenly to see a change, as you rightly say, from the draft 2004 legislation, we wanted to ask that question and make sure that we had a satisfactory answer.

Q560 Chairman: You say you seek that assurance, but what form does that assurance take? What are you looking for specifically?

Ms Paraskeva: I think we are looking for an explanation of how the Code, for example, particularly the requirement to apply the Code and protection of it, will be there for the employees of GCHQ and, if they are, for example, asked to behave...
inappropriately, to whom do they take that complaint?

**Q561 Lord Armstrong of Ilminster:** It was suggested to us in evidence that GCHQ and, I think, the other agencies do all at any rate, to a considerable extent, use the Civil Service Commission for their selection.

**Ms Paraskeva:** They do indeed and I myself have been involved in the appointments of the Head of MI5 and GCHQ very recently as well as the Home Office appointments in security.

**Q562 Lord Williamson of Horton:** When we declared our interests earlier, I made clear that, for what seemed like years and years, I was a member of the Civil Service and, incidentally, I was Private Secretary to two Labour ministers and two Conservative ministers during that time, so what was said earlier shows that the Civil Service was acting, if I may say so, in a manner which I personally find very appealing. I wanted just to turn now to the independence of the Civil Service commissioners, and you will know that the Public Administration Select Committee was a bit concerned about this point, and our indefatigable clerks have quoted your evidence to the Public Administration Select Committee, and also the Constitution Unit were much concerned about it, so I do ask you whether you feel reasonably satisfied that the draft Bill provides the Civil Service Commission with an appropriate degree of independence from the Government? Secondly, should the Commission have the right to initiate investigations without receiving a complaint? It is my first question, the general one, that I am mainly interested in.

**Ms Paraskeva:** In some ways, I suppose, you could argue that we will have more independence once our remit is actually defined in statute. We thought very long and hard with colleagues from the Cabinet Office about what kind of model would enable us, going forward, to secure that independence. Whilst we have agreed with them that the executive NDPB, non-departmental public body, is an appropriate mechanism, I think there may be one or two areas for clarification when we establish that body. We would like something, for example, to safeguard the Commission from government interference and we think that it is not beyond us to draft something that would enable that. We also think that perhaps funding is a difficult issue if indeed the control of your finances is by those whom you regulate and perhaps one way through that would be to put a duty on us to report on the adequacy of our funding rather than to set up some complicated mechanism that would just be costly in itself. A further nuance is the provision for all commissioners to be appointed on the basis of fair and open competition in the same way as the First Commissioner is, so I think, with some small, but important, amendments, we are fairly content.

**Q563 Lord Armstrong of Ilminster:** Are you content that your appointment is confined to five years and cannot be renewed?

**Ms Paraskeva:** I think five years is probably the right amount of time. My appointment was originally three years, renewable by two, and it did seem to me, when it was suggested as five years from the outset, that is a much better length of time to plan how you are actually going to use the job and develop the role, and I think five years is just about long enough to see through the kinds of changes or developments that you might want in a job.

**Q564 Lord Armstrong of Ilminster:** In other parts of the Bill for other commissions the term is five years, but it is renewable or there is no provision which says it is not renewable. In the case of the Chairman of the Civil Service Commission, it is specific, one term only.

**Ms Paraskeva:** Indeed, as it is for the other commissioners, and I actually think that is probably right. I think it would be wrong for either the First Civil Service Commissioner or the Commissioners to stay in those posts for a very long time. There is the question, if you are the regulator, of your actually trying to stay at some distance and over time one gets closer and closer to the departments that one works with, and I think there is a safety net in having a fixed term of office.

**Q565 Chairman:** Lord Williamson also asked the question about the right to initiate investigations without receiving a complaint from a civil servant. Do either of you have a view on that?

**Ms Paraskeva:** Indeed you will have seen me quoted as sitting on the fence, not a place I normally comfortably land myself, but I do find this a very difficult area. Clearly, we have some nervousness about opening the floodgates and I think we all know what that would do. Nonetheless, as an independent regulator, it is actually quite difficult to argue that we should not have this power, so we have been giving it some further thought and we might suggest some careful wording, which would give us a reserve right to carry out investigations where there was sufficient evidence. As I say, we are nervous with the resource implications of this and the fact that it would change the nature of our work quite considerably, so we would not enter this area lightly. At the present moment, I do investigate and I do this by writing to the Head of the Home Civil Service and suggesting that he might invite me to, and that has worked very well. Of course, what we have to do is to legislate for the people that come after us, not the people in the
current roles and, therefore, I can see that I might need to get off the fence.

Q566 Chairman: Sir Gus, on that very specific point, do you have a view?

Sir Gus O'Donnell: Certainly. Remember that at the moment civil servants can take complaints with the Code directly to the Commissioner, so that, I think, is a really important safeguard. What Janet has said about us working together on other sorts of complaints has worked very well very informally. I would really worry about giving commissioners that sort of discretion because, if someone wants to question that discretion as to why it was used in one case rather another, then you get into some difficult territory as well, so personally I would not go there.

Q567 Lord Morgan: We considered the question of posts in the Civil Service that were excepted from the requirement of appointment on merit and they include, as you will know, senior posts in the Diplomatic Service and also posts under the Royal Prerogative. Do you see any difficulty with the principle of having exceptions from appointments on merit and do you think they can be justified and, if they are justified, should any conditions, nevertheless, be attached to those appointments?

Ms Paraskeva: To be clear, because I think in the past we have referred to them together, there are two kinds of exceptions. There are the groups of people, as you say, those appointed by Her Majesty, and there are special advisers and so on, and then there are the exceptions that the Commissioners can make themselves, the cases that I referred to earlier. On the groups of civil servants, Gus, I am sure, will comment on those appointed by Her Majesty, and we would of course assume that any civil servant caught by that provision, for example, commissioners at HMRC, would come within the ambit of the Bill. We can see no reason either why diplomats should not be appointed on merit; it does seem bizarre that you would not want to have your best people as your diplomats. The other named group of people of course was special advisers and they are completely outwith our remit and they are of course the personal appointment of ministers.

Q568 Lord Morgan: To take the diplomatic appointments, this would cover the appointment of somebody on merit who was not himself a member of the Diplomatic Service, would it? I can think of cases where people who are not members of the Diplomatic Service have been appointed to be ambassadors, but on merit it was a very good appointment and it worked very well.

Ms Paraskeva: Indeed I would say that that was on a par with a member of the public, who had not been a civil servant, coming in to take a top job in the Civil Service for the first time. They are, nonetheless, appointed on merit and I think it is very difficult to argue that that should not be the case.

Q569 Lord Tyler: We have not heard from Sir Gus on this because I understand he takes a different view from the Commission, that the general blanket exception for the Diplomatic Service is justified, so I would be very interested to hear why he thinks that.

Sir Gus O'Donnell: Well, in practice, over the past 40 years I think something like one in 200 of these appointments have been through different means. The example I gave when PASC asked me was when I was very much involved when I was working for John Major as Prime Minister, when Chris Patten did the job in Hong Kong. I think there are cases where you might want to have someone with a strong political background specifically for specific cases, so I think there are some truly exceptional cases where actually you might find that the best person comes from outside the Diplomatic Service, but I would stress that I would think they would be truly exceptional.

Q570 Lord Tyler: But that is not a justification for the general exception, that is supporting what the commissioners are saying, that one in 200, I think you said just now, may be a very special case which the Commission could consider.

Sir Gus O'Donnell: That is why I would say that the appropriate way to go about this is to have procedures which would allow this to happen in exceptional cases, and that is what happens at the minute.

Q571 Lord Tyler: But then it does not need the general exception.

Sir Gus O'Donnell: Well, that is a question with the general exception where we have used that general exception to operate in a way where it has always been members of the Diplomatic Service who have taken up these posts, unless there has been a desire for a truly exceptional case.

Ms Paraskeva: We would argue in the opposite direction, that, even without general exception there, we could, nonetheless, exempt in any specific cases such as the one you suggest.

Q572 Sir George Young: Can we move on finally to the question of special advisers where there are, I think, three issues. One is their numbers, the second is their functions and the third issue is how they are paid for. On function and numbers, we have got Janet’s views helpfully set out that, in the way the Bill is drafted, you could run a coach and horses through the entirety of the Civil Service. Sir Gus, do you agree that there should be a limit on the numbers of special advisers and also that on the face of the Bill there should be a restriction on their functions?
Sir Gus O’Donnell: I am happy with the current situation in the sense that I think it is very important that we have transparency about numbers and cost, and I think it is very important that we treat special advisers as temporary civil servants, so we have a Special Advisers Code. I worry just about the practicalities of having a cap on numbers because, as soon as you announced a cap, I suspect that that would become a minimum, not a maximum, and that people would just move to it straightaway. I think it is important for the Civil Service to do the functions of operating impartially, not getting involved in political partiality, but that you actually have some groups there who can operate in a partial way, so I think good special advisers are actually good for impartiality in the Civil Service, so I am in favour of special advisers to a limited extent. I thought the kinds of numbers we have talked about have been fine. In terms of their functions, I think it is important and actually I think this is where we could clarify that it is clear that they do not order civil servants around, look after budgets and those sorts of things.

Q573 Sir George Young: You would like to see that in the Bill?
Sir Gus O’Donnell: I could certainly live with clauses like that.
Ms Paraskeva: I think we would very much like to see greater clarity in terms of the role of the special adviser. There has been a suggestion, your suggestion, of “short money” and maybe one would not need to cap the numbers, if indeed the budget for advisers were arranged in that way. I think the most important point for us is that there is some absolute clarity about their role and the restrictions. I think it is the case that “good fences make good neighbours” and, if civil servants and special advisers understand each other’s respective and complementary roles, we might secure for the future what we have now, I think, which is a really very workable arrangement.

Q574 Sir George Young: Can I just press you a little bit on the number because I think in your evidence you were more cautious than Sir Gus about the absence of any number. Is there not a point where the terms of trade between the Minister and the Civil Service might change and, if you get more than a certain number of special advisers around that particular Minister and interacting through him, is there not a downside if you do not have any limit on the number of special advisers?
Ms Paraskeva: Certainly there is a difficulty if you have too many advisers compared to the number of senior civil servants who are actually working at the ministerial interface. It is a question of whether a cap would actually secure what you are looking for or whether there are other ways of dealing with that, and I think Sir Gus makes the point that, if you have a cap, it is almost inevitable that people will employ up to it, which is why I did think it was an attractive proposition to see the financial limitation of party monies being used, and of course that would change the nature of the special adviser and lead one to question whether in fact special advisers actually need to be civil servants.

Q575 Sir George Young: Can we just pursue that for a moment. What would be the impact if, for the sake of argument, we did say that we were going to extend short money to the Government and they would fund special advisers out of short money rather than as they are funded at the moment? A good thing or a bad thing?
Ms Paraskeva: I assume that, whenever there is a financial cap, there is a real cap on the numbers of people that one would employ, so that could be, I think, something that was really worth looking at.

Q576 Lord Armstrong of Ilminster: Would their status as temporary civil servants not be weakened if they were paid in that way?
Ms Paraskeva: I think it does beg the question of whether they would be civil servants at all.
Sir Gus O’Donnell: I would be very cautious about this. You could put a monetary cap and then say, “That’s enough”, and then we will find we have got lots and lots of unpaid people around, so I would be very nervous about that. The idea that we separate them out and put them in a different class so that they are no longer subject to all the rules that are in the Special Advisers Code now at the minute, I would be very, very nervous about. It will make them, as it were, something other than the team and actually I think it would drive them into a different place and we will get an adversarial relationship internally, and I would really be very, very cautious about going down that route.

Q577 Sir George Young: Although Lord Butler seemed to take a different view.
Sir Gus O’Donnell: Illustrious predecessors will, I think, probably have a range of views on this matter.

Q578 Lord Armstrong of Ilminster: Could one predecessor just say that in earlier evidence to this Committee, it was suggested quite strongly, I think, that there should be a change in the Bill, not just in any Code, but in the Bill, which would add a provision to the effect that special advisers may not recruit, manage or direct civil servants. Would you like to see that in the Bill?
Sir Gus O’Donnell: As I said earlier, I think there is scope for having more words in here which would better specify the appropriate functions of special advisers. They are specified in the Code, but actually
having it in the Bill, I would certainly have no objection to that.

**Q579 Lord Maclennan of Rogart:** Again in answer to an earlier question, you pointed to the growing use of people parachuted into the Civil Service from other areas of expertise, businessmen and the like. I wonder what sort of special procedures there are in place to ensure that such people do in fact fulfil the criteria of merit and are not simply friends of those in high places. It is a third category perhaps.

**Sir Gus O'Donnell:** You are absolutely right, it is hugely important, and the reason we are bringing these people in is because we have skills gaps in the Civil Service, possibly temporarily. They are invariably done through open competition with Janet alongside me and we are assessing them. What is the principle of this legislation? That we get fair competition.

**Q580 Lord Maclennan of Rogart:** Can we just get a note on what the procedure is and how it is handled so that we can make a comparison with the normal methods of recruitment?

**Sir Gus O'Donnell:** The vast majority of them come in through the normal methods of recruitment.

**Ms Paraskeva:** We regulate them in exactly the same way as we regulate open competition, but we can indeed provide you with some further information as to how it happens.

**Chairman:** Perhaps you would be good enough to do that, and the final question I would ask, apart from thanking you also for coming, is: do you think that this really should be within the Constitutional Renewal Bill or, having waited 150 years, do you think it deserves a Bill of its own? You may like to drop us a note on that, as you are not able to answer it now. Thank you very much for coming.


**WEDNESDAY 18 JUNE 2008**

Michael Jabez Foster, in the Chair

Present: Hart of Chilton, L, Martin Linton
Morgan, L, Ian Lucas
Norton of Louth, L, Fiona Mactaggart
Tyler, L, Emily Thornberry
Williamson of Horton, L, Mr Andrew Tyrie
Sir George Young

Memorandum by Lord Mayhew of Twysden, Lord Morris of Aberavon and Lord Lyell of Markyate (Ev 40)

**THE ROLE AND POWERS OF THE ATTORNEY GENERAL**

**PART 2**

**Clause 2 Ban on directions in individual cases**

(1) *The Attorney General’s function of superintendence of the Directors does not include power to give a direction in relation to an individual case.*

**Comment**

This clause should be removed. The power to direct is very important.

Provision of a fair and independent prosecution system is one of the key responsibilities of government. But it must be independent of political control ie control by the executive. This has been achieved down the centuries by making it the responsibility of the independent law officers of the Crown, the Attorney General and the Solicitor General, and their counterparts in Scotland and Northern Ireland, who, while appointed by the Prime Minister and capable of being dismissed by the Prime Minister are independent law officers appointed by the Queen herself under the Great Seal. If the Prime Minister does not like his advice or decision he can sack the law officer but he cannot change the decision. He must find a new law officer to do so if he can.

The Attorney General’s function of superintendence is part of his ultimate responsibility for the prosecuting arm of the state. It must therefore also carry ultimate power. One cannot have responsibility without power.

The power is however by no means unfettered. Although the power to direct the DPP or the DSFO exists and has existed in current form since the Prosecution of Offences Act 1879 there is no specifically recorded instance of it being exercised at least since the Second World War. The well established practice is that difficult prosecuting decisions of national importance are discussed carefully between the Director and the law officers. Where necessary a full written opinion from Senior Treasury Counsel will normally be obtained and agreement reached. The decision is then taken by the Director or on his or her behalf with the concurrence of the law officers. But the power to direct, if it were absolutely necessary to do so, is essential for two reasons. First it demonstrates and establishes the necessary authority. Second it engages beyond doubt the responsibility of the Attorney General and hence of the Government for what transpires. In consequence there is true accountability. The Attorney can never get out of it by saying to Parliament that he did not agree.

**Clause 3 Protocol for running of prosecution services**

**Comment**

There is a case for enshrining in statute a fuller explanation than currently exists of the respective roles of the Attorney General and the Directors. However this type of enabling legislation has a limited value. It would be much better for the draft bill itself to contain the protocol in carefully considered language which can then be debated and amended by Parliament.
Clause 4 Director of Public Prosecutions

Clause 5 Director of the Serious Fraud Office

Clause 6 Director of Revenue and Customs Prosecutions

COMMENT

These clauses actually say very little about the role of the three directors. At 4(1) The Director of Public Prosecutions—

(a) is appointed by the Attorney General; and

(b) subject to what follows, holds office in accordance with the terms of the appointment.

Clause 7 to 10 Attenuation of Attorney’s prosecution consent functions

COMMENT

These are enabling clauses and simply enable the Attorney General by statutory instrument to amend existing consent functions. Parliamentary control is therefore very limited. Some of the consent functions are thoroughly sensible and necessarily highly political and should be retained. Others could easily be transferred to the Director which in practice means to the members of the Crown Prosecution Service at whatever level the Director specifies, something which is not generally recognised.

It would be much better for the Draft Bill to contain a list of the relevant functions specifying which are to be exercised by the Attorney General, which are to be exercised by the Director personally and a third column showing which he may delegate as provided for in Clause 9(3).

Clause 11 Abolition of nolle prosequi

COMMENT

This clause should be removed.

The prosecuting arm of the state needs to be exercised with careful regard to the public interest. The power of the Attorney General to enter a nolle prosequi is an important part of his role as guardian of the public interest, for which he is responsible and accountable to Parliament.

Clause 12 Power to intervene to safeguard national security

COMMENT

It is important to recognise that the Attorney General’s power to direct where he is satisfied that it is necessary to do so for the purpose of safeguarding national security is part of his role as Guardian of the Public Interest generally. It is therefore not necessary that a separate provision should preserve this power.

It will nonetheless be noted that the British Aerospace case would under this clause be able to be handled in future in virtually the same way as the Bae case was handled by Lord Goldsmith.

However other cases of high sensitivity involving the armed forces where the Attorney’s power and demonstrable responsibility are of great importance would not necessarily be covered.

The power to direct should be retained generally; but the manner of its exercise, and of the inter relationship between the Attorney and the three very senior and themselves substantially independent public officials can usefully be set out in statute as stated above.

Clause 16 Annual Report on exercise of Attorney’s functions

COMMENT

This is not objectionable and may provide some useful basis for examination by select committees and by Parliament but is not likely to be as useful as the regular system of Attorney General’s questions in the House of Commons used to be. The House of Lords might consider instituting a regular question time session for heads of department who are members of the House of Lords. At present the only one is the Attorney General but there have been others in the past and may be in the future.

11 June 2008
Examination of Witnesses

Witnesses: Lord Lyell of Markyate, a Member of the House of Lords, Lord Morris of Aberavon, a Member of the House of Lords and Lord Mayhew of Twysden, a Member of the House of Lords, gave evidence.

Q581 Chairman: Good afternoon and may we welcome you to the Select Committee on the Draft Constitutional Renewal Bill. As you know, the committee is charged to look at the various aspects of the Government’s proposals for constitutional renewal, an important part of which is the role of the Attorney General. You will have had the opportunity to see, and we thank you for coming today to comment on, those proposals, particularly in the light of your experiences and the learned advice that you will, no doubt, be able to give us. The Government has written a Green Paper stating that the Government is fully committed to enhancing public confidence in the office of the Attorney General. Will this set of proposals achieve that objective?

Lord Lyell of Markyate: I think the Government is right in one of the important decisions it took before this Bill was drafted; it was right to keep the Attorney General as an independent law officer of the Crown sitting as a Minister in Parliament. I think that was a very important decision and I think that is right. There are other sensible aspects of the draft Bill. There is something to be said for having a protocol to clarify the relationship between the Attorney General and the DPP and the Director of the Serious Fraud Office and Her Majesty’s Revenue and Customs Director because that is an area which, although I think we all grew up with it, has not been spelt out and could probably quite usefully be spelt out. The third thing that I think could be valuable would be to have a look at the different consents which have become a little bit of a hotchpotch over the years. A substantial number of them are, quite rightly, left with the Attorney and, just having looked at them myself, there are one or two, or three or four, which are to be handed to the Director in the draft Bill which actually I would keep with the Attorney. The third point on that is that I think that it is not generally recognised that if a consent is currently a matter for the Director currently, what that effectively means is that it is given to the Crown Prosecution Service at large. I think there is room for a category of consents which should be taken by the Director personally and that that should be spelt out. Those are the main points with which I agree in the draft Bill. I suppose the most important on which I have reservations—and I am sure you will be coming to this—is that I think it is an essential part of the role that the Director should have the power, albeit in practice it has not had to be used formally in my memory, to direct the DPP and the Director of Serious Fraud Office, and so on.

Q582 Chairman: Before I ask one of your colleagues, just on a matter of detail: the Counter-Terrorism Bill of course does provide for the Director to have a specific role in making a judgment, for example on whether to proceed in an application for holding up to 42 days. Is it that sort of power that you are suggesting would have a place more generally, that the Director in person should be able to exercise the power?

Lord Lyell of Markyate: No, I was talking about the consents. You will remember that in the draft Bill and under the present law the consent either of the Director of Public Prosecutions or of the Attorney General has to be obtained, and some can certainly be passed from the Attorney General to the Director of Public Prosecutions, and some would be perfectly satisfactorily taken by any suitable member of the Crown Prosecution Service. The power to direct is the ultimate authority of the Attorney General in a major prosecuting decision. If he and the relevant Director could not agree, it would be in the Attorney’s power to direct the Director to take a particular course to prosecute or not to prosecute. It would not lead to a constitutional crisis, but it would certainly lead to something of a crisis. That is a very valuable tension; it should be retained.

Lord Morris of Aberavon: Chairman, I am not for the moment going into the detail of the matters addressed to you by Lord Lyell because I think they arise on other questions, but may I say immediately that I welcome the Government’s proposal to retain in substance the office of Attorney General. That was the key matter and there have been contrary reports in the past and I am very glad that is taken. As regards enhancing, I do not think there is a great deal in the Bill, I fear, other than on the Iraq issue, about which the legal advice is still controversial. I think the case for enhancing is overdone. There has been from time to time controversy. In my time I remember Manningham-Buller getting into very great difficulty in the House on a weekly basis at one stage. Sir John Hobson was taken before his fellow Benchers in the Middle Temple by Reggie Paget and Harold Lever for professional misconduct. I was fortunate; I was never taken, but that is a halo which I put on my head. Obviously there is not a great deal in the proposals. I suspect that they will not be dancing with joy in the streets of my former constituency, nor not even a little jig.

Lord Mayhew of Twysden: I agree with what has been said by both Lord Lyell and Lord Morris. I think the key to the question of public confidence in the Attorney General lies in accountability, and I think it has to be accountability to Parliament. We will come
to this, I do not doubt, if you think it right, later on. The difficulty in taking any of the present functions away from the Attorney and vesting them in the Director or some immaculate official untainted by party contamination is that you do not get the accountability to Parliament, which I believe the House of Commons at any rate will insist upon, and rightly insist upon.

**Lord Morris of Aberavon:** May I add to that because I think Sam Silkin spelt it out in *Edwards* on the Attorney General and adopted by Lord Rawlinson: If the office were done away, “to whom would the independent, non-political law officer be accountable? If there were no ministers to whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister be answerable for an independent law officer would in practice have to control him, else we should have a semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament.” To stand at the Dispatch Box to defend the prosecuting service is a very signal thing.

**Q583 Mr Tyrie:** I do not want to pre-empt the thunder of someone who is about to ask questions immediately after me but I would just like to clarify one thing, first of Lords Mayhew and Morris. You both came before the committee on which I served, which was then called the Constitutional Affairs Select Committee, on this very subject about a year ago, and gave extensive evidence, which I have in front of me. We have begun to touch on exactly the same points again. I just wondered whether there was anything that you did not say in that evidence that you feel, having come away and thought about it, you would like to add now.

**Lord Mayhew of Twysden:** I thought that I was given a very fair run. I certainly was given plenty of opportunity to expand on my ideas about accountability, which I have just broached this afternoon, so I did not come away saying, “Gosh, I wish I had said that”.

**Lord Morris of Aberavon:** I think I would say the same. It was a very good hearing from our point of view. I thought that I was given a very fair run. I certainly was given plenty of opportunity to expand on my ideas about accountability, which I have just broached this afternoon, so I did not come away saying, “Gosh, I wish I had said that”.

**Lord Lyell of Markyate, Lord Morris of Aberavon and Lord Mayhew of Twysden**

published only in April. I have looked at that reasonably carefully. I wanted to ask whether there was anything in there that you disagreed with or whether that covers most of the points you are going to be making today.

**Lord Lyell of Markyate:** You have looked at it more recently than me, but I do not think there is anything there that I disagree with. If you have spotted something you think I might do, please draw it to my attention.

**Mr Tyrie:** Is there anything you would like to add?

**Chairman:** I think that is a bit of an open question. Do you want to put a particular point to Lord Lyell?

**Q585 Mr Tyrie:** It is a pretty thorough report¹ which was completed only a few months ago. I just hope that most of the points Lord Lyell felt were important on this subject were in that report for us to take a look at. That is all.

**Lord Mayhew of Twysden:** Chairman, may I just add that, having had the chance to read the evidence given in the CASC report, both by Lord Goldsmith and latterly by Lord Mackay, which are of course appended to the report itself, there are things that are said there which I would have been very glad to have said myself and probably would not have put them as well. I do not want to be led into a kind of heffalump trap: because you did not say this to CASC, it rather detracts from what you may say this afternoon. Might I just read the last sentence of Lord Mackay’s evidence. It is to be found on evidence page 92 of that Fifth Report of CASC. It is very short. He says: “I believe that the principles under which the office of Attorney General rest are sound, that it fits well into our system of government, that it has stood the test of time and should be retained.” I respectfully agree with that.

**Q586 Lord Morgan:** We have had a variety of evidence, gentlemen, on the question of separating or the desirability of trying to separate the judicial from the political function. This, as I recall, has occasioned a lot of controversy in the past, including in the case of Sam Silkin, as Lord Morris mentioned, the Gouriet case with the trade unions. Lord Falconer argued before us that the Attorney General should be an independent figure, free from political pressure. What do you feel about the dangers here and is there not a problem about being independent if you are giving advice to a group of people of whom you yourself are one?

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¹ Footnote from Lord Lyell: It will be noted that the report of the House of Lords Select Committee on the Constitution did not set out to express an opinion of the committee. It confines itself largely to setting out the competing points of view of Professors Bradley and Jowell. But broadly, I largely agree with Professor Bradley and disagree with Professor Jowell.
18 June 2008

Lord Lyell of Markyate, Lord Morris of Aberavon and Lord Mayhew of Twysden

Lord Morris of Aberavon: May I deal with that? I have read Lord Falconer’s evidence. I disagree with it. I refer to Sam Silkin here. Of course, Sam Silkin was criticised by the Court of Appeal in the Gouriet case, but he was upheld by the House of Lords and his office was held by the Lords to be an independent one and the decision was one that only he and he alone could take.

Lord Lyell of Markyate: If I could just add to the independence aspect, I think probably all of us have had to give advice to our political colleagues from time to time which has been unpalatable and sometimes thoroughly unpalatable. We know what we believe to be the right advice and I believe every one of us has given it and not been affected in any way by the political unpalatability, except to make doubly sure that we were sound on our position.

Q587 Lord Morgan: Do you think there is no problem at all, that it simply cannot happen? Lord Lyell of Markyate: I do not think there is. I was seven years PPS to Michael Havers and then 10 years as a law officer, and obviously I have read the Edwards’ books and so on and looked back on the history. There is a very strong ethos in the office, as I have emphasised in the letters which I have sent to your committee and which I have put in in answer to the consultation. There is a really very strong ethos in the office that you will be completely independent and straightforward in your advice giving. Speaking for myself, and I am sure I do for the others, you would just hate to go against that.

Q588 Chairman: Do you feel that it is not just the fact of independence but the appearance of independence, the possibility that those on the outside find it more difficult to accept an advice that is unpalatable if it comes from a political figure as opposed to one that appears independent by not being part of the team?

Lord Morris of Aberavon: May I say, if it ain’t broke, why fix it? Over the years, as Lord Mackay has set out and as quoted by Lord Mayhew, the respect for the Attorney has been high. That is why I doubt whether you can enhance it. I believe the job can be better done by a political figure. He takes a holistic view. He has to take into account the whole range of issues, rather different from the high street solicitor, with respect to yourself, sir, and may well be a commercial lawyer. He has to have substantial political experience. Whatever my deficiencies as Attorney, I am sure that over the years one did build up quite a bit of, I hope, political credibility and was able, when asked to advise perhaps the Speaker, perhaps on matters like the DeLorean case for winding up the interests of the Government—and maybe other interests concerning the property of one or two rather important people—to bring a holistic approach to the whole issue. There were some issues where it was rather important to be a political animal. I had to appear at Strasbourg on one occasion to defend the issue of how far down a civil servant should be able to take part in political activity. Of course, the greater the involvement of a civil servant in political activity, the less the appearance of impartiality. One could judge those issues. Those are some of the matters which arose, and accountability at a Dispatch Box at the end of the day to defend your decision is of paramount importance.

Q589 Lord Hart: This is a question about the advice of the Attorney General. There has been a little dispute in the evidence we have had. Should the Attorney General’s legal advice ever be disclosed and, if so, in what circumstances?

Lord Mayhew of Twysden: I think that there are rare circumstances when the actual text of the advice could be disclosed, and those circumstances are limited to when the Government, which is the client in this context, actually wants it to happen. Save for those circumstances, the Government are entitled to the confidentiality of the actual text that they receive, and I think for good reasons. I do think that it is necessary and absolutely right that what I call the character of the advice should be made public. I think that is certainly right, but the actual text is a different matter. The text will very probably recite various suggestions that are put forward, or various areas of weakness to the Government’s case—let us say for the purpose of argument—which have been contained in the instructions to advice which come to the Attorney. Any good counsel or solicitor asked to advise will of course rehearse the other side of the argument before coming to an analysis of where the outcome should be. I think you would get cherry-picking and you would get damage done to the Government as a client which they are entitled to be spared. I do not think it would be in the public interest but, having said that, the character of the advice is certainly something which the public are entitled to know and should know.

Lord Morris of Aberavon: I would agree with Lord Mayhew. On previous occasions when I have given evidence, I have likened his role to a family solicitor, and you would not like the details of advice tendered to you, with respect, by your family solicitor, to be made public and put in the marketplace. It is a client and lawyer relationship. It is privileged. It is the client’s privilege and the client is Her Majesty’s Government. As a general rule, once it is breached, they might ask a Minister why you have not consulted the Attorney on this or that or a whole host of other matters. I maintained that line throughout. Occasionally there were suggestions by government
departments: please will you disclose you have been consulted? I remember one case on the compensation for Japanese prisoners of war. I knew if I gave way on that issue, which was not controversial from my point of view, whatever other people might have thought, then the floodgates might be open. The formula I devised, immodestly perhaps, was that Her Majesty's Government could say they had the advice of high legal authority. They were content and no other question was asked. Perhaps it was immodest but that is the formula. I would make one exception. Lord Mayhew and I have appeared before the Constitution Committee of the Lords, of which I am now a member, in order to proclaim our views that Parliament should take the decision on going to war. We put forward the view that it should be done on a convention and not on legislation. We did it in the face of opposition from all Her Majesty's Ministers—the then Lord Chancellor, a Minister from the Foreign Office, a Minister from the Ministry of Defence—and the committee upheld our views. In those narrow circumstances, if the responsibility is going to be on Parliament to decide we are going to war, and it is a novel situation, then Parliament should be fully informed.

Q590 Chairman: Do you see the Attorney’s role as being the adviser to Parliament generally or only in those specific circumstances, as opposed to simply adviser to the Government?

Lord Morris of Aberavon: Generally, I would say in those circumstances I would single out, but of course the Attorney is also the adviser to the Speaker; I believe he is adviser to the Queen. He can be called upon before the committee. Again, and this is why I think the formula suggested by Lord Mayhew is a very happy one, the character of the advice can be given without the details. You would know a good lawyer advising his client would rehearse the pros and cons. You might not want to put the cons before the whole of the public.

Q591 Chairman: Lord Lyell, do you have anything to add to that?

Lord Lyell of Markyate: No, I think that has been very well put by Lord Mayhew and Lord Morris. I do not think there is anything that I need to add.

Q592 Lord Hart: On the point that Lord Morris has just made, on that single point as to advice in relation to war, if the convention route was chosen, what do you say to that, Lord Mayhew?

Lord Mayhew of Twysden: The convention would be that Parliament has to authorise in advance, save for emergency situations, which everybody understands may arise. Parliament has to authorise under the convention that we propose the action that is being taken, and they would have to be told certainly the character of the advice that had been given. That ought to be sufficient without seeing the precise terms that it was expressed in to the Government.

Q593 Lord Hart: So is there a difference between you? Lord Morris, were you suggesting that there was more than the character of the opinion?

Lord Morris of Aberavon: I would not dissent. I think we are in a new situation and we have to work at it. I think events would resolve how much has to be revealed, but I think Parliament is in a new situation here and it would be rightly claiming to have the maximum information. How much has to be worked out.

Chairman: Before I call Lord Tyler, I did forget to say at the beginning that I should tell you that the interests of members of this committee have been declared in advance and are on the web page for everyone to see. Are there any other declarations that need to be made today? If not, that gets that out of the way.

Q594 Lord Tyler: All three of you have laid great emphasis on accountability to Parliament. Does it follow that you think it is therefore essential to be a member of one of the Houses, because, after all, the Comptroller and Auditor General is accountable to Parliament, by a different mechanism? Do you believe that if he or she, the Attorney, has to be a Parliamentarian, he should necessarily always be a Minister? Do you think that if a Minister, it is appropriate for the Attorney General to attend Cabinet and in what circumstances?

Lord Mayhew of Twysden: The last one first; I think that the Attorney should attend Cabinet by invitation. It may be his own invitation in pursuance of his duty to uphold the rule of law, which means that of course amongst other things the Government has to comply with the law. I do not think he should come as of right, as I understand is the practice at the moment. It never was in my day, nor in the days of my predecessors. The reason for that is a practical one. I think that if he gets drawn into controversies of a political character which are being argued out in Cabinet when he is there and it then falls to him to give legal advice, those who found his legal advice adverse to their political interests will be tempted to think: well, he would say that, would he not, because of the line he has just been taking in the row we have been conducting? I do not think it is conducive to belief in his detachment from government that he should go as of right. That is the first thing. As for whether he should be a Minister or not, I find myself really agreeing very much with what Lord Goldsmith had said at page 59 of the evidence of the CASC report, if I might read it. He says: “I consider that I
have been best placed to give frank, well-informed and constructive advice to my colleagues in government precisely because as a Minister I am in a position to understand the system of government, the process of policy formulation and the overall context in which the advice is sought.” He goes on to say: “Such advice tends to be more heeded by Ministers because it comes from one of their colleagues.” He cites Professor Jowell who has recently put it: Surely Ministers are more likely to accept such advice because it comes from “one of them”, someone essentially on their side, rather than from some externally contracted technocrat. By the same token, a Minister receiving unwelcome advice is perhaps less likely to sweep it aside when it comes from a ministerial colleague rather than a civil servant or some external lawyer. So that is my answer to the last two questions. I am sorry but I have forgotten the first?

Q595 Lord Tyler: A parliamentarian always?

Lord Mayhew of Twysden: I think so, yes. I have always found it very difficult to see how the ideal degree of accountability can be achieved unless you are a member of one House or the other. It is an absolutely unique situation to stand at the Dispatch Box and defend your decision or the decision of somebody for whom you are in other ways responsible. As I have said before and as Mr Tyrie will no doubt remember, the sharpest darts come from behind you, and it is quite unique. I am afraid I am not as clear as I should be on the accountability of the Auditor General but I am quite certain it does not extend to standing at the Dispatch Box in the Chamber.

Lord Lyell of Markyate: I think it is very important to be a Minister. First of all, as Lord Mayhew has said, you can cross-examine effectively or question a Minister at the Dispatch Box far more effectively than even the best select committee can do, and you do it much more frequently. One of the problems in recent years has been that the Attorney General has been in the House of Lords, and there are not regular questions to the Attorney General in the House of Lords. I think that is one of the things that might be considered. It would not only apply to the Attorney. If there are other Ministers—after all Lord Carrington was Foreign Secretary in the House of Lords—who head departments, the House of Lords might consider having questions in the same way as the Commons on a regular basis. I think that is extremely healthy, but to be standing at the Dispatch Box, as Lord Mayhew has said, is highly effective. The other point of being a parliamentarian is that you do day-to-day, year-by-year, build up that very political background experience which helps you to put your advice into context; you build up a trust and a feeling amongst your colleagues as to what you are like and it is tested in the fire of Parliament. I think that is very valuable. So I strongly support the continuance of the Attorney General and the Solicitor General as being Ministers in Parliament.

Lord Morris of Aberavon: May I add that I agree entirely that they should be in either House, and I would say preferably and very strongly be in the House of Commons, but unless you have people who can be appointed at any particular time, then we are exceedingly fortunate to be able to put lawyers of eminence in the House of Lords. I think it is a very unhappy practice that has developed recently of Ministers being members of Cabinet. They have not been so since 1928. I never went to a Cabinet. I went to innumerable Cabinet committees. I was on the War Cabinet because actions on Kosovo were fast moving. Indeed, I had to approve on the 68 of the 69 days each and every air target every day of every week. They came to me at my home, to my constituency, wherever I was; I had to deal with it because we had to ensure and give positive advice to the forces that we adhered to the Geneva Convention. But to be involved in Cabinet—I tell you, you should be too busy to be in Cabinet to prepare for matters involving foreign policy, economic affairs and a whole host of things. There is a point in being a little distant from political colleagues. It was Lord Rawlinson who said in Edwards again: An English Attorney General—he means there English or Welsh I emphasise—ought to be aloof from his colleagues in the ministry to a quite formidable extent. That was his opinion and I think it stands. If he is involved in political decision-making, the less he is involved, the better. There is one other aspect. Under the Ministerial Code of Conduct, which with respect is worth looking at, any ministerial colleague who wants to litigate has to consult the Attorney General. In my first few months I had a whole host of colleagues who wanted to consult me. I invariably gave them excellent advice, if I may say so: do not litigate. I think they all accepted it in due course, but in the first flush of excitement they all wanted to litigate. It is much easier to do that if you are down a mile or so away in Buckingham Gate or wherever you happen to be than with your office near or in the Cabinet Office or something of that kind. It is important to be slightly apart and to give legal advice, and I do not think you would want to be too close to your family solicitor either.

Q596 Lord Williamson of Horton: I want to ask about the Attorney’s role in the formulation of criminal justice policy. We have had different views expressed to us. Lady Scotland cited cases where she thought it was very beneficial and some others, which I will not quote, thought that it tended to oblitera
or confuse the independent role of the Attorney General. What do you yourselves think of the retention of the role of the Attorney General in relation to the formulation of criminal justice policy?

Lord Lyell of Markyate: Speaking for myself, I think the way it was done in earlier years was better. The Attorney General did not have formal responsibility; it nearly always resided with the Home Secretary, but the Attorney General was consulted about it and therefore had some input. I do not think it sits particularly easily with the role in general to find yourself actually formally a part of tripartite ministerial responsibility.

Lord Morris of Aberavon: I sat on the tripartite committee which was set up. It was helpful but I think it is only worth doing up to a point. There is a danger of being too mixed up with policy, which is rather different from informing colleagues what is happening. They may want to prosecute more drug dealers in Brixton; they may want to prosecute more sheep stealers in north Wales, which I have done myself on one occasion; but there is a limit. It is a very dangerous situation. I remember, Lord Mayhew may remember as well, there was a proposal by the Government to send junior Ministers, I think from the Home Office and some other department, and the Solicitor General round the country chivvying up prosecutions. I let it be known to Lord Goldsmith that I did not find this agreeable at all because the Solicitor General had no role in whatever it was, and I do not remember the details, that was being proposed, and the proposal was quietly dropped. Do you remember it, Lord Mayhew?

Lord Mayhew of Twysden: Actually, I am trying to remember it as you described it. It did not register with me, perhaps because they thought that my independence does seem to be rather sensitive prosecuting decision. I was a criminal lawyer and I said, “Let us see the film of what happened”. He and I sat down for an hour or so and watched and discussed and read all the evidence. I doubted very much; I could see as a criminal defence lawyer all the chinks that would be exposed in the prosecution. He listened, did not say very much, went back and the prosecution was dropped, but it was his decision. How on earth, if you do not have the ultimate power, even though it has never been exercised, can you ensure that he does listen, and he does listen. That is my experience.

Lord Lyell of Markyate: I think the potential tension is very valuable. After all, the Director of Public Prosecutions is a very important independent public official in his own right, but it is the Attorney General who has to answer to Parliament. You cannot have responsibility without power. I think of one particularly sensitive prosecuting decision. I was much less of a criminal lawyer than Lord Morris but I had had some reasonable criminal experience. This was a case where the evidence had to be weighed very carefully. One had to consider whether what one was told initially on the face of it, which all seemed very black and white, was likely to come out in that sort of way were the matter to be tried in court. What we agreed to do, as one quite frequently did in very difficult criminal cases, was to get Senior Treasury Counsel at the Old Bailey to go away and give a really careful, well argued opinion and then come back to it. In that particular case Senior Treasury Counsel went away and said that in his opinion there was not a realistic prospect of conviction for reasons which he explained. What had been a difficult decision resolved itself through careful discussion on both sides and the seeking of independent and carefully thought out advice.

Lord Mayhew of Twysden: In four years as Attorney and five before that, often having to do both jobs because Michael Havers was away seriously ill for a...
great deal of time, I never had an occasion when I thought to myself “gosh it is a bit of luck that we have got the power to direct” because we always arrived at a decision which was the decision of the Director, whether of Northern Ireland or for England and Wales by discussion. I very much agree, and you would expect me to do so because this is a joint paper we put in, with what has been said about the importance of the ultimate ability to direct. I am sorry to be a bore about this, but it comes back to the desirability for accountability. The prosecuting arm of the state is immensely invasive; it has a huge effect upon people’s lives and wellbeing. You only have to ask yourself how people behave when they get a summons to appear in a magistrates’ court or a country court and there is a great fuss. It is very important that that arm of the state should be exercised in a way for which the ultimately responsible person is accountable and is accountable to Parliament. How can that happen if the director is entitled to say, “Well, I am sorry, but it is my decision, as you rightly remind me, and it is going to be this”, and you happen to disagree with it? You have to stand up in the House of Commons and you have to say, “This is a decision which I disagree”. That is not going to do much for public confidence in the criminal justice system, I suggest.

Q598 Fiona Mactaggart: Why do you think the Government did this?

Lord Mayhew of Twysden: I think that the Government is seeking to feed an asserted perception that anybody holding the present functions and responsibilities of the Attorney General cannot be trusted to exercise them fairly and with integrity. I say it is an assertive perception that nobody can really be expected to do this with integrity because I have not come across any evidence myself of lack of confidence in the system. Where this has all arisen has been in the events of recent controversy, notably the advice about the Iraq War, latterly about British Aerospace but, as Lord Morris has said to you this afternoon, there have always been controversial decisions from time to time, a tiny proportion of those that are taken week-in and week-out. It would be a great mistake greatly to change and in my view to diminish an office which, as Lord Mackay has said in the passage I have cited, has stood this test of time and is sound. I think you would end up with something much less accountable and much less satisfactory.

Lord Morris of Aberavon: Could I supplement that, in view of the question by Fiona Mactaggart? I do not think the Prime Minister, with respect, was adequately briefed on this issue in the White Paper which was issued when he said the Attorney General would withdraw from making decisions on matters where he or she were not statutorily bound and would no longer take decisions. He was not adequately briefed because they never do take decisions unless they are bound by statute. I think the whole thing flows from the limited information which was given to him when he made the sonorous claim that she would withdraw from decision-making other than where she was statutorily bound. I think it flows from that.

Q599 Emily Thornberry: I would like to ask you about the proposed Clauses 12 to 15 that have been fairly controversial, which are the ones that will allow the Attorney General to stop a criminal investigation or prosecution on the grounds of national security. The concern is that that decision could be made without any meaningful accountability to Parliament, to the courts or to any international bodies and that, given the AG is appointed by the Prime Minister and is a member of the Government, it would be very unfortunate if it was ever seen that any decision that they made may have been made on political grounds. I wonder if you have any comments about that?

Lord Morris of Aberavon: May I comment very briefly that I think that the clause basically rehearses and restates what does happen now because the Attorney General, if he is informed by his fellow Ministers, may take a decision whether it is right in the public interest to take such a decision. I certainly believe there should be that reserve power because he has to take into account a wider remit than perhaps would otherwise be. I think the doctrine comes back to what Shawcross said many years ago, that the Attorney may consult—this is again from Edwards—his colleagues and in some instances he would be a fool not to do so, and ultimately the decision is his. I would maintain that position and this is the kind of situation where somebody with a political slant can take a better decision than perhaps somebody whose experience is strictly limited to the ordinary law.

Q600 Emily Thornberry: They would have a better understanding of national security?

Lord Morris of Aberavon: Yes, because he would have been briefed by colleagues. According to Shawcross, he should consult colleagues if he needs that kind of advice and, being a political Minister, the Attorney’s job is not to put a sprag into the Government’s coach but to ensure that all considerations are there to ensure that they keep on the right road, on the right side of the road, and not to divert. He gives that advice as a political animal, knowing quite a bit
about national security. He is cleared at a very high level and he is able to give the kind of advice at the end of the day which ensures that on the one hand the public interest is safeguarded and on the other national security is taken into account.

Lord Lyell of Markyate: I agree with everything Lord Morris has said on that. It is essentially part of the overall power to direct. I think, so to speak, it has been put back into the Bill because it was recognised that it is one aspect, but a very important aspect, of that general power to direct, but it is not fundamentally different. It is certainly true that the Attorney, who is cleared to a very high level, is the repository of information which is sometimes so sensitive that he just will not tell anybody about it, and possibly his most senior civil servant will be party to it but has to take it into account. Also, I would like to reinforce what I remember about Lord Mayhew saying about the very formal way in which I recall that representations from Ministers would take. I was deeply struck when the first time it was the Minister of Defence, George Younger, and he came to consult the Attorney, and I was a fairly new Solicitor. It was done in the most formal and careful and scrupulous way and in no sense was there any suggestion other than that the Secretary of State for Defence was putting forward important matters for consideration, but the decision was that of the Attorney.

Lord Mayhew of Twysden: I very much agree that it is important to see what is dealt with in Clause 12 as part of the overall duty to uphold the public interest. One of my criticisms of the Bill is that there is no reference to the traditional role of the Attorney General as the guardian of the public interest; it is merely a facet of it. It is right that it should remain because since every state has to have a prosecuting arm, it would be absurd if in a case where there was plain damage to national security, there was no provision to take that into account in deciding whether or not there should be a prosecution. Just on the latter point, Ms Thornberry has drawn attention to the risk that great damage would be done and it would be very wrong were the Attorney to take party political or partisan considerations into account, and of course it would be terribly wrong. If I can reassure her from personal experience—I remember the case, and there is more than one, that Lord Lyell has just mentioned—that in one case I was adjured in the most fervent terms not to permit a prosecution of somebody in Northern Ireland because great damage would be done. It was the decision of the Director of Public Prosecutions for Northern Ireland with which I agreed that we could not claim to be upholding the rule of law, so serious was the matter, were we to act upon those representations, and he was prosecuted. In the event, he pleaded guilty to enough counts to enable the matter to be dealt with without the risk of cross-examination giving rise to all sorts of matters of intelligence. The point I would just like to end with is that not once was there the slightest cheep of criticism from any of my colleagues that I had gone against their wishes, not once.

Lord Morris of Aberavon: Chairman, it is a very longstanding convention. It was Viscount Simmons when he was Lord Chancellor who explained and set out the need for the formality of the approach which Lord Lyell has mentioned and that it is done on a very proper basis. If there is such information, it should be done formally. I think that supports my view that the Attorney should not be too close to ministerial colleagues and not sit in Cabinet.

Chairman: I am terribly sorry, we are going way past our time, not because of the answers, because they are extremely illuminating, but we are just asking so many questions. We are going to ask one other question—Martin Linton has a question—and then the other matters that we intended to ask, which may arise out of your paper and so on, perhaps we can put further in writing and get a response in that way, if that would be acceptable.

Q601 Martin Linton: This is a fairly short question coming back to Clause 11, which abolishes the power of the Attorney General to stop a prosecution, the so-called *nolle prosequi*. This is an issue where all three of you disagree with the Government and indeed, according to this, with a majority of government consultees. I thought maybe you could explain why you hold that view.

Lord Morris of Aberavon: I feel very strongly on this, Chairman. It is again an ultimate power not often used these days. The courts now in the case of illness and unfitness to be tried tend to reach their own decision on this, but there is the ultimate power to withdraw the prosecution. I found it very important in two particular cases. There was an elderly lady, well into her eighties, who used allegedly to write anti-Semitic literature of the most appalling kind and she was prosecuted time after time and had enormous publicity for a long period of time. She was now in her late eighties and obviously getting frailer and frailer. I took the decision that enough was enough. We were fuelling the publicity which she craved for, and that was the end of her and nobody saw her or heard anything more about her. I also had an unfortunate case of a circuit judge who had been allegedly involved in a mortgage fraud. The jury had been out I think for 15 days and there was a question of a re-trial. The Crown came to me and said, “This man is collapsing. Every day when we wait for the jury, the 15 days, it is getting worse and worse”. I took the
decision. The point was this: I would have to defend it in Parliament. I would have to defend it at the Dispatch Box. Not a murmur was raised. Had he been an official, how could Parliament question an apparently irrational decision not to proceed with the prosecution? I had adequate material, took the decision, and I knew there was a possibility that I would have to defend it. Hence, it is important to maintain it, and I think the Government are going down the wrong way completely.

Q602 Chairman: Is that a view that is shared?
Lord Lyell of Markyate: Yes, I share that view. I had a difficult one involving illness. In fact I issued the nolle prosequi but I was fully ready to defend it. Had it come into the public domain in a major way, which it did not, it would have been much better defended at the Dispatch Box, and I think public trust would have been completely maintained.
Lord Mayhew of Twysden: I absolutely agree with that. Just harking back to the last question which overlaps to some extent with this, I had another case of the character that Lord Lyell mentioned where Defence Ministers very properly, having been consulted by me as to where they consider the public interest lay, made their representations and the decision of the Director for Northern Ireland was

that although there was evidence to justify an important prosecution, the public interest required that it should not take place. By reason of the fact that I was a member of the House of Commons, I was able to go to the House of Commons and make a statement of my own initiative explaining this. The consequence of that was that I was very properly grilled for something like 45 minutes and, at the end of it, the matter dropped and it never came back to the House of Commons by any of the copious means by which it could have done, with which you will all be familiar. I thought to myself and continue to think that that could only be explained on the basis that people thought that they had had an honest account of a difficult decision and confidence in the integrity of the decision had been established. That could not happen if the superintendent of the decision-taker or the decision-taker himself had not been a member of the House of Commons.

Chairman: Thank you very much for those comments. We have learnt a great deal from your experience. We do have an awful lot of other questions but if we may put them in writing, and the Clerk will ensure that you receive them as soon as possible, and you do have the time to respond, we would be very grateful. Thank you very much indeed for coming.

Supplementary memorandum by Lord Morris of Aberavon (Ev 68)

On what grounds would you argue that the Attorney General should continue to have superintendence responsibilities over the prosecutorial directors? You state that you would have preferred the draft legislation to have included the protocol itself. What specific elements would you suggest that the protocol should include?

I think I have already answered in substance. I am content with the status quo. I am not much exercised by having a protocol.

Are the provisions in clauses 4–6 of the Draft Bill, setting out the tenure of office of the Prosecutorial Directors, appropriate? You state that “these clauses actually say very little about the role of the three Directors”. Is there anything else you would wish these clauses to include?

They probably are. If I recall correctly they all have fixed term contracts now, with the possibility, but not necessarily an expectation or renewal.

What would you suggest should be included (or not included), in the proposed Annual Report? In particular, is Clause 16(2), which states that certain types of information need not be included, an appropriate power? Are there any other ways in which Parliamentary scrutiny of the work of the Attorney could be improved?

I think appearances at select committees of both Houses at regular intervals, say annually, and exceptionally where there is a particular need would be appropriate.
Should the oath of office of the Attorney General be reformed? Are the Government right not to seek to do this through legislation (unlike the oath of the Lord Chancellor for example)?

All oaths should be brought up to date. I think an oath, or rather a duty to uphold the law, spelt out on the face of the legislation, in addition to a Ministerial duty to uphold the law would be appropriate in view of the changed circumstances.

The solemnity of swearing the oath is salutary and memorable, and it is forgotten that it is accompanied by Letters Patent.

27 June 2008

Supplementary memorandum by Lord Mayhew of Twysden (Ev 67)

What is your opinion of the Government’s proposal to transfer or abolish most of the requirements for the Attorney General’s consent to prosecutions? Can you elaborate on your argument that the Attorney General should retain her power to stop a prosecution by way of a nolle prosequi?

Because there is no common thread between the many statutory requirements for the Attorney’s consent to a prosecution I think there is a strong case for rationalising the list of offences for which some authoritative consent is required. I do not think I can helpfully add to what my colleagues and I have jointly said to the Committee about the means of achieving this. Incidentally, it is rather remarkable that the Government should be continuing to add to the list, notwithstanding its asserted belief that the Attorney’s multi-hattedness precludes public confidence in his/her independence.

The argument for the Attorney being able to stop a prosecution by entering a nolle prosequi is a simple one. The power has to be vested in someone unless a prosecution once commenced is to be unstoppable in any circumstances—which would be absurd, and forseeably unjust and against the public interest. Yet whoever it is vested in ought to be directly and personally answerable to Parliament in a controversial case, because exercising the power to stop a prosecution can have as profound a significance as commencing one. So we are back to the absolutely central point about accountability—on which it would be tedious of me to elaborate further.

On what grounds would you argue that the Attorney General should continue to have superintendence responsibilities over the prosecutorial directors? You state that you would have preferred the draft legislation to have included the protocol itself. What specific elements would you suggest that the protocol should include?

Parliamentary accountability is again the key here. The prosecuting arm of the state is capable of being immensely invasive. The public interest requires that it be exercised justly and not oppressively. If there is to be any superintendence of those with responsibility—and we have for the last 130 years rightly required that there shall be- then I believe the exercise of that superintendence, both as to policy and its execution, is best able to be examined by Parliament through questioning the Attorney at the despatch box. As to the proposes protocol, I cannot think it satisfactory to define important matters such as the “the general responsibilities of the Attorney General and each of the Directors”, or the “objective of the prosecution services”, within a “statement of how the Attorney General and each of the Directors are to exercise their functions in relation to each other”, thereafter stipulating only that “the Attorney General and the Directors must have regard to any relevant provision of the protocol when carrying out their duties”: Cl.3(6). I really don’t know what the legal effect of all this would be. If legislative provision for these matters is to be made at all it would seem a mistake to achieve uncertainty. A schedule to the Bill would be a better vehicle for whatever provision is sought to be made.

Are the provisions in clauses 4–6 of the Draft Bill, setting out the tenure of office of the Prosecutorial Directors, appropriate? You state that “these clauses actually say very little about the role of the three Directors”. Is there anything else you would wish these clauses to include?

I do not have any anxiety about the proposed tenure of office of the prosecutorial Directors. If a schedule were to be employed in place of the proposed protocol a more extensive description of their functions than is provided by clauses 4—6 of the Bill could be achieved.
Examination of Witnesses

Witnesses: LORD CARLILE OF BERRIE of Berriew, a Member of the House of Lords and PROFESSOR JEREMY HORDER, Criminal Commissioner, Law Commission, and Member, Criminal Justice Council, gave evidence.

Q603 Chairman: Good afternoon. Can we thank you for coming to our Committee. As you know, we are looking at a whole series of issues but in particular this afternoon we are looking at a number of issues on which we would welcome your comments, particularly with regard to the Attorney General’s powers. Can I also at the very beginning say that members have declared interests relevant to this inquiry and they are available today and on the Committee’s website. The second thing I need to say is by way of an apology. It is possible that there will be votes at 5.30 and there is a risk that a quorum will be not maintained after that, so it may be we will need to go as far as we can up until 5.30 and ask that other questions be dealt with by correspondence. I do apologise for that in advance. If I can ask colleagues to be as brief as possible in questions we may indeed make some progress before then. Can I open by asking, the Government is fully committed to enhancing public confidence in the office of the Attorney General, do you think the proposals that have been set out achieve that objective?

Lord Carlile of Berriew: No, in a word. I think we have a problem about conflict between perception of the integrity of the office and the integrity of the officiholder. I believe that if one can remove questions about the integrity of the officiholder which may arise from time to time, and of course I am not talking about the present incumbent, then I think one will enhance the credibility of the role of the Attorney General. My view, therefore, is that it would be far better if we had an Attorney General who was independent of the government whose term of office spanned the period of a General Election. I think that would enhance confidence in the office. The only other thing I would add is there is some kind of template for this. The Lord Advocate in Scotland is not a member of the Scottish Parliament but appears in the Scottish Parliament, answers questions and deals with any issues that might arise, so that there is availability and transparency through the Scottish Parliament. I think this could be done through membership of the Attorney General of the House of Lords.

Q604 Chairman: Professor Horder?

Professor Horder: I take a slightly different view. The Government is on the right lines in the broad sense that it has tried to focus attention on the importance of the Attorney’s role in relation to the rule of law, and that is important in the present context where the Lord Chancellor’s role has changed a great deal over the last few years making the Attorney’s role in relation to upholding the rule of law very important, particularly so. The Government has also proposed that the Attorney should have a role in relation to national security and that also, it seems to me, is right and in my view inclines me to the view that the Attorney should be a parliamentarian at the very least. Let us not anticipate that particular question. What I would say is where I think there is a weakness is in that the commitment of the Attorney General under these new proposals to the rule of law is perhaps half-hearted; it is to be there in the oath, that is fine, but there is only so much you can do by way of an oath, it seems to me, and I believe there is scope for making the commitment to the rule of law of the Attorney General much more explicit in the Bill and making a better effort to distinguish between that role and the role of just giving legal advice on whatever it may be on a lawyer/client basis to Government. I think that is a very important distinction.

Mr Tyrie: You have heard and no doubt read the evidence from the Attorney General trade union representations which we have just been listening to.

Chairman: That is the retired section!

Q605 Mr Tyrie: The retired section. They were saying in a nutshell that the accountability aspects of the role require an Attorney General to be able to be
called before Parliament and in particular to the floor of the House of Commons. Do you think that a select committee can do the job adequately or do you think there is something to the points made by the troika?  

**Lord Carlile of Berriew**: I think there is something to the point that is made by the troika and that is why I say an independent Attorney General should be given membership of the House of Lords, or whatever it becomes. I suppose there is no reason why the Attorney General should not be given a slot at Question Time in the House of Commons, though I always fear that the House of Commons, if you will forgive me for saying so, evolves at about the same rate as the species, so one cannot be optimistic about a change like that. We have had successive Attorneys General in the House of Lords now and in their different ways they have shown the sort of accountability that I think is necessary. I have absolutely no problem about it being accountability to the House of Commons, of course.

**Q606 Chairman**: You share that view, Professor Horder?

**Professor Horder**: I do share that view. Contrary to the troika, I think that there are advantages in having a member of the House of Lords as the Attorney General. There is perhaps a little bit of distance in the public eye, at any rate, from the hurly-burly of party political politics, but there is also, as Lord Mayhew was keen to point out, the possibility of a dart coming from behind, there is accountability at the Despatch Box, and that is very important. I do agree with that view.

**Lord Carlile of Berriew**: If I can revert to the question about a select committee, I think select committees are extremely useful. I have served on select committees and given evidence to many select committees now and they carry out a very important role, but it is often historic in its analysis and lacks the immediacy of accountability before a House of Parliament. I would like to retain that immediacy, albeit by transferring it to an independent person.

**Q607 Lord Morgan**: This follows from the very interesting answers we have just heard. We have had a variety of views on the problems of the “legal” and “political” aspects of the Attorney General being separated. In terms of the answer we have just heard, would that not be a problem also if the Attorney General were in the House of Lords? Lord Goldsmith has had a few problems.

**Lord Carlile of Berriew**: I do not think so. If you look at the judgment of Lord Justice Moses in the BAe case, the innuendoes or implications behind that very strong judgment—

**Q608 Chairman**: I do apologise. Because that issue is *sub judice*, we have got to avoid discussing the actual merits.

**Lord Carlile of Berriew**: Thank you very much. I do not propose to deal with the merits, but the innuendo is of a generally political kind and I believe that an independent Attorney General would be distanced from such inference or innuendo. The case is, of course, subject to appeal and it would not be right to mention any more about it.

**Q609 Lord Morgan**: Could I move on to my other question which is relevant to it, namely the disclosure of the legal advice of the Attorney General. Do you think such advice should be disclosed and in what circumstances?

**Professor Horder**: We are familiar with the point that the Government is the client and the Attorney General is the lawyer, but the Government is not just any client and the Attorney General is not just any lawyer, they are there to represent public interest and, of course, legal professional privilege can be waived and there may be public interest dimensions to that. Lord Mayhew is right that of course the general character of advice should be disclosed, that seems to me to be the right thing in the interests of openness, but before I can answer that question with a “yes” or “no” I would need to know what sort of advice the Attorney was being asked for. There is a tricky point here about the rule of law. There are two sorts of advice that you can give. One is, “The rule of law requires this answer or perhaps one of these two answers”. There is a second kind of question that a Government might want to ask and that is, “Okay, but legally speaking what can we actually get away with? Is there a third and fourth answer that just slips through the legal net? That is the one we politically would most like to see going ahead.” If one gives advice on that, one is beginning to slip away slightly from a guardian of the rule of law to being just a straightforward government legal adviser. If the straightforward government legal adviser model is retained, I think it follows almost automatically that that kind of advice will not be disclosed and probably should not be because it will inhibit discussions between Government and their legal advisers about that sort of issue.

**Lord Carlile of Berriew**: I agree entirely with Professor Horder that the Attorney General must be the guardian of the rule of law, in which case the direct answer to Lord Morgan’s question which, if I may say so, oversimplifies the issue, is yes, but not necessarily routinely, and subject to appropriate redaction. To put a little flesh on this, what I would foresee if we were to have, as I suggest, an independent Attorney General would be for that person to report, say monthly or quarterly, very broadly on the issues that they had been asked to
advise upon and, if appropriate and necessary, the conclusions they had reached. There is a problem though. Both Houses of Parliament, and I have been a member of both, and especially the House of Commons, suffer from an enormous amount of curiosity, some of which is somewhere approaching the idle. I do not mean that the people who ask the questions are idle but they are very interested in the answers to all kinds of questions and there are 600 and something-odd potential questioners just in the House of Commons. I do not think it would be right for every word of every piece of advice to be published. There are going to be matters of public interest on which certainly there should be publication, possibly subject to redaction. Equally, there are going to be matters about which the public interest, particularly on grounds of national security, requires that very little should be published. I think then has to be a merits based judgment, therefore, subject to the assumption that a proper and transparent account is given by the officeholder of the role he or she performs.

Q610 Lord Tyler: I think I can anticipate Lord Carlile’s answer to this, but can I just clarify that clearly from what he has already said he does not believe that the Attorney General should be a minister, should not attend Cabinet at all, or perhaps in some circumstances, and perhaps, Professor Horder, you could also give us a response on that also.

Lord Carlile of Berriew: I believe the Attorney General should not be a minister. In my view, the Attorney General should attend Cabinet when an appropriate issue arises. I should mention in this context that I foresee a situation in which there is inserted an additional person or group of people, which for shorthand I would call “Downing Street counsel”. The Prime Minister is perfectly entitled to obtain confidential legal advice if he wishes to, but if there is to be formal legal advice to the Government then it should be transparent and, as I suggest, given by an independent person. If such formal legal advice is required, then I think it would be expected that the Attorney General would attend Cabinet, give their independent advice on the issue arising and that advice should be properly recorded and minuted.

Professor Horder: The most controversial role, difficult role, under these provisions for the Attorney General is in relation to national security matters. I find it difficult, I have to say, although I am sure it is not impossible, to imagine someone wholly independent being entrusted with that function by Government. I would be happier in my own mind seeing a parliamentarian, and probably a minister as well, with responsibility of that sort in this reformed role, I have to say, which is not to say that there could not be a completely different model with an independent Attorney General. Other countries seem to manage perfectly well with that. If so much importance in an interventionist sense is going to be placed on the national security card, if I can put it that way, then I think there needs to be quite a close relationship between the Attorney and Parliament itself, in my view through membership.

Q611 Lord Williamson of Horton: I want to ask about the formulation of criminal justice policy. Do you think the Attorney General should retain her role in relation to the formulation of criminal justice policy? Some people who have given evidence to us think it might confuse the independent role of the Attorney General.

Professor Horder: I can see the point that was being made by the troika about the awkwardness in some respects of having the prosecuting authorities under the authority of the Attorney General. We all accept that the responsibilities of the Attorney General are a bit of a mixture of things that have grown up over a period of time. One wonders, for example, under the protocol, is it really the job of the Attorney General to talk about what the DPP’s media policy should be and so on. There are some odd things in there that one would think it more appropriate to be performed by the Ministry of Justice and so on. However, I hope no-one could deny that there is an important role to be played in relation to the co-ordination between the prosecuting authorities, and there are quite a lot of them now—DPP, SFO, Revenue and Customs, not to mention the military prosecuting authorities—in the interests of the rule of law to make sure that if there are common interests in regard to prosecution policy they are settled by the Attorney General in consultation and that he or she is responsible for that policy to Parliament. So there is a dimension of prosecution policy, I believe very strongly, that is where the Attorney General has a strong interest.

Lord Carlile of Berriew: Yes, and I agree. Particularly if one were to have an independent Attorney General then their independent advice, I am not sure about the formulation in the question, on criminal justice policy and its consistency with the rule of law of which the Attorney General is guardian seems to me to be a reasonable requirement of the office.

Q612 Fiona Mactaggart: I am uneasy, if I can be honest, Lord Carlile, about the independent Attorney General as having responsibility for the public interest in relation to justice, which is a critical part of this role you would agree. In my experience those people who have not had the kind of experience of a political relationship with the public often find it hard, not impossible but find it hard, to put the public interest in its broader sense first. I wondered if you could unpick that a little.
Lord Carlile of Berriew: The first thing I would say is that if you go and look at the performance of Eilish Angiolini as Lord Advocate in Scotland, and the Solicitor General for Scotland—

Q613 Fiona Mactaggart: It is a very small country.
Lord Carlile of Berriew: It has the same legal issues. It has a criminal justice system and there have been some extremely controversial cases there. They had to handle Lockerbie, for example, which was at least as difficult a case as any Attorney General has had to handle in England and Wales. The experience in Scotland is entirely good. I have discussed this with the Lord Advocate as to how comfortable she feels in that role. She would have to answer for herself, but my impression is that it is functioning very well. Also, the way in which the person is selected and who is selected is very important. I would favour a sort of parliamentary approval system as was mooted in the original consultation paper in relation to the choice of Attorney General. My own view is that this could be achieved without too much difficulty. I do not know what the evidence is that someone who has been a member of the House of Commons or a member of the House of Lords is going to be any better. There is a sort of given that because they have been a Member of Parliament they understand the place better, but that sometimes leads to rather negative results.

Q614 Fiona Mactaggart: To get to the point that I am most concerned about, which is the powers of the Attorney General and the authority of the Attorney to decide on whether a prosecution should proceed or not. I wonder if you would both give us your views on the pros and cons of the situation as it presently exists and the situation as is proposed in the Bill.
Professor Horder: I broadly agree with the structure that is put forward in the Bill. The contrary argument was put by the troika that it is valuable to have the Attorney General involved in some individual cases, giving consent or issuing a nolle prosequi because of illness and so on in particular cases, but, with respect, I did not find that the strongest of arguments, because in relation to the nolle prosequi there is an abuse of process doctrine which has developed in recent years which is meant to deal with that. Also, such things could be dealt with through the protocol that is to be drawn up between the Attorney General and the prosecution authorities. I did not find that a terribly strong reason for going against what was actually—

Q615 Fiona Mactaggart: Their fundamental reason was the reason about accountability.
Professor Horder: That is right, but I am uneasy about the idea of accountability in relation to individual prosecution decision-making that does not relate to national security, if you like, that just involves ethical or other issues in individual cases. It seems to me that it is right, broadly speaking, that prosecution authorities take those decisions and they can, of course, seek the advice of the Attorney in individual cases. You do not need to go so far as to say that actual consent has to be given. There is nothing to stop the prosecuting authorities going to the Attorney General and saying, “We have got a real problem here, what would you advise?”

Q616 Fiona Mactaggart: Would you mind it if it was automatically public if an Attorney was to say, “No”? Would that deal with your problem of feeling that it is too much interference?
Professor Horder: When I was drafting the response to the Criminal Justice Council I said that, indeed, whenever advice was given on that sort of basis it should certainly be published, yes, because it does not involve a national security issue and why would you not do that.
Lord Carlile of Berriew: I was simply going to say in answer to Ms Mactaggart, so far as the Commons are concerned I suppose the most obvious one is that there are, for example, three perfectly good senior officials, the DPP, the Director of Revenue and Customs Prosecutions and now the new Director of Military Prosecutions, who are very experienced and well capable of making these decisions themselves. I come down on balance with the troika on this because I think the accountability point is an extremely important one. There are, as we heard, very few decisions of this kind. We heard a couple of anecdotes from each of them from their time as Attorney General, and that is probably about the average strike rate. I think that there are some cases which are so important that the public interest should be exercised by the most senior person on the piste, and that is the Attorney General. Having said that, where such decisions are made they should be reported. One should not have to rely on the good fortune of nobody raising them in Parliament, and I would see them being reported as a rule in the monthly or quarterly reports to which I referred earlier.

Q617 Chairman: If the Government’s proposal that the power to give directions should be removed, is it right that there should be an exception in relation to cases affecting national security?
Lord Carlile of Berriew: In my view, yes, for this quite straightforward reason: decisions on the grounds of national security may have to be considered urgently and on the floor of one or other House of Parliament. I do not think an ex post facto explanation before a select committee is accountable enough.
Professor Horder: I completely agree with that. There is just one query which I might raise in my capacity as Law Commissioner and looking at reform of the bribery laws and our international commitments on this issue, and that is in clause 14(3) where it is talking about the withholding of information from Parliament and it talks about the inclusion of information being prejudicial to national security or seriously prejudicing international relations. That is a much broader category. There is going to have to be some further thought on how broad or narrow we understand this question of national security. You will all be aware that is a slippery concept. I am sure that all international bodies would accept that individual prosecuting authorities can intervene in prosecutions on the grounds of national security, they would all accept that, but they would be rather more sceptical, I think, about a broader concept of intervening on the grounds of prejudicing international relations unless that was set down with a great deal of clarity to make sure it is consistent with our international obligations.

Q618 Lord Norton of Louth: Just very briefly on clause 16, and I know you have already touched upon it, the Attorney making an annual report before Parliament. To some extent the clause itself stipulates what should not be in it, but how appropriate is that and how far would you go beyond it in terms of accountability to Parliament? You have already indicated some of the ways in which you think the Attorney should be accountable, is there more that we should be looking at?

Lord Carlile of Berriew: In my role as independent reviewer of terrorism legislation, I have now more experience than I would wish, I think, of writing reports which are published either as parliamentary papers or as Stationary Office papers. My experience is that there is a great deal of scrutiny of those reports by people who are interested and it is very telling scrutiny. The production of an annual report, which I do for three different functions as independent reviewer of terrorism legislation, is a useful discipline and it gives Parliament something to debate or get its teeth into in some other way if it wishes to do so. I do not think an annual report alone is the subject for a more ongoing and dynamic relationship between Parliament and the officeholder of Attorney General. I would indeed see the annual report as a compilation and expansion on those more frequent periodic reports that I have already referred to. I can give you an example actually from the terrorism field. The Home Secretary is required to report to Parliament quarterly on the progress of the Prevention of Terrorism Act 2005 Control Orders and I have consistently encouraged Home Secretaries to put more detail into these reports, and they are doing so. I think that kind of principle, that you give a quarterly report and then build it into something bigger, is a very sound principle. It would enable select committees, sometimes numerous and overlapping, to look at different aspects of the work.

Q619 Lord Norton of Louth: So you feel that the existing parliamentary means for examining that report are sufficient in terms of extant select committees?

Lord Carlile of Berriew: No. In an ideal world I would like to see select committees, particularly joint committees like this, having far more influence than they have. I hesitate to use the word “power” because I do not mean it, but I think you will understand what I am getting at. All too often select committee reports, if they are deemed inconvenient, particularly by a government with a large majority, are simply an exercise in occupational therapy for the members.

Professor Horder: I have nothing to add.

Q620 Lord Hart of Chilton: The White Paper suggests that the oath of the office of the Attorney General should be reformed by an inclusion to the rule of law, which you referred to earlier, but did not seem to think that it was important to legislate for that. What are your views?

Professor Horder: I do not think I have a very strong view except that it seems to me, as I said earlier on, that the Government proposes to do quite a lot of the commitment to the rule of law on the part of the Attorney General through the oath, in which case I think there might well be a case for putting it on a statutory footing. I think that might be important. However, if you look at oaths generally that are sworn by the Attorney General in the United States, for example, or by European Court judges, they tend not to go into the detail of what the duties of the person actually are, what they tend to say is, “In performing my duties I will be independent, I will be discreet, I will not be swayed by such and such a factor” and so on, whereas here what is happening is that some of the duties are being included in the oath and if you are going to do that you probably need to put them on a statutory footing but, as I have already said, I would prefer to see a commitment to the rule of law a little bit more integrated into the role of the Attorney General or herself.

Lord Carlile of Berriew: I take the rather old-fashioned view that oaths of office have an importance in two ways. First of all, most importantly, for the officeholder. If you were to ask a judge to recite the oath of office which he or she has taken, and only once, most of them will remember every single word of it. Secondly, I think it is very important for public accountability that the oath should be seen to be taken and that it should cover
the principles underlying the office in question. I think my preference, though I would not pretend that I regard this as the most important issue under debate, is that the oath should be incorporated in statute in an appropriate form.

Q621 Chairman: Clause 3 of the draft Bill sets out a proposed model of a statutory protocol between the Attorney and the three Prosecution Directors. Do you think the protocol that is proposed is adequate or, indeed, should the Attorney General continue to have superintendence responsibilities in any event?

Professor Horder: I have already said a little bit about it in that there are some slightly curious things in there: for example, the Attorney General dealing with the press and media relations that the Directors have to have, and also dealing with complaints against them and so on. That seems slightly odd. In general terms I am in favour of having such a protocol. First of all, it has the advantage of being a published basis on which the Attorney General and the Prosecution Services will jointly operate but, secondly, it takes the form of so-called “soft law” which means that it can be adapted, updated, as circumstances dictate. That is also an important feature of it which we do not use enough of, in my view. Where I would perhaps put a query is 3(1) says that the Attorney General must, in consultation with the Directors, prepare a statement. Consultation with the Directors, yes, but one would hope, if not exactly by statute but by other means, there would be consultation over the protocol with other important bodies like the police, for example, who will have an input to make, I think a very important one here. I am not quite sure why, if the consultation with the Directors is in statute, one might not want to add perhaps one or two other bodies which should be consulted.

Lord Carlile of Berriew: I agree. Protocols are good as long as they do not become a proxy for decision-making. There is certainly no objection to protocols. I agree with Professor Horder that consultation should not appear to be limited by the statute. There should be the opportunity and, indeed, the requirement to consult across a broad spectrum, including those who live outside the London and Westminster village and legal London, which is rather too close to us than perhaps is good for us sometimes.

Chairman: Can we thank you very much for coming and giving evidence. We are going to call it a day there only because we are conscious that the Lords are going to vote very shortly and rather than even risk having to adjourn and come back this would be an opportune moment to end. We do have just one or two questions more that would have been asked and if we can send them to you in writing it would be extremely helpful if you could respond. For now, can we thank you for offering your expertise to the Committee and our grateful thanks for attending.

Supplementary memorandum by Professor Jeremy Horder, Law Commission (Ev 63)

**On what grounds do you disagree with the Government’s proposal that the power to give directions in an individual case should be removed? Given that the power to direct has not been exercised in recent years, to what extent would the Government’s proposal mark any substantial change from the current position?**

I believe that there is a need for clarification on this issue, although it seems unlikely that there is any change from the existing position.

In general, the role of the AG in relation to prosecutions, in so far as it is to remain, should be a higher level one. It should be concerned with securing observance of the rule of law in the generality of cases, and should not extend to seeking to do justice in individual cases.

Judges nowadays have a much more active role in that regard than they used to in a more adversarial age, when the “enthusiasm” of prosecutors (at a time when there was no CPS) might need curbing by direction from higher up. Likewise, prosecutors have a code of conduct to follow, of a kind that did not exist years ago.

The more closely associated with a party in Government an Attorney is, the more difficult it will be for him or her to appear to a cynical public to be (if not actually to be) acting solely in the public interest in individual cases. Those kind of problems are much reduced if the AG has only a higher level role.

**On what grounds would you argue that the Attorney General should retain the power to direct cases affecting national security? Would the proposed power in clauses 12–15 mark an increase in the Attorney’s current powers, and if so, in what ways? To what extent could the exercise of this power be subjected to judicial review or be accountable to Parliament?**

These are all very difficult questions.
AG’s Powers

The first question concerns the scope of the AG’s powers. I must admit to being no real authority on this particular point. There are two issues.

The first issue concerns the grounds on which the AG may intervene. I do not believe that in law there are any formal limits to these, save those that would be imposed by the courts: prohibitions on acting in bad faith, in a biased way, or by reliance on irrelevant matters etc. What the Bill does is to draw out certain aspects of the grounds (“safeguarding national security”), without necessarily abolishing any other grounds that the AG may have to intervene in prosecutions.

The second issue concerns the stage at which the AG may intervene. Here the Bill gives wide powers to intervene not only to stop proceedings, but (a) to prevent proceedings being issued, and (b) to prevent matters being investigated, with a possible view to prosecution (12(1)(a)).

I am made uneasy by this final power in 12(1)(a) which seems to be drafted with the Cornerhouse case very much in mind, and no one should need reminding that hard cases make bad law. It seems to have implications not only for prosecutors but also for the police who may be doing the investigating: should the AG’s writ really run so far? Is there a risk that he or she will in effect have power to curb the investigatory freedom of the police, and hence trespass on the Home Secretary’s territory?

I would have preferred to see prosecutors and police given freedom to investigate without the risk of “political” interference, bearing in mind that prosecutors themselves must consider the public interest when pursuing investigations. If the AG is to be permitted to intervene, then the stage at which proceedings are issued, ie once a case file is complete and can be inspected by the AG, is an appropriate one, as is of course any later stage in those proceedings. In both these latter instances, the matter has passed from the police to the prosecution service, and is thus more firmly in the AG’s domain.

Should the AG be concerned with “national security”?

The next issue is whether the AG should be regarded as an authority on “national security” for the purpose of intervening.

I do not believe that intervention in the interests of national security should be regarded as purely political, and hence a matter for the PM him or herself. There might be something to be said for giving the Home Secretary the ultimate “say” on this issue, in consultation with the relevant prosecution authority. However, if the Home Secretary plays his or her “national security” trump card, and ends a prosecution that the DPP had authorised, that will inevitably diminish the authority of the AG as the person with superintendence of the prosecution authorities and, more broadly, with responsibility for upholding the rule of law.

I continue to believe that it would be preferable for the AG to take the decision to prevent/end a prosecution on the grounds of national security, although obviously the Home Secretary and the Prime Minister (as in the Cornerhouse case) may express robust views on the issue to the AG. A decision to divert off the normal path of the rule of law, in the interests of national security, will have more legitimacy if it taken by a person with special responsibility for upholding the rule of law itself (of course, I appreciate that all Ministers are under the obligation to abide by the rule of law).

Should an AG’s decision based on “national security” considerations be judicially reviewable?

The short answer is “yes”. No one performing an executive role should be above judicial review, and hence not answerable to the law, period. However, it will no doubt continue to be the case that the AG will in any proceedings be able to claim public interest immunity respecting disclosure of documents whose release for the purposes of litigation would prejudice national security.

Still less should a person in an executive role be able to withhold information that was at the basis of their decision from Parliament, except in the most exceptional of circumstances; and that makes me concerned about the sheer breadth of 14(3).

14(3)(a) and (b) are too wide, and should be narrowed. They should cover only cases where (i) legal professional privilege would be maintained in respect of the information in question (not cases where it merely “could” be maintained), and where (ii) national security is at stake (not cases about international relations more generally). The same point can be made about the AG’s annual report, under clause 16.

As I believe that I indicated when giving oral evidence, 14(3)(b) will put the UK in danger of breaching its international obligations. It is another clause that looks to have been generated as a simple response to the Cornerhouse case.
The problem lies in giving the AG power to withhold information from Parliament relating to a prosecution that has been ended because in the AG’s view it would, “seriously prejudice international relations”. If information under this heading is withheld, there will be no way of knowing if a decision has been taken for reasons of economic advantage, as opposed to a wish to protect national security or secure human rights. This is significant, because of our international obligation not to have regard to economic advantage, in some situations.

The previous AG gave an assurance that he would abide by the requirements of the anti-bribery Convention of the Organisation for Economic Co-operation and Development (the “OECD”). Very broadly, these requirements involve a commitment not to interfere with prosecutions of UK firms who may have been involved in bribery, simply because such prosecutions may damage the UK’s economic interests.

What concerns me, and will concern the OECD, is that whilst the grounds for intervening in a prosecution under clause 12 are purely “national security” based (which is fine), the grounds for withholding information under clauses 14 and 16 about a decision taken under clause 12 are not solely “national security” based. I criticised this above.

What is your opinion of the Government’s proposal to transfer or abolish most of the requirements for the Attorney General’s consent to prosecutions? Can you elaborate on your argument that the Attorney General should retain her power to stop a prosecution by way of a nolle prosequi?

In the submission to the Attorney on reform that I drafted for the Criminal Justice Council, it was suggested the AG’s consent powers should be removed. It should always be open to the prosecution services to ask the AG for advice in individual cases (and there could be an annual report on advice given, in some shape or form).

A requirement that the AG consent to prosecution in cases as numerous as at present is too demanding and excessively bureaucratic. There is, for example, no real reason why the AG should have to consent to a bribery prosecution under statute, when a prosecution for bribery at common law has no such requirement. The position is currently arbitrary.

Further, a consent requirement is commonly justified by the presence of a public interest element in certain kinds of prosecution, over and above the normal public interest element in prosecutions. Yet, the viability of most prosecutions turns on evidentiary considerations, not public interests ones, but the current consent requirements do not draw that distinction. So, the AG must formally give consent even when the decision is really one for prosecutors “on the ground” who are familiar with the strengths and weaknesses of the evidence.

At the risk of repeating myself, I am uneasy with the role of the AG in relation to individual cases (putting aside national security cases). The Government is thus right to seek to distinguish the supervisory, and rule-of-law based, higher level role of the AG, in relation to the prosecution services, from decision-making in individual cases. The latter should be a matter for Directors.

It follows that I do not support the continued power to enter a nolle prosequi. As indicated above, the more active role of the judiciary in modern times (to stay proceedings for abuse of process), coupled with the development of a professional prosecution service bound by a code of conduct, is enough. Frankly, I regard it as wrong to think that there should be accountability to Parliament for the conduct of prosecutors in individual cases.

When the independents met the current AG, she was (understandably) keen to stress that Directors value her role as a provider of independent advice about individual cases. I should be sorry to think that removing formal consent powers would in any way inhibit Directors from seeking the AG’s advice in individual cases; but it should remain “advice” that they seek, not a formal consent. As the Criminal Justice Council has indicated, it will always be possible for there to be accountability to Parliament for the advice given in particular cases, through the provision of an annual report on cases where it has been sought.

On what grounds would you argue that the Attorney General should continue to have superintendence responsibilities over the prosecutorial directors? You state that you would have preferred the draft legislation to have included the protocol itself. What specific elements would you suggest that the protocol should include?

I could see the organisational logic of giving the superintendence role to the Ministry of Justice or to the Home Office, since they already have such a role in relation, respectively, to the prison service/court service and the police. One could distinguish management and operational issues from rule of law and public policy issues, and focus any protocol on the latter in a way that clause 3 does not currently do.
For example, it seems odd that the protocol is to cover media relations and complaints (3(2)(h) and (i), which would appear to be matters better handled by a broad Ministry of Justice or Home Office policy for all criminal justice bodies.

However, so long as the prosecution services and the AG are content that the current arrangements work well, I see no pressing reason for change.

In other respects the Protocol is satisfactory, although 3(2(c) needs careful handling. Is it or is it not meant to be a way that the prosecution services can consult the AG about individual cases, even though the AG’s consent powers have gone? I would not object to a “yes” answer, personally, but this could be clearer.

Are the provisions in clauses 4–6 of the Draft Bill, setting out the tenure of office of the Prosecutorial Directors, appropriate? You state that “these clauses actually say very little about the role of the three Directors”. Is there anything else you would wish these clauses to include?

I have no comment on this, save to puzzle over the specific inclusion of 4(8)(a). Why should a Director’s failure to have regard to the Protocol merit special mention, so far as being removed from office is concerned, given that, in 4(8)(b) it is in any event made clear that the Director can be removed for failure to perform efficiently and effectively? The AG him or herself drafts the protocol (3(1)), in consultation with the Directors. Surely that is enough?

June 2008
Background to the Prosecution Consent Functions of the Attorney General

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

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

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

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

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

Proposals for Reform

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

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

2 See in particular paragraph 5.27 of Consents to Prosecution LC255.
The Annex to this note identifies which prosecution consent functions of the Attorney are to be abolished (Category 1), retained by the Attorney General (Category 2), transferred to the Director of Public Prosecutions or other Director (Category 3, sub-divided into 3 sub-categories).

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

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

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

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

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

In addition, while the Attorney General’s Office have conducted a full search of existing legislation, it is possible that a further prosecution consent function might be identified in the future. Taking a power would enable an amendment to be made to such a provision.

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

Attorney General’s Office
15 May 2008

Annex

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

CATEGORY 1: ABOLITION

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

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

Agriculture and Horticulture Act 1964 section 20 (any offence under the Act—relates to the grading and transport of fresh horticultural produce)
Marine Insurance (Gambling Policies) Act 1909 section 1 (prohibition of gambling on loss by maritime perils)
Water Industry Act 1991 section 211 (offences in relation to sewerage offences derived from other Acts)

Category 2: Retention by the Attorney

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

These have been grouped along the following lines:

(i) Offences which are especially likely to raise issues relating to national security.
(ii) Offences which are especially likely to raise issues relating to international relations.
(iii) Offences which are particularly likely to raise other issues relating to the public interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Serious Crime Act 2007 section 53 (prosecutions where conduct likely to take place outside England and Wales).
Suppression of Terrorism Act 1978 section 4(4) (ofences which but for but for s4 would not be an offence. Section 4 extends the UK courts' jurisdiction in respect of offences committed outside United Kingdom. The offences include murder, kidnapping, false imprisonment, nuclear offences and firearm offences.)

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

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

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

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

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

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

No additional offences identified.

Category 3A: Transfer to DPP (or Other Prosecutor) with Safeguards

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

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

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

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

Criminal Justice Act 1988 section 135 (torture).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prevention of Oil Pollution Act 1971 section 19 (offences under the Act unless proceedings brought by harbour authority or, in certain cases, the consent of the Secretary of State or a person authorised by him has consented. Offences relate to the discharge of oil into the waters of a harbour in the United Kingdom and failure to comply with a requirement of a harbour master, or in respect of obstruction of a harbour master).
Public Health (Control of Disease) Act 1984 section 64 (consent required for offences under the Act or byelaws made under the Act unless prosecution brought by the party aggrieved, the local authority/body who has the duty of enforcing the provision or the person who made the byelaw. A constable may also take proceedings in certain cases).

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

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

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

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

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

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

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

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


**Category 3C: Transfer to Director of Service Prosecutions**

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

**Supplementary memorandum by the Attorney General’s Office (Ev 72a)**

ANNUAL REPORT TO PARLIAMENT BY THE ATTORNEY GENERAL

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

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

- Information in relation to criminal cases: Where the Attorney exercises a function in relation to a particular criminal case, it may not be appropriate for the annual report to include information about the particular case. It will be particularly important that the annual report does not include information which would prejudice the investigation of a suspected offence or proceedings before a court.

- Information which is legally privileged: The annual report will not generally include information about legal advice that the Law Officers have provided or other material for which a claim to legal privilege could be maintained.

- Information with implications for national security or international relations: Information the disclosure of which would prejudice national security or would seriously prejudice international relations will also generally not be included in the annual report.

- Personal data: It will generally be inappropriate to include personal data in the annual report.

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

The Law Officers have various roles:

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

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

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

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

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

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

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

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

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

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

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

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

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

— management of panels of Counsel (including Treasury Counsel) to represent the Crown in civil and criminal proceedings, including action taken to promote diversity of the panels;
— litigation in which the Attorney has intervened/participated on a public interest basis;
— litigation in which the Attorney has, at the request of the court, appointed an advocate to the court;
— role of the Attorney General in appointing special advocates;
— litigation in which the Attorney General or Solicitor General has appeared in person;
— litigation brought by the Attorney at the relation of a person who would not otherwise have standing (relator actions); and
— intervention in legal proceedings to assert the rights of Parliament.

Exercise of functions in relation to oversight of the Treasury Solicitor’s Department and the Government Legal Service.
Including a summary of the key trends in work undertaken by the GLS during the year; details of staffing and skills; diversity.

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

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

**CRIMINAL JUSTICE MINISTER**

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

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

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

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

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

— exercise of functions in relation to the Public Prosecution Service;
— exercise of functions in relation criminal prosecutions;
— exercise of other functions in the public interest; and
— exercise of functions in relation to litigation.

**Attorney General’s Office**

15 May 2008

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**Examination of Witnesses**

**Witnesses:** Baroness Scotland of Asthal, a Member of the House of Lords, Attorney General, Sir Ken Macdonald QC, Director of Public Prosecutions, Mr Richard Alderman, Director, Serious Fraud Office, and Mr David Green QC, Director, Revenue and Customs Prosecutions Office, gave evidence.

Q622 **Chairman:** Good afternoon, Attorney, good afternoon, gentlemen, and thank you for joining us to answer questions on the role of the Attorney General in relation to the proposed changes in the Government’s draft Bill. Before we start can I remind everyone that members have declared interests relevant to this inquiry and they are available today and on the Committee’s web page. Are there any other declarations of interest that have not been previously declared? If not, perhaps we can start. Can I say that the first four questions are really for you, Attorney, and whilst if there is a particular point we are happy to hear from the others, it may be helpful if we generally try and contain the answers to you and then later on there will be lots of questions for your colleagues. The first question is a very obvious one. The purpose of the Government’s White Paper was to enhance public confidence in the office of the Attorney General by the changes proposed. To what extent do you think that is achieved by the draft Bill? Baroness Scotland of Asthal: I think it is achieved by virtue of the fact that it now gives us a bit of clarity. One of the issues that I was very surprised and concerned about is how little anyone understood of the role of the Attorney General, what the powers were, what the restrictions were: how in fact we did business. One of the most important contributions that this consultation has therefore made is bringing that transparency and clarity and debate and discussion. I think it is something that we need to be very grateful for that there is this deliberation on the role and how it works. I think what we wanted to do is to underline and reinforce the independence of prosecutors and the way in which prosecutorial decisions are taken. We also wanted to ensure that there was proper accountability to Parliament and to
the public, and providing that greater transparency and clarity is of critical importance, and I think we have done that.

Q623 Chairman: You have had the opportunity, I imagine, to see the Justice Committee report that was published earlier today?
Baroness Scotland of Asthal: Yes I have.

Q624 Chairman: They do not seem to think that you have. Do you have any immediate response to that?
Baroness Scotland of Asthal: Obviously I am going to take some time to consider the minutiae of the report, but I see very clearly that the majority of the debate is on the legal adviser role. You will have seen from the consultation that we had that we had about 50 responses and the one part of the Attorney’s role that seemed to be given a lot of support was actually the role of legal adviser. We had a very open consultation, we had no prejudged view as to what the outcome would be, but what we were very clear about is that we wanted any change to be an improvement and an enhancement as opposed to change for change’s sake, and therefore we had to listen really carefully to what everyone had to say. That is parliamentarians, lawyers, members of the public, all those who could assist us in coming to a clear reformation of what the role of the Attorney should be. We thought consultation was important and the consultees were very clear, and you will have seen the evidence submitted, that they did not see major advantage in changing the legal adviser role, and so we have very much gone for that. I will of course scrutinise with great care the evidential basis upon which the Committee forms a different view and I would be very keen to see the basis of that assessment and whether it differs from the very cogent and well-argued evidence that was produced during our consultation.

Q625 Lord Tyler: I think it is perhaps slightly unreasonable in that we all assumed that this had been your breakfast and morning reading and it was much marked up because, of course, you gave evidence to the Committee and indeed to the previous Committee. They seemed to give more special concern to the issues of public confidence. You emphasised clarity and accountability but their conclusion was that “the draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister; it gives greater power to the Executive; and it does not sufficiently increase transparency”. I wonder if you would give us an initial response to that.
Baroness Scotland of Asthal: I am afraid I do not agree with that assessment and therefore I come back to the evidential basis. I hear of course the assertion in relation to public confidence but I am afraid if you look at the evidence behind that assertion there does not appear to be a great deal. What we were looking for when we undertook our consultation is whether there was in fact evidence to show that the role lacked public confidence and lacked the sort of resonance that we wanted to see. There was no evidence produced that, firstly, any Attorney in recent times had given advice that was politically or otherwise tarnished. There was no evidence that public confidence in the role itself was markedly diminished. Therefore I say we do look for the evidential premise upon which these recommendations were made. We asked some very clear questions in terms of the force that publication of advice would have in relation to the Government and we just did not see that this would add value. Transparency is possible in the way in which we have tried to suggest an annual report for the Attorney. You know that the Attorney at the moment is not subject to scrutiny by a separate committee. It is not a matter for me and I am not suggesting that we could dictate what Parliament wished to do in terms of scrutinising the role, and every Attorney in recent history has always attended any Parliamentary committee that they have been invited to, but is it appropriate for the Attorney to give a better account of what the Attorney’s role is? I think it is and that is why we are suggesting an annual report and that is why we are throwing open the suggestion that the Attorney could come under a specific committee which would be able to ask pertinent questions. I hear what is said. I regret to tell you that I was in New York at the UN and only came back yesterday morning and was then in meetings throughout the whole day and have had limited time to enjoy the full fruit of the Justice Committee’s report, but I am sure I will be able to digest it in great detail in due course. I know that others have had a little more opportunity than I.

Q626 Lord Tyler: So, in short, you think Members of Parliament on this Committee, with Government majority may have misread the issue of public confidence in your office?
Baroness Scotland of Asthal: I understand absolutely why questions of confidence in the office arose; I think we all do. It is against the backdrop of advice that was given in relation to Iraq, questions in relation to BAE and indeed we have to remember the cash for honours issue. What I do say is that whoever makes those decisions they are going to be controversial. I do not want to be pejorative but you could name any individual you like and say they will then become the final arbiter and that decision will still have with it a great deal of controversy. For example, if you were to separate the legal advice role out and say another individual will be given the task...
of providing that advice, one can imagine similar aspersions on confidence being made. For example, I have heard people say of any lawyer employed by us, “Well, they would say that, wouldn’t they, because the Government is paying the piper and he who pays the piper calls the tune.” That is fundamentally to misunderstand the nature of legal advice. If you have a lawyer who tells you what you want you want to hear, you have a fool for a lawyer. A lawyer’s job is to give a client the objective evidence and advice they need, not the advice they want to hear. One has to remember that every piece of advice that is given can end up being tested in court because if you give advice to the Government and the Government goes to court and puts those arguments before a court, then it will be tested, and you will soon find out whether you have a fool for a lawyer or not.

Q627 Baroness Gibson of Market Rasen: I think the Attorney General has answered the question about her views on being chief legal adviser, but could I just clarify totally the position that legal and political functions should be separated. You are basically saying to us that you do not think that that is necessary?

Baroness Scotland of Asthal: I think one has to really understand what the role of the Attorney is (because of course I have three separate functions) but the function in relation to giving legal advice to Government, to Parliament and to Her Majesty is similar to any other legal adviser. You have to be able to give cogent advice to your client and sometimes in a really robust way. One of the questions that was asked during our consultation is that if you have a Secretary of State who has to be given some trenchant and robust advice which they should take because that would enure to their advantage, is it easier to hear that advice from a person of similar rank, particularly if it is going to bind you, or is it easier to accept that advice from an official who does not share the same rank and who may not therefore be seen in quite the same way? I think lawyers’ experience is quite often you have to give your client advice and information that they find painful and difficult to accept but they need to hear because the law is the law is the law. I think that the role therefore of an Attorney is very important because it is not just the individual advice on the individual occasion. The Attorney General sits at the apex of all the legal advice which is given by the Government Legal Service to all departments and from time to time Government Legal Service officers—civil servants—have to give their departments robust advice. It is, I have been made to understand, of great comfort to those lawyers if they can say to the department, “Well, if you do not like my advice, you could of course always ask the Attorney.” I am told that has a very salutary effect! That must not be underestimated because it is not just the controversial things; the Attorney is there as the guardian of the rule of law throughout what government does on a day-to-day basis, not just the sexy stuff that hits the headlines and is really important but the things that people think are mundane, the things that people never hear about. The Attorney is there to support and enable the Government Legal Service to know that they can challenge where appropriate on the law and that they have a specific government minister who is of Cabinet rank who will be there to support their independent assessment of the law if they need it. The Government Legal Service has two tracks: one of course is they have an accountability to the Secretary of State for the department in which they work; but they also have a separate accountability as lawyers to the Attorney, and upholding the rule of law on a day-to-day basis is something of real importance the Government Legal Service has to do. Whatever Government of whatever political complexion needs to have right at its heart the rule of law embedded in everything it does on a day-to-day basis. The question is if you uproot and pull out the Attorney General and replace that with someone else, will it have the same force, the same resonance, the same efficacy, the same potency as it has now. We were very clear in this analytical assessment that we were determined to improve and enhance accountability and to improve and enhance the ability to support the rule of law and not diminish it. Any change or reform had to satisfy that test. Does it improve accountability? Does it improve the support of the rule of law? Does it make it more fundamentally rooted in what we do? If it does, we will do it, but if it does not, then we cannot and we will not. I need to be really clear with the Committee that my own commitment was to burnish not tarnish the rule of law. We really have to be strong on that. Reform has to be for improvement’s sake, not for reform’s sake, and if we are not going to make it better then at least we should not make it worse.

Q628 Lord Hart of Chilton: These two questions are about the disclosure of the Attorney General’s legal advice. The first is a general one. How can public confidence in the legal advice that the Attorney gives be retained if, as the Government proposes, such legal advice should not in general be disclosed? The second question is an aspect of that on advice of the legality of going to war on which there has been much controversy recently, and it is this: what do you make of Lord Falconer’s assessment that it is inconceivable that the Attorney’s advice in relation to the use of force could remain confidential in the current view of the world?
Baroness Scotland of Asthal: I think I need to say straight away that I do not share Lord Falconer’s view. I think we have explained that there may well be serious difficulties about disclosing the Attorney General’s advice. For example, it may include reference to sensitive intelligence, military or diplomatic material and, like any proper legal advice, it will include an analysis of the competing arguments and risks. Any proper legal advice will do that and in the end it comes down to a balance whether you advise your client to do A, B or C. Sometimes of course in any good legal advice you will spend quite a long time disaggregating the arguments that might be put in your favour or against you and giving your client what one would hope to be cogent advice as to where the balance lies. I think more generally there is a serious risk that publication of legal advice will mean that the advice will be less full than it would have been, that the lawyers and clients will have been less frank with each other and that, as a result, the quality of that legal advice may be undermined. If people are going to make an informed choice I have certainly found in my experience that you need sometimes to be brutally frank with your client. Sometimes there are no good choices, just the least bad one. You have got to enable your client to understand the reality of the position that they stand in. I am also very conscious of the fact that there seems almost to be an unwillingness to treat the Government, Parliament or Her Majesty, as a normal client. A normal client has to be given the privilege of that frankness and I am worried that if one were to change the basis upon which that advice is given it would end up being less frank. Frankly, if a Government has to make a decision as important as this they do need sometimes very brutally frank information and advice so they can make a truly informed choice. I would be very loath to see the day that the Government, Parliament or Her Majesty are suggested to deal with advice when it comes to the question of advice on the use of force. We do think that they are sensible measures. We absolutely understand that parliamentarians generally want to know the basis upon which opinions and advice is given, and therefore one will see the memorandum that quite often attaches to legislation which sets out the legal argument but does not necessarily give the fine detail of the advice itself. I think there is an appropriate honourable compromise that one can arrive at which enables people to know the basis upon which you have made the decision and does not trespass against the sort of client/adviser confidentiality that enables people to make the most of the advice they are given so they can really make the best decisions. We are, I hope, looking at putting in place reforms that hone the ability of a government to make a good decision as opposed to hamper them in such a way that it ends up assisting them to make bad decisions. I know that this Committee wants the former not the latter.

Chairman: I know both Lord Norton and Lord Morgan want to ask a quick question on that issue.

Q629 Lord Norton of Louth: It is just a very quick postscript, as I think you have been making clear in terms of the relationship between the Attorney and Government, the Government is the client?
Baroness Scotland of Asthal: Yes.

Q630 Lord Norton of Louth: Would you therefore accept as the client it is at the discretion of the Government as to whether the advice should be made public? Would you accept therefore that it is at the exclusive discretion of Government or do you think the Attorney in some circumstances should have the opportunity to prevent disclosure?
Baroness Scotland of Asthal: The first thing of course to say is that I do believe that the tradition that you do not say whether the Attorney has or has not advised should be maintained; I do say that. Secondly, of course it is always open to the client to waive professional privilege. I would just put a note of caution on that. One would hate to arrive at the position where the Government waived privilege when it was convenient and did not waive legal privilege when it was not. There are a number of occasions where—and I am going to talk historically now not necessarily in terms since I have been Attorney because that would be inappropriate—where the Government has taken the view that notwithstanding the fact that it would be incredibly helpful for the privilege to be waived that the Government should not waive the privilege because we would be left with this “pick and mix”. You cannot be a fair-weather friend and you cannot say, “Well, it suits me today to waive it but it does not suit me tomorrow,” because that undermines the whole premise upon which it is granted. However, there are occasions when all clients will say because of the specific importance and nature of this one special issue that it is appropriate to waive it, so, yes, clients can waive it but I would caution against a suggestion that it could be a pick and mix because I think the general rule should be that legal advice should not be disclosed and that the Government of the day—and I am thinking about any Government now—should be encouraged to follow that rule which will mean that in bad weather they will not disclose but in good weather they will not disclose either because that is
the only way that you preserve the confidentiality of legal advice.

Q631  Lord Norton of Louth: Should the Attorney be completely distanced from that particular decision, in other words it would be at their discretion?
Baroness Scotland of Asthal: I think it would be important for an Attorney to assist in that regard because of what I have just said. Sometimes the Government of the day may wish to do a pick and mix and you will find the Attorney saying, “Actually that is inappropriate because you may choose to disclose today but you may not wish to disclose tomorrow.” Sometimes there has to be a balance overall as to what will enure to the best of the system. That again brings you to the fact that the Attorney sits slightly outside of this because on so many of these decisions the Attorney will be the minister who will have to consider what is in the public interest, not necessarily just what is in the Government’s interest but overall what is in the public interest, and so I think it is quite a helpful thing for the Attorney to be involved in that regard.
Chairman: Perhaps we could call on Lord Campbell.

Q632  Lord Campbell of Alloway: I will be very brief because as I think you know, Attorney General, I happen to agree with everything you have said, but I just want to take one point towards the public perception of the role of the Attorney. Surely the Attorney General is answerable not to the public but to Parliament and that is the fundamental distinction between, say, myself as a lawyer and the Attorney? There is that fundamental distinction. If you tinker with that you are bound to get into the sort of trouble, surely, to which you have referred?
Baroness Scotland of Asthal: I hear very clearly the voices that say the role of the Attorney General has served us well. It has accrued to itself the various functions over time because those functions were necessary and pertinent. The role that the Attorney currently holds is so delicately balanced that really one should not tinker with it at all. I absolutely understand that view. And therefore we looked very carefully, and that is why I say it has been very important for us as we looked at every single reform to think very carefully as to what impact those changes will have. So, for example, we think it is extremely important that the Attorney continues to be a minister of Cabinet rank in order to carry out those functions at the highest possible level and to enhance the accountability before Parliament because, you are absolutely right, it is the ability of both Houses to hold the Attorney and the Solicitor of the day to account for the issues with which they have been entrusted. During all the troubled times, whether it was in relation to BAE or Iraq or all those issues, the Attorney and the Solicitor had to go to the House and were held very very forcefully to account both in the Commons and in the House of Lords. We have understood the value of that accountability and have not sought to diminish it inappropriately.

Q633  Lord Campbell of Alloway: Just one thing, I think you agree with me, but you did not say, so, I will ask the question: the Attorney is of Cabinet rank but he does not attend Cabinet other than on invitation; is that right?
Baroness Scotland of Asthal: That is correct.
Chairman: Fiona Mactaggart, would you like to follow that one up?

Q634  Fiona Mactaggart: There have been suggestions that the frequent and almost usual attendance of the Attorney at Cabinet has in some way created an assessment that this is now a political role and confidence by the public has been diminished by it. Do you think that is the case? What is your attitude to attendance at Cabinet?
Baroness Scotland of Asthal: Firstly, I do not think that is the case. Attendance at Cabinet is very much a matter for the Prime Minister. A Prime Minister will invite an Attorney to attend if he or she believes that that attendance is merited. The Prime Minister of the day has indicated that he wants me as Attorney to attend Cabinet and I do attend whenever I am able to do so, but it would be true to say that I am not always able to attend, for example if I am, as I was just recently, out of the country or doing matters of government business elsewhere. I cannot always attend but of course I will attend on each and every occasion that I am specifically asked to attend by the Prime Minister. I do think we need to be very wary of this assertion or slur that if you are part of a political machinery you are somehow besmirched and incapable of giving independent and individual legal advice. I do not think that that is true. I also think that a number of Prime Ministers have taken the view that it is best to get your legal advice early. It is not always possible to know exactly what will come up at Cabinet at any given time and therefore for an Attorney to be able to listen to and inwardly digest some of those issues early and sometimes give just the gentlest indication that a certain course of action may not be totally the best way of dealing with it early can be extremely helpful. I would be very unhappy about suggesting that a Prime Minister of the day could not make their own decision as to who to invite around the Cabinet table. Some Prime Ministers take one view; another Prime Minister may take another, and I think it is a prime ministerial preference and I am content certainly for it to continue on that basis.
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Q635 Fiona Mactaggart: In your consultations about public confidence in the independence of the role was this featured as one of the things which influenced people’s sense of confidence or not?
Baroness Scotland of Asthal: I think it featured to the extent that people looked at what historically has happened. There has been an ebb and flow in practice. Sometimes Attorneys in the past have only attended when called upon and they would wait outside and come in and deal with legal aspects, sometimes they would not, but I think there were comments made about the perception issue that if the Attorney attended Cabinet on each and every occasion whether there was a perception. I think also there is a need to understand the change that has taken place in part of the Attorney’s function in terms of policy development. Prosecutors now play a very different role to that which they did five or ten years ago. For instance, the Crown Prosecution Service is now very much the gatekeeper to the criminal justice system in that prosecutors now are responsible for charging. Prosecutors are also intimately involved in the development and creation of operational criminal justice policy and since 2003, through the National Criminal Justice Board, the Attorney has been part of the tripartite relationship which delivers criminal justice policy. When I was Minister of State at the Home Office I very much valued the contribution that Peter Goldsmith made as Attorney and therefore as spokesman on behalf of the prosecutors to the development of prosecutorial and criminal justice policy. So in many ways in the last few years the Attorney has become an equal partner in that tripartite relationship to develop criminal justice policy. As one of the people responsible for that delivery it has become increasingly important for the Attorney also to play that role and to be the spokesman for the development of that prosecutorial policy within the criminal justice framework.

Chairman: Thank you for those answers. We are now going to move to the second part of our session. Your colleagues will get a speaking part now! I am going to ask Lord Williamson to ask the first question.

Q636 Lord Williamson of Horton: This is a question about the Attorney’s role in the formulation of criminal justice policy. First of all, do you think that the Attorney General’s involvement in the formulation of this policy has made the office too politicised? Some people think that. Do the Directors think that the Attorney’s criminal justice policy function gives the Directors a better voice in the formulation of government policy?
Sir Ken Macdonald: It is certainly true, as Baroness Scotland said, that the role of prosecutors in our system has developed very considerably in recent years and that has been a deliberate result of policy decisions. We felt that prosecutors had too limited a role and they should be more influential, they should become the gatekeepers into criminal justice through taking over control for charging decisions from the police, they should have much more engagement with local communities, they should be much more public and visible and they should have a voice. We have deliberately driven a process in which prosecutors have some influence on the development of criminal justice policy. That has been a conscious decision. It is absolutely critical from our point of view that in those circumstances we have a minister who is able to fulfil that role for us. I will give you one example of this. Most proposed criminal justice legislation comes to us now for us to look at and comment upon because we have a pretty good idea from our perspective what will work and what will not. Being able to bring influence to bear on other government departments, to have proposed legislation adapted or changed or not proceeded with is another matter. It is very important for us to have, through the Attorney, a seat at the top table when criminal justice discussions are taking place. I think the absence of prosecutors from those discussions in the past has led to a fundamental imbalance in the system which, not least, has led the public to conclude in the past that no one looks out for them in that process. That is part of what we see our job being. We find the Attorney’s presence in those discussions very reassuring from our point of view.

Q637 Chairman: Is that a view that would be shared by David Green or Richard Alderman?
Mr Green: I agree with all that Sir Ken has said. The Attorney Superintendence the prosecuting authorities. She understands the prosecution process, which is crucial, and she ensures that the interests of prosecutors are taken into account at the top table. Without it, of course, criminal justice policy would not be fully joined up unless the prosecutors were represented at that level.
Mr Alderman: I agree. I would like to give one example. Over the last couple of years there has been a fraud review dealing with how, as investigative and prosecuting agencies, we deal with fraud, what is the best way of being joined up and dealing with fraud issues as a whole. That was launched by the Attorney and Chief Secretary. It has produced some excellent results which are really pointing the way forward in how we deal with this. My view is that this is not something that the agencies like the Serious Fraud Office could have done by themselves. It is very much something where the Attorney and Chief Secretary were leading. As a result of that they have been able to give it the impetus and the involvement by
everybody that was needed in order to produce the success that we have.

**Q638 Emily Thornberry:** I want to ask you some questions about the Attorney’s role in prosecutions. Does the Government’s proposal to remove the powers to give directions in any individual case mark any real change from the longstanding practice?

**Sir Ken Macdonald:** I was always something of an agnostic in this debate about whether there was power to direct, although most people believed that there was. In the sense that it has never been exercised so far as anyone can discover there may not be a dramatic change of practice or any change at all, although stating a withdrawal from the bulk of casework obviously has an importance of its own. I must say that during the five years that I have been DPP no one has ever sought to direct me either to prosecute a case or not to prosecute a case and I have never come under any political pressure at all in relation to individual prosecutions. Sometimes there have been disagreements, but I have made the decision as best I could as an independent public prosecutor and then justified that decision later. I think the answer is that there will not be an enormous difference in my day-to-day life as a result of the Attorney General withdrawing from the bulk of prosecuting decision-making because in my experience, if there is such a power, it has not been exercised.

**Q639 Emily Thornberry:** The other question is about the other side of the coin, which is the new clauses 12, 13 and 15 which give the Attorney the power to stop a prosecution on the grounds of national security. Is that going to increase the Attorney’s powers?

**Sir Ken Macdonald:** It depends whether you think there is a power to direct. At the moment if you do not think there is I suppose the answer is yes. Most people say there is and, therefore, the answer is that by withdrawing from the bulk of casework the Attorney’s powers will reduce. May own view about this is that I really cannot imagine a situation realistically in which that direction would be given because it seems to me that in a clear case where national security is engaged it is inevitable that the Attorney General and the Director would agree about this.

**Baroness Scotland of Asthal:** I think it is really important to look at the relationship that Attorneys and Directors have had over time. One of the things that is quite interesting is that in the Glidewell Report Sir Ian Glidewell made clear, that in the event of there being a disagreement between an Attorney and a Director the Attorney’s view would prevail. That is the understanding between Directors and Attorneys that has gone on for a number of years. The power of direction is a bit like the nuclear missile; you never have to use it because you have got it there and the question is what will happen when you take it away. That is why a number of people have been very anxious about what will happen if the Attorney does not have the power to direct, as we believe the Attorney currently has, in all cases. Will diminishing the power to direct and restricting it simply to issues in relation to national security so diminish the Attorney’s power that it makes the Attorney impotent to supervise and superintend in any meaningful way? That is a concern that I know that at least three previous Attorneys, who may have given evidence before this Committee, will have had. That is why we think that the protocol setting out with clarity the relationship between an Attorney General and a Director will be of importance, because then it will not be dependent on the nature and the character of the officeholder, which may change the balance from time to time. It will be encapsulated in a document which will be open and available and which will clearly set out what the nature of that relationship will be. I do think that what we are proposing—and I have to accept this because I know how uncomfortable it has made a number of people—is a diminution in the power of the Attorney General and it is quite a significant one. However, we hope that with the protocol we will enunciate with clarity the nature of the relationship between an Attorney and the Directors which will be transparent, fair and efficacious. I would not suggest for one moment that on one side you will not be told that the world has come to an end because we are suggesting that we remove the direction and on the other side that we are not going far enough. I think it is a balanced response.

**Q640 Sir George Young:** That brings us neatly onto this protocol which defines the relationship between the Attorney and the prosecuting authorities. We have seen the letter which you wrote to the Chairman of the Constitutional Affairs Committee which set out some of the detail, but I see the Constitutional Affairs Committee regretted that the protocol was not ready and they say, “The protocol should be published well before the Bill is introduced in the autumn”. Will that be the case?

**Baroness Scotland of Asthal:** I really cannot give you a definitive answer. One of the things that we were absolutely clear about was that this is a document which would not simply be crafted by me and imposed upon the Directors. We wanted it to be a living document, a document which the Directors together with our office would be able to craft in a way that accurately and fairly set out the nature of the relationship and how it would work. I cannot guarantee to you when it will be ready. What I will
say is that this document will have to be a living document. It is not necessarily going to be one which will be permanently set in stone because it may have to change and adapt. Let me just give you one example. We are going to try to rationalise the consent function. You will know that the Attorney currently has more than 100 consents. Some of those consents are clearly no longer relevant and they are outdated. Some can easily be transferred to Directors and that is clear. But some, particularly those which have very recently been given to the Attorney by Parliament, will have to be looked through. That sort of detail is going to take a little time.

Q641 Sir George Young: Could I invite your colleagues to take up the invitation which you extended to them a few minutes ago, which is to contribute to this living document rather than have it imposed on them, and ask them what they would like to see enshrined in this document and whether they would like to see it put on a statutory basis?

Sir Ken Macdonald: The document has to find a balance between reassuring the public that prosecutors make decisions free from political pressure and from an independent position at the same time as maintaining a level of appropriate accountability to Parliament. This is the document that for the first time will define what superintendence means, so it is a critical document. As Baroness Scotland has said, it has to be capable of application whoever happens to sit in the current post-holders but one which will not be permanently set in stone because it may have to change and adapt. Let me just give you one example. We are going to try to rationalise the consent function. You will know that the Attorney currently has more than 100 consents. Some of those consents are clearly no longer relevant and they are outdated. Some can easily be transferred to Directors and that is clear. But some, particularly those which have very recently been given to the Attorney by Parliament, will have to be looked through. That sort of detail is going to take a little time.

Q642 Mr Richard Alderman: This is something that very much involves all of us. We are involved in the drafting and the discussion about that. It is something that we have reached as a result of a process of discussion and consensus. What I am looking for is clarity and transparency, details of the different roles and what can be expected from different parties to the protocol. Baroness Scotland of Asthal: I can assure the Committee that the Directors and I will be working very hard on this and it will be a partnership piece of work.

Q643 Lord Campbell of Alloway: It is a fascinating situation to hear how this is developing. Some of you will remember that the Trooper Williams case was only disposed of in this House on the basis of an undertaking given by the Attorney General. I do not know how that undertaking affects the prosecuting service. The undertaking was that he would not exercise his right of retrial without giving a full opportunity of representation by the accused. It was in connection with military affairs but it was a supervisory jurisdiction. I wonder if this could be taken into account sometime.

Sir Ken Macdonald: I do need to respond to that, with respect. Lord Campbell, because I think we are talking about the same case. The Trooper Williams case was stopped when the prosecutors decided not to proceed with it and we went to court on that basis.

Q644 Lord Campbell of Alloway: That is not the point, Sir. It started with the Attorney’s consent. The whole point you have missed, sir, is how it started and whether the undertaking given by the Attorney will affect the prosecution, not how it stops but how it starts.

Sir Ken Macdonald: I am sorry to respond again. Trooper Williams was charged with murder and the Attorney General’s consent was not required for that prosecution.

Q645 Lord Campbell of Alloway: It was sought and granted.

Baroness Scotland of Asthal: I think what I can certainly do is undertake to provide an answer to Lord Campbell. I understand the import of this question which is to the effect of “will the Attorney still be able to give undertakings in relation to prosecutorial decisions to Parliament in a way that hitherto the Attorney has been able to”. In the past, either the Attorney had the power to direct or had the power in a given case to consent (and that is certainly an issue which we will turn our minds to). In relation to consents where the Attorney retains the role and power to consent, that will clearly continue to be the case. Where the consent function is given to a Director, we will need to think as to how any assurance that Parliament may need can be given because I should imagine that the conduit through which such assurances will be given to Parliament would still end up being the Attorney or the Solicitor General. In regard to a number of the delicate cases, it is right that the role of the Attorney will still be provided for. In the body of the protocol what we hope to provide for is appropriate avenues for consultation and information between the Attorney General of the day and the Director of the day. We are not seeking to draft a document which will be specific to the current post-holders but one which will be capable of application whoever happens to sit in our respective chairs. I will certainly take on board the import of Lord Campbell’s question and make...
sure that there is some conduit through which assurances can be given to the different Houses, the Solicitor currently in the other place and to the House of Lords through me as Attorney General.

**Q646 Lord Norton of Louth:** I want to come back to something you touched on at the beginning which is clearly very important in the context of the Government’s White Paper and that is the whole issue of parliamentary accountability. In the draft Bill there is the proposal of the annual report. The Bar Council in its evidence to us very much welcomes that. The Justice Committee queries whether it would add much to the existing arrangements. Just on the annual report itself, there is provision for it, but there is also provision in the Bill for certain information to be excluded. It is really about the justification for that. More generally, from your perspective, you are on the receiving end of parliamentary scrutiny, is there anything else over and above that that you think would actually enhance scrutiny? You have alluded to the possibility of a committee. The Justice Committee says it is the committee already. Is there anything over and above an annual report that you think would make the Attorney more accountable to Parliament?

**Baroness Scotland of Asthal:** I think the attendance before a committee does. I really want to say to the Committee how important I think the annual report is and that we should not underestimate it. The thing that quite perplexed me was that there was no one place where what the Attorney did and how the Attorney did it was collated. It is not to be wondered at that nobody understood what the Attorney did because there was not anywhere where that could really collectively be discovered. I think there is also a certain synergy between what the different Directors do that are superintended and supervised by the Attorney. There is some added value in one document saying what is the prosecutorial offer that is made for and on behalf of the people of our country. There is a huge interest in the unduly lenient sentences, the work that the Attorney does in relation to charities, intervening, et cetera. Lots of people do not understand what the guardian of the public interest role is. Let me just say very honestly to this Committee that before I became Attorney in what I now see as my arrogance I believed that I really and truly did understand what the Attorney did. After all, I have been a Minister since 1999, I have had the privilege of being number two in the Lord Chancellor’s Department for two years, I spent four years in the Home Office and I have worked with the Attorney General. If anyone should know what an Attorney General does it should have been me. I tell this Committee absolutely honestly that I did not understand the depth and the complexity and the importance of some of the key roles discharged by the Attorney. What has really struck me is the importance of the Attorney as the apex of the Government Legal Service and also the importance of the Attorney for the informal non-statutory supervision of other prosecutors across Government, for instance, the MoD, BERR, DWP, the role that the Attorney has in relation to the panels, making sure that gender and equality issues are fairly represented. Of course I knew that the Attorney was the head of the Bar, but I did not know how that interlinked with some of the work we are doing internationally in pro bono. So there is a depth and an importance to the different aspects of the Attorney’s role that I had not actually fully appreciated. There is a synergy between the three roles. When I first started to look at this I thought that there might have been a better way of constructing the role so that you could have added value. But I came away with a very clear understanding every time I tried to pull something away as to what happened when I did that. That is why we have come to the conclusion we did in the White Paper, not because we lacked courage and boldness because we did want to be bold, but we did not want to be foolhardy.

**Q647 Lord Norton of Louth:** From what you are saying, it seems you envisage quite a substantial document, perhaps a similar one to the Lord Chief Justice’s Annual Report which is a very thorough and helpful document, something of that nature.

**Baroness Scotland of Asthal:** I do want to have a full report. I would also like to make it clear what the Attorney does for members of the public. I would like to answer the question of why the Attorney is important to the ordinary man and woman on the street. What do we do for them? Why is what we do important to the ordinary person? I do not criticise those who say they do not have a clue what the Attorney does and what the Solicitor does and why they are important. The Solicitor told me that she was asked how much conveyancing she did! We have really got to make sure that people better understand what this job is for and why we think it has an opportunity to add value. I would like us to add greater value in terms of being the voice of the guardians, of the rule of law and the public interest and I think that is a very important part of my role as Attorney.

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Q648 Lord Plant of Highfield: I would like to pick up the last point that you made and take you back to the rule of law which you emphasised very much in a welcome way in the early part of your evidence. One would hope that ministers of the Crown always act within the rule of law, but the fact is there are two members of Cabinet rank, one officially a Cabinet minister, the Lord Chancellor and the Attorney General, who have a special responsibility for the rule of law. The Lord Chancellor’s position in respect of that has a statutory basis and yours as Attorney is based on an oath rather than on statute. There has been a proposal to turn it into a statutory duty. The Government seems to have rejected that view. I just wonder what the rationale is for not putting the Attorney’s duty in respect of the rule of law into statute and whether you see any possible stresses and strains between two ministers of equal rank who have a similar duty, whether statutory or non-statutory. What the rule of law requires is not necessarily all that obvious in every case and there could be an honest disagreement about what the requirement is. In those circumstances whose authority is the highest?

Baroness Scotland of Asthal: There have always been two ministers of Cabinet rank in relation to the rule of law issues, so to that extent it has not changed. I think we need to be very clear, the Lord Chancellor has never been the law officer. The law officers in Government are the Solicitor General and the Attorney General, and when it comes to determination of what the law is then that is the Attorney’s role. If we look at the ministerial code, it provides that where any department is troubled by an issue of law then the Attorney has to be (a) told about it and (b) given good time to express a view. The role of determining an issue of law remains the Attorney’s. Of course, the Lord Chancellor has made a specific oath to uphold the judicial independence because of the change that was made to the role of the Lord Chancellor. That is why the very specific statutory oath was made, to preserve the importance of that part of the Secretary of State’s job. We now have the possibility that the Lord Chancellor and Secretary of State for Justice need not necessarily be a lawyer, whereas the law officers remain a post where a senior lawyer has to

Q649 Lord Plant of Highfield: There is a commitment to reform it.

Baroness Scotland of Asthal: Yes, and we provide it. We are going to make it clear what the oath is and it will be changed so that it is more up-to-date and a bit more pertinent. If anyone wants to read my oath, it is a thing of beauty to behold!

Q650 Chairman: We will do that. Thank you very much for the evidence. We do have several other questions we wanted to ask you but time has defeated us. For example, your predecessors told us that *nolle prosequi* is a valuable ultimate power that you would be wise to get rid of. We would very much welcome some comment on that. We would also particularly like some comment on clauses 4 to 6 of the draft Bill that sets out the tenure of office of the Prosecutorial Directors and how their independence is affected by that. I wonder whether we could write you a note and have that in writing?

Baroness Scotland of Asthal: I am very happy to do that. I am very sorry that I have not been able to have the opportunity to answer all those today.

Chairman: Thank you very much.

Further supplementary memorandum by the Attorney General (Ev 74)

This note gives the Committee an indication of how we propose to take forward the preparation of the protocol with the prosecution services envisaged in clause 3 of the draft Bill.

Clause 3 provides that the Attorney General must, in consultation with the Directors (ie the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office), prepare a protocol stating how the Attorney General and the Directors are to exercise
their functions in relation to each other. The protocol will be published and laid before Parliament (clause 3(3)).

The protocol is intended as an important component in the package of proposed reforms to the Attorney General’s role. It will set out, in an authoritative public document and in more detail than hitherto, how the statutory relationship of “superintendence” between the Attorney General and the prosecuting authorities is to operate. It will provide greater clarity, both as between the Attorney General and the Directors themselves, and for Parliament and the public at large, about the respective roles and responsibilities of the Attorney General and the Directors. The protocol will need to be sufficiently specific in its terms to meet this aim of achieving greater clarity, whilst being sufficiently flexible to meet the varying activities and workloads of the prosecuting authorities over time and so as not to require constant amendment (although the protocol may of course be revised and clause 3(4) of the draft Bill requires the Attorney General to keep it under review from time to time).

Officials from my Office and the three prosecuting departments are currently in discussion about the proposed protocol and what it should say. It is therefore too soon to provide an indication of detailed drafting. However clause 3(3) of the draft Bill sets out the sorts of provisions which the protocol may cover. Over and above that, we envisage that the protocol will include provisions about:

— The setting of the strategic direction for the prosecuting authorities; the setting of their objectives and the drawing up of their business plans.

— The ways in which the prosecuting authorities report to the Attorney General on their activities.

— The circumstances and ways in which the prosecuting authorities are to consult the Attorney General or provide her/him with information.

— The role of the Attorney General and the prosecuting authorities in relation to prosecution casework, including the handling of those cases in which the Attorney’s statutory consent is required for a prosecution; and the handling of any case involving a direction by the Attorney General on national security grounds (clause 12 of the draft Bill).

— The roles of the Attorney General and the prosecuting authorities in contributing to criminal justice policy to ensure (among other things) it properly reflects the impact on prosecutorial operational practice.

— The Attorney General’s accountability to Parliament for the work of the prosecuting authorities, and how the Directors support the Attorney in that role.

A worked-up draft of the protocol will be available to support debate when the Bill comes before Parliament.

I hope the Committee finds this helpful.

I am writing in similar terms to the Rt Hon Alan Beith MP, Chairman of the Justice Committee.

Baroness Scotland QC

1 June 2008

Further supplementary memorandum by the Attorney General (Ev 76)

I was very grateful for the opportunity to give evidence to the Joint Committee on 24 June, along with the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions. I found it a very useful session and I hope that you and the Committee did too.

We were unable to get through all the questions the Committee wished to put to us and we agreed to provide further material in writing. I also agreed to respond in more detail to the issues raised by Lord Campbell of Alloway. I have discussed this response with the three Directors.

Are you content with the provisions in clauses 4–6 of the draft Bill setting out the tenure of office of the Prosecutorial Directors? Is there anything else you would wish these clauses to include?

The Committee will appreciate that much of the material in these clauses is not new. In particular, under current legislation, the Attorney already appoints the three Directors and sets the terms of their appointment. These posts are already civil service appointments.

What is new here is the provision that the Attorney must appoint a Director for a term of five years and that the Director may only be removed from office by the Attorney if the Attorney is satisfied that he/she is unable, unfit or unwilling to carry out the functions of the office. This is a significant enhancement to the security of tenure for the Directors. Currently, the Directors are appointed for whatever term of office the Attorney considers appropriate (which has ranged from one year to five years) and are dismissible by the Attorney subject only to the limitations of contract law and public law.
I note that Professor Jeffrey Jowell has commented, in evidence to the Justice Committee, that these clauses appear to enhance the appearance and possibility of political control of the prosecutorial system. It is not clear what the basis of these comments is given, as I have noted above, these provisions represent a significant enhancement to the security of tenure of the Directors as compared to the status quo. I would note in particular that the grounds for removal from office (that the Director is unable, unfit or unwilling to carry out the functions of the office) sets a very high test for dismissal.

The Justice Committee queried the provision in the draft Bill which provides that, when determining whether a Director is unfit to carry out the functions of the office, the Attorney may take into account the failure by the Director to have regard to relevant provisions of the protocol (see clauses 4(8), 5(7) and 6(8)).

It is a mark of the importance we attach to the protocol that we think it is right to signal clearly that in determining whether the Director is unfit to carry on his/her functions, compliance with the protocol is a relevant factor. The protocol will, for the first time, set out what the superintendence relationship means and how the Attorney and the prosecuting authorities should exercise their respective functions. So it is right that compliance with the protocol is recognised as a key indicator as to the fitness of the Director. But the test remains one of unfitness—a high test.

Your question asks if there is anything else which these clauses should include. There is one area where some further work may be needed.

At present there is no limitation in the draft Bill on the Attorney’s power to reappoint a person as Director, albeit that any reappointment would have to be for a term of five years.

There may be a case for a limit on re-appointment. This would re-emphasise the appearance of independence for the prosecuting authorities. And there is a risk of a post-holder who has served a full five year term who is then re-appointed for another five years becoming “stale”.

There are a number of alternative approaches here which could be adopted. These include the possibility of providing that a Director can be re-appointed but only for a short period (eg a second term of two years). Another alternative would be to provide that a Director can be re-appointed, but only once.

This is an area where the Government is still thinking. Again, we would welcome the views of the Committee.

The three Directors have confirmed that, subject to the need for further consideration to be given to the possibility of reappointment, they are content with these provisions and consider them to be an enhancement to the current position.

In clause 7 and Schedule 1, the draft Bill states that the present requirements for the Attorney’s consent to an individual prosecution will be either a) transferred to the relevant Director or other authorised person b) transferred to the Director with a power of delegation c) abolished altogether d) retained by the Attorney.

What is your rationale for deciding which category each consent requirement should fall into?

The Government’s policy in this area is as follows.

— Where the requirement for consent is no longer needed, it should be abolished. (One possible example is the requirement to obtain consent for a prosecution under the Agricultural Credits Act 1928.)

— Where the offence is particularly likely to give rise to public interest/public policy considerations, the Attorney’s consent should continue to be needed. (Examples are prosecutions under the Official Secrets Acts or war crimes.)

— In all other cases, the function of consenting should be transferred to the prosecuting authorities.

In addition, there is particular sensitivity about consent functions which have recently been conferred on the Attorney General—if Parliament has recently and consciously decided that it is right that consent should be obtained from the Attorney, rather than the DPP or other Director, careful consideration is needed before we change that.

There are over 100 offences for which the consent of the Attorney is currently required. Determining which of the above categories each offence falls into is not straightforward. My office has sent you separately a summary of our thinking so far on how to categorise each consent function. But further work is needed on this...
aspect of the draft Bill. In particular, discussions with the prosecuting authorities are on-going. In addition, the Government looks forward to considering any comments which the Committee has on this aspect of the draft Bill.

*What is your view of the evidence of the former Attorneys that the power to enter a nolle prosequi is a valuable ultimate power and that you would be unwise to get rid of it? Can you perceive any practical difficulties arising if nolle prosequi is indeed abolished?*

The power to halt a trial on indictment by entering a plea of nolle prosequi is an ancient one. The scope of the power has not been authoritatively defined. But in recent years it has been used by Attorneys General on a sparing basis, usually where the defendant is so unwell that it is inappropriate to continue with the proceedings and there are no other means of bringing them to a halt.

In line with the Government’s proposals to end the power of the Attorney General to direct the prosecuting authorities in an individual case (except where national security is at issue) and to refine the range of offences for which the consent of the Attorney General is required to prosecute, the Government has proposed that the nolle power should be abolished. But I accept that the abolition of the nolle power does carry a number of risks.

First, it will mean that the Attorney General has, absent those very limited cases where the power of direction is retained, no means of bringing a prosecution to an end, no matter how inappropriate or oppressive the prosecution is. This will include private prosecutions.

Second, the powers of the main prosecuting authorities to discontinue proceedings are not unlimited. The removal of the nolle power will leave a “gap” in which the prosecuting authority has no power to bring proceedings to an end. (In broad terms the prosecuting authorities have statutory powers to discontinue proceedings up to committal. After the defendant has been arraigned, no evidence can be offered. But in between those stages, the prosecuting authorities have no clear powers to bring the proceedings to a halt.)

For this reason we are considering whether it is appropriate to modify the powers of the main prosecuting authorities to discontinue proceedings. This in turn raises difficult issues. In particular, should it be possible to re-instate proceedings which have been halted under an extended power of discontinuance? (Proceedings halted by a nolle can in theory be re-instigated but in practice are not.)

Third, as noted in the submission made by Lord Mayhew, Lord Morris and Lord Lyell, the Attorney General is directly accountable to Parliament for the exercise of the nolle prosequi power. Abolition of the nolle power, possibly coupled with the expansion of the powers of the main prosecuting authorities to discontinue proceedings, will impact on the extent to which key decisions in relation to prosecutions are subject to direct Parliamentary accountability.

So I accept that the abolition of the power of nolle prosequi does carry risks. I also note that the Justice Committee has queried the utility of the abolition of the nolle power. The Government would be very interested in the Committee’s views on this point.

Issues as to accountability to Parliament raised by Lord Campbell of Alloway.

Lord Campbell of Alloway, referring to the Trooper Williams case, raised the question of how the Attorney General could give an assurance to Parliament about a prosecution case once the Attorney ceases to have power to take the final decision in the vast majority of such cases.

Without getting into the history of the Trooper Williams case itself, it seems to me the answer to Lord Campbell’s point is as follows. The Attorney General and Solicitor General will continue to be accountable to Parliament for the work of the prosecuting authorities which they superintend. We envisage that the prosecutors’ protocol to bedrawn up under the draft Bill will contain provisions about the Law Officers’ responsibilities to Parliament, and the obligation on the Directors to support the Law Officers in that role. Even where the Attorney General will no longer be the final decision-maker in a particular case, it will still be open to the Attorney and the relevant Director to consult one another about the case, for the Attorney to seek information about it and to convey that information to Parliament in response to Parliamentary Questions or otherwise. If there should be any question of seeking an assurance as to how a case is to be handled, under the proposed reforms this would generally be a matter for the relevant Director (where relevant, in consultation with the Law Officers). But again it would be for the Law Officers to convey the Director’s decision to Parliament and answer questions about it.

In those cases where the Attorney General will retain a decision-making role (for example where the requirement for the Attorney’s consent to prosecution is retained), the Attorney will of course continue to be accountable to Parliament for the exercise of that power.
I am happy to address any further queries the Committee has about the reform of the role of the Attorney General.

I look forward to considering the Committee’s report in due course.

Baroness Scotland QC
28 June 2008

Supplementary memorandum by the Revenue and Customs Prosecutions Office (Ev 69)

I have the following observations on the question: are you content with the provisions in clauses 4–6 of the Draft Bill, setting out the tenure of office of the Prosecutorial Directors? Is there anything else you would wish these clauses to include?

— It may well be counterproductive to limit the Directors to a fixed term of five years.
— Events (such as a significant change to workload, responsibilities or organisational structures) might occur towards the end of a five year term which would be best addressed by continuity at Director level within the prosecution authority/authorities affected.
— The Attorney might be faced with a position at the end of a five year term where the available pool of applicants lacked credibility.
— Greater flexibility would be achieved by maintaining the ability of the Attorney to reappoint a serving Director for a term of less than five years.

David Green QC
July 2008

Examination of Witness

Witness: LORD GOLDSMITH, a Member of the House of Lords, gave evidence.

Q651 Chairman: Lord Goldsmith, may we thank you very much indeed for coming to give evidence to the joint committee. I said at the beginning and must repeat that members have declared interests relevant to this inquiry and they are available today on the web and on the Committee’s website and indeed in writing if anyone should wish to see them. The White Paper, indeed the draft Bill itself and the notes accompanying it say that it is enhancing public confidence in the office of the Attorney General is the purpose of the legislation proposed. Do you think the proposals do achieve that and, if not, could you say what the gaps may be?

Lord Goldsmith: May I just thank the Committee for fitting me in this afternoon. I know you dealt with other returning Attorneys General on a previous occasion and I could not come. I wanted to try and assist the Committee if I could. Does it assist? Yes, I think that certain elements will help to reinforce, establish or maintain public confidence and I welcome that.

Q652 Lord Tyler: I wonder if you have had a chance of looking yet at the Justice Select Committee’s Report on this issue, and I think you may have given evidence previously to them on the role of the Attorney General.

Lord Goldsmith: I did. I discovered that there was a report when I listened to the Today programme this morning, and I was given a copy when I arrived and I have obviously had a little bit of a look, but I cannot say I have studied it completely which is perhaps a pity.

Q653 Lord Tyler: Well, it may be slightly unfair, but you know what this building is like! One of their conclusions is that “the draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister; it gives greater power to the Executive; and it does not sufficiently increase transparency”, and they give examples of that. You may also have noted that your previous colleague in the Government, Lord Falconer, described the draft Bill as the “constitutional retreat Bill”. Both these comments are a great deal more negative, pessimistic than was implied in your initial reply just now. Can you justify your optimism?

Lord Goldsmith: Well, I certainly can. I was rather surprised to read the remarks of my very, very good friend and longstanding colleague, Lord Falconer, but there we are, that is his point of view and he has expressed it. I do not agree with what I have seen of the Justice Committee’s Report, forgive me for saying that, and I did not agree with the Report that was produced by the then Constitutional Affairs Committee. I was critical of it publicly. I think it failed to have regard particularly to the evidence that they had, not from me, but the evidence that they had from previous Attorneys General, from people like Lord Mackay of Clashfern, from other law officers, judges, Lord Woolf, for example, and I do not see any reflection in the present Justice Committee
Report of discussion of that evidence, so, I am sorry, I am unrepentant, I disagree with them.

Q654 Lord Tyler: The Chairman referred particularly to public confidence in the role and office of Attorney General. Do you think the proposals in the draft Bill are likely to increase perceptions that are positive of the role and office?

Lord Goldsmith: Well, I have answered that question to the Chairman, yes, I do. I think that there are elements there that are important, although I would want to underline some aspects of those. Lord Norton was asking about an annual report and I think that is a helpful thing to do. Indeed, in my first year of office we produced an annual report. It was not delivered to Parliament because there was not a parliamentary framework for doing that. I think the people who read it found it helpful to understand what the Attorney General did and I very much agree with the remark I just heard from Baroness Scotland, that it would be good if people knew more about the things that the law officers do actually which are beneficial to the public and, if those of us who have held this office did not do enough, though we often talked often enough about it to make that clear, then it is our fault. I suspect the problem was that we tended to talk to lawyers and judges who understood it and to parliamentarians rather than to the public, so I think an annual report would be a good thing. I also think that some form of more regular scrutiny by a select committee is valuable. Now, there are difficulties about how one achieves that, and I give, if I may, one instance where the normal problem is that some of the information that one has and on which one has relied is simply something that you cannot just reveal publicly. It relates to perhaps national security or it relates to some aspect of an individual’s behaviour. I was able on one occasion to go to the Intelligence and Security Committee with a prosecution case which concerned a former member of one of the security services whom we were not prosecuting and I knew that was going to give rise to public interest questions and perhaps parliamentary questions. I thought the best way of explaining the reason was to go to the ISC, which I did. I laid it all out before them and actually took, I think, counsel with me to explain the reasoning for the decision, and I thought that was helpful because they saw what the reasoning was and, as far as I could see afterwards, there was not any particular criticism, or any criticism, of that decision, so I think that that sort of committee structure for handling those problems could well be helpful.

Q655 Lord Morgan: One of the issues, Lord Goldsmith, that the Justice Committee focussed on was the well-known theme of the apparent blurring between the legal and political aspects of the Attorney General as a member of the Government, but giving independent advice, and I was wondering what your view was of that please and whether your own experience, as Attorney General, has shown any difficulty or complications in distinguishing between the legal and the political.

Lord Goldsmith: I do not believe there was any difficulty. All law officers know that it is their responsibility to give independent legal advice, to take decisions which are based on the evidence and the law. Indeed I have told the story before that one former law officer was told within 24 hours of coming into the building of the salutary tale of Patrick Hastings and the Campbell case and how, if an Attorney General appears to be influenced by political considerations, it can lead to the fall of a government, and it was actually the first Labour Government, so that had particular resonance with certain former law officers.

Q656 Lord Morgan: He talked to Jimmy Maxton. I think.

Lord Goldsmith: Yes, absolutely. If I may say so, again listening just now, you had some enormously important evidence from the present Director of Public Prosecutions who said that over the course of five years he had never, if I took his words right, had any political pressure. The former Director of the Serious Fraud Office in relation to the BAE case, when he was asked to explain, made it absolutely plain that he had had no political pressure, that the conversations he had had with me were perfectly proper. When I stood down, I was quite touched by the number of letters I got from people within the legal departments of government and also from counsel used by government, saying, “We just want to make it clear”, and I paraphrase, “that in none of the dealings that we have had with you have you been anything other than professional as a lawyer, looking at the evidence and the facts and not bringing political issues to bear”, and I just hope that something which would help public confidence, which would be the sort of remark that the Directors have been making there from their experience, actually got wider publicity because people would then say, “Well, actually perhaps there is for some reason a misconception about how these decisions are taken”.

Q657 Martin Linton: Lord Goldsmith, can I take you on to the question of publication of the Attorney General’s advice which, I know, has been a matter of controversy for you.

Lord Goldsmith: Yes.

Q658 Martin Linton: Obviously all the evidence we have had so far has been in terms of published in certain cases or remaining privileged or rare
circumstances, et cetera, but can I throw the words of Lord Falconer at you again, and feel free to disagree. He said, “It is inconceivable that the Attorney General’s legal advice in relation to the use of force can remain confidential in the current view of the world”.

Lord Goldsmith: I saw that and I just wondered whether he was saying that, as a matter of pragmatism, that is what is going to happen or whether he was saying it was desirable because, if he was saying it is desirable, it certainly was not what he said in government.

Q659 Martin Linton: And you are saying it is pragmatically true?

Lord Goldsmith: Pragmatically. I think there is a very important distinction to be drawn between the publication of legal advice and indeed all those things which lead up to legal advice and a very good explanation of the legal basis on which the Government is acting. I think the latter is very important and it needs to be there and, if it were put forward in a way with which a law officer disagreed, one would hear about that, but I remain nervous about the publication of legal advice for the reason I have always given: if government knows that the legal advice it gets is going to be published, it will be much more hesitant about seeking that legal advice and it will be much more hesitant about the facts that it puts before the law officers for that advice and the law officers will be more hesitant about the way they express the advice, and there are occasions when it is necessary to express caveats, qualifications, ifs and buts and those are difficult things if they are going to be published on the front pages of newspapers, so I think that is the ultimate reason why generally the advice itself ought not to be published. There will be exceptional cases and it is always open to a Prime Minister to say, “I want this advice published”.

Q660 Martin Linton: Well, without disagreeing with you, can I just press you on how that plays both in Parliament and with the public because, as Lord (?) said, if we are going to put war powers into this Bill so that Parliament automatically decides whether to go to war or not, then, he said, Parliament should be fully informed. Is there a case for giving Parliament the legal advice on which the Government has taken a decision?

Lord Goldsmith: He speaks for himself, but I understand that and I have seen it also as a problem about putting war powers into a statutory form with approvals because I do understand the argument, that it is difficult to ask parliamentarians to make a decision on certain things if they do not have the full information on which to make it, and that may be a reason for saying that one needs to have a somewhat narrower approach to what you are asking Parliament to approve. However, there are ways of doing it. I suppose, the first and most important of which is to say that the legal basis upon which the Government intends to act should be explained, set out in some detail and Parliament can then judge that and no doubt there will be no want of other commentators who will be happy to express the view that that is right or wrong.

Q661 Martin Linton: With the public, it has been suggested that public confidence in the legal advice that the Attorney General supplies to the Government cannot be retained if that advice is never disclosed. Do you feel that there has been, because of this conflict, a diminution of the public confidence in the role of the Attorney General?

Lord Goldsmith: I think the whole issue plainly of the Iraq war was very difficult in many different ways, in terms of confidence in different ways, confidence in statements about intelligence, confidence in how the Government reached the decision that it did. It is interesting that, despite that, I still found that I got a lot of correspondence from people, saying that they saw the Attorney General as someone who could help them with their problems. Courts continue to call on the Attorney General to undertake particular roles, and the Northern Ireland Court specifically asked me to undertake a review into what one of the public authorities had done which they thought might have been contrary to good administration and good administration of justice, and Parliament itself has continued to give roles to the Attorney General, so I hope the answer is that ultimately no, it has not diminished confidence, but the possibility of getting the degree of greater transparency through report, through a select committee perhaps with special arrangements so that particular things could be looked at which are difficult to reveal, that might help too.

Q662 Chairman: Have you any knowledge as to whether other jurisdictions deal with the publication of advice differently than within our jurisdiction?

Lord Goldsmith: Yes, but there are all sorts of different models. I do not, I am afraid, have the detail in mind. I did for the purposes of the evidence I gave to the Constitutional Affairs Select Committee when it was that, and we appended a list of the other jurisdictions, but sometimes I think it depends what you are asking the law officer to do. One of the difficulties, I think, about putting the present Attorney General in a different position is that you will probably end up with the Government taking legal advice from somebody else. It may be that at the end of the day Parliament says, “Well, we want to know from the official Attorney General, as it were, what happens”, and I think you will get a lot of advice given actually much more secretly, and I think some
people have suggested that one saw that with the White House, that within the White House there were other secret legal advisers, but it was not a public department which provided legal advice and that never really saw the light of day at all until long after the event when people perhaps criticised certain decisions.

Q663 Lord Norton of Louth: On the issue of the relationship between the Attorney and Parliament, you will probably be aware, or certainly not surprised here, that we have had very different opinions about whether the Attorney should remain both a Minister and sit in the Commons or the Lords, and, perhaps not surprisingly, Lord Falconer was taking one view and the other former Attorneys were taking a somewhat different view. What would be your view? Do you find it useful to be both a Minister and be sitting in the Lords and, if it is the case that you believe the Attorney should remain a Minister, what are the circumstances in which it is appropriate that the Attorney should attend Cabinet? Should it be a regular feature or simply when invited because there is a very specific issue on which the advice of the Attorney is required?

Lord Goldsmith: If I can just deal with the last question first, I think the answer to that is that it depends on how Cabinet is run. I do not know how it was run when Lord Armstrong, as it were, drew up the agenda. When you get into a situation, and this was the fact while I was Attorney, that the agenda for Cabinet gave very little away as to what was going to be discussed, and I think that it then became that there would often be matters which would arise in Cabinet perhaps which only the Minister who was going to raise them knew was going to happen. We did try for a period of time that I would only attend Cabinet when the Cabinet Secretary said that there was a specific issue of legal advice. The problem was, when you looked at the Cabinet minutes afterwards, you found that half the time something had arisen which you ought to have been there to deal with, and that is a practical issue. My policy in Cabinet was not to speak unless it was on a matter of legal advice or it was a matter relating to criminal justice, for which I had some responsibility as well, but I would not otherwise speak on other issues. Should the Attorney General be a Member of Parliament? In my view, clearly yes. That results in the enormously important accountability to Parliament which I think is a key feature and that, I know, has been well covered. Should the Attorney General be a Minister? In my view, yes, I think that that puts you in a position where it is much more difficult for your colleagues to ignore, or disagree with, your advice and, if I dare, I think there was one instance of that in relation to Guantanamo Bay where I was strongly of the view that British nationals there should not remain, that they should be put either on trial which was fair or they should be released. Ultimately, my view was, having negotiated, that there would not be a fair trial and, therefore, they should be released, and I think it was much more difficult for the Government to resist that conclusion (and, you will not be surprised to hear, there were some for whom it was not a very welcome conclusion) precisely because I was a Minister and, in a sense, one of them and on their side.

Q664 Lord Norton of Louth: So it is the position that gives you extra clout in providing advice, and in terms then of basically the existing arrangements, you would say that, on the whole, they have worked pretty well?

Lord Goldsmith: Yes.

Q665 Chairman: I suppose we are back to the public perception of it because at least the Justice Committee seems to think that a conflict exists because the Attorney is a Minister and it may be said that it is not partial advice, but advice which is convenient to the Government of the day. That would make a proposition at least that it may be seen to be biased even though it is not.

Lord Goldsmith: I gave a lot of advice to the Government which was inconvenient to the Government, and all law officers have done that. The problem is, and this is a perception problem, that that is not the advice one knows about, things that the Government have not done in the field of executive action, in the field of legislation that they have not done. The one area that everyone does know I did advise about was obviously military action in Iraq, but that gives the impression that that is the way that legal advice is given; it is absolutely not.

Q666 Chairman: Do you share perhaps Baroness Scotland’s view that, if it was a wholly independent adviser, but in the pay of the Government, it would make little difference in terms of public perception?

Lord Goldsmith: I did not hear that she said that, but it does seem to me to be a fair point. I would just underline that I think a career lawyer/civil servant just will not have the same respect from ministers, not because they want to disobey the law, but sometimes they have a very legitimate objective to attain and it is problematic for them that they cannot do it the way they want, but a colleague who sits with them can say no, and they know it is not being said because you are anti the Government, but it is being said no because you think it cannot be done.

Q667 Lord Williamson of Horton: We have had quite a bit of evidence on the Attorney’s role in the formulation of criminal justice policy, including some very clear and convincing comments within the
last hour from the prosecutorial directors. Do you think yourself that the Attorney General's involvement in the formulation of criminal justice policy has made the office too politicised or not?

Lord Goldsmith: Well, I know the criticism. I do not think it is fair criticism. I think that actually the role that law officers have played in the formulation of criminal justice policy has been actually important and beneficial both on some occasions in trying to tone down or round the edges of some policies, but also the point that I heard the Director of Public Prosecutions, Sir Ken, making about the role of the prosecutors. This, for me, was a very important part of my job, to ensure that the prosecutors' viewpoint was considered. They have enormous experience, so they are the only government department in one sense that have front-line experience of dealing with crime because the others supervise people who have front-line experience, but the prosecutors do it, and I think it was very important, it took a significant part of my time and I think it has been beneficial in many ways.

Q668 Emily Thornberry: What do you think of the Government's proposals to take away the power from the Attorney General to direct prosecutions in individual cases?

Lord Goldsmith: This is the bit that I am actually most worried about. Sir Ken was quite right in saying that the power to direct was not used and I certainly never used it. What I am concerned about is the framework within which there can be discussions about individual cases and let us not think that these are the highest-profile cases. I remember an occasion when it came to my attention, I think, from a piece on the radio that there was a granny who was being prosecuted for assaulting a 15- or 16-year-old boy because she had shoved him in the chest outside her house when she had been suffering for months, so she said, from young tearaways, whatever, outside her house. Now, I said, “Well, I want to see the papers”, and I looked at them and they may well have been right, the prosecutor may well have been right that technically this was an assault, but it just seemed to me that this was absolutely not a case to prosecute. I did not direct anybody to do anything, but I did make it known that I would like them to reconsider that particular decision and it was reconsidered at a higher level within the CPS and the prosecution was dropped. I think if I had not had any power at all to deal with individual cases and this had all been husbanded in by the agency, by the prosecutors, if I had said, “I want to call for the file”, they would probably have said, “No, you can’t see what it’s all about. This is for us to do”, and I think that would have been a mistake, and there are other cases as well where the involvement—

Q669 Emily Thornberry: But can the DPP not be trusted to do that?

Lord Goldsmith: On this particular occasion, he had not. I am not criticising him, but he had not. I think also that this is an area where the political antennae that come from being in Parliament helps: seeing what the public are concerned about, not what is going to win or lose by-elections, that is not the point, it is just what the body politic is concerned about which is broader than the narrow question of law, it is why we have a public interest test, and I think someone who understands that because you are surrounded by it is actually in a better position than a director, however distinguished, however good a lawyer, actually sometimes to make those calls.

Q670 Emily Thornberry: What about the question of security and the Attorney General’s power to stop a prosecution or an investigation on the grounds of national security?

Lord Goldsmith: Well, somebody needs to be able to stop a prosecution if the balance between national security and the particular case is such that national security would be unduly damaged by the prosecution going ahead, and that is an area where one would expect the law officer to be involved.

Q671 Emily Thornberry: But the new clauses are going to increase the power that the Attorney General has.

Lord Goldsmith: I am not sure they increase the power. I would expect that they would operate actually in the same way that things have generally operated in the past which is that there is a discussion between the Director and the Attorney and, as Sir Ken said, there were a number of cases that we discussed. I would not question decisions, but ask questions about decisions and sometimes I would be satisfied, sometimes I would still have a doubt and that would be resolved, so I would anticipate that this would still result in a discussion with the Directors and indeed an Attorney would be a fool not to take the fullest possible advice from the Directors involved as to how they saw the situation.

Q672 Emily Thornberry: To what extent should the exercise of this power be judicially reviewable or indeed subject to parliamentary scrutiny?

Lord Goldsmith: I think parliamentary scrutiny is important. I think Parliament does scrutinise individual prosecuting decisions after the event. I think there are restraints which ought to operate as to how one expresses views in relation to it. Judicial review, well, the classic view has been that, in the exercise of public interest functions, the Attorney is accountable to the public through Parliament rather than to the public through the courts, and I think there is merit in that, but no doubt the courts will
decide whether they think they should judicially review and they may well take that view.

**Q673 Lord Tyler:** In relation to the exemptions, the Justice Select Committee has a specific concern about extension to international relations which they describe as a “significant step further than national security on which the basic power to give a direction is based”. Would you agree?

**Lord Goldsmith:** No. I think I would leave this to the good sense of the Attorney of the day to see when, looking at the thing sensibly in the round, it is appropriate to stop a prosecution where you have to balance, on the one hand, the desirability of the prosecution, the nature of the alleged crime, perhaps the strength of the case as well against what the damage is actually going to be.

**Q674 Fiona Mactaggart:** One of the issues which takes up quite a lot of space in the Green Paper and which has been not discussed a lot in our evidence is the proposal to transfer, or abolish, most of the requirements for the Attorney General’s consent in relation to prosecutions. I wonder if you would tell us what your view is about that.

**Lord Goldsmith:** I think most Attorneys would welcome it because it was often quite a burdensome task. The Attorneys did try, the law officers did try to get rid of the consent requirement for corruption cases, but it was actually Parliament, as I recall it, at that stage which insisted on keeping it that way. As long as there are proper opportunities for consultation and, I am afraid I would say, on some individual cases between the Attorney and the Directors, then I have no difficulty at all with the idea that the formal consents should increasingly go to the Directors. There will be some where it may remain appropriate for them to stay with the Attorney.

**Q675 Fiona Mactaggart:** Do you see a connection between dropping the formal consent and not dropping the power of the Attorney to make a direction later on?

**Lord Goldsmith:** I am sorry?

**Q676 Fiona Mactaggart:** The proposal in the Bill is that the Attorney should lose the power to direct the Director of Public Prosecutions in relation to an individual case, and I am wondering whether you saw a connection. The Bill proposes to lose both ends, if you like, and, as I understand what you said, you wanted to keep the power to direct at the other end and I was wondering if you saw a connection between the two. That is all I was asking.

**Lord Goldsmith:** I think it would be desirable to keep a framework in which the Attorney General of the day can have detailed discussions about individual cases. We always got a list of sensitive cases and they were not sensitive because they were political, they were sensitive because of the nature of what public opinion might say about them. I think it is important to have that framework. Either you are going to have some framework for being able to insist upon that discussion or, I think, one loses something. I think the consent requirement is not really it and I think that is quite separate.

**Q677 Lord Campbell of Alloway:** I quite agree with you, that there has to be some framework both ways, but can you really think of a better one than the one we have got positively that ought to be put in the form of a statute instead of left to the common sense and the expertise of the Attorney himself? Can you really support any change to this?

**Lord Goldsmith:** Well, the benefit of the work that this Committee is doing may well include simply dispelling some of the myths, and some of the myths which maybe grew up as a result of there being hugely political debates, indeed in the context of a general election as well, about the role that the Attorney General had. The Attorney General’s role has always involved dealing with difficult cases, and that is why you have an Attorney General there and, if one goes back over history, mine was not the first time that there were controversial issues. One can go back, I have listed them elsewhere, there is Gouwiet, there is Leila Khaled, there are a number of cases, and it is not surprising because, whichever decision the Attorney General had taken, it probably would have been controversial either way. I am just troubled and, if it is my fault for not explaining this better in public, I am troubled that there are some misconceptions how these decisions are made and I very much hope that this Committee will at least, whatever else it says, pick up on the remarks, such as those of the Director of Public Prosecutions, as to how actually this political pressure, whatever people might say in Westminster, actually has not been present. Now, that is a way of saying gently to Lord Campbell that I think there are some improvements that can be made, but the basic structure of the role, I think, has worked far better than people sometimes credit it with.

**Q678 Chairman:** I am sure you have seen the opinion of the former Attorneys who gave evidence about the *nolle prosequi* power which, they said, it would be unwise to get rid of. Can you see any specific practical difficulties arising if indeed that was abolished?

**Lord Goldsmith:** Well, it would mean that there was a lever which is not often used, but is present so that there can be a discussion between the law officers and the prosecuting authorities about the wisdom of continuing a particular prosecution, and at the moment that is a power that is there and its presence is probably more important than its exercise.
Q679 Baroness Gibson of Market Rasen: I would like to ask about the Attorney General’s superintendence functions in relation to the Directors. Could you tell us what the key elements of the Attorney General’s superintendence responsibilities over the Directors are and what elements, do you think, should be included in the proposed protocol?

Lord Goldsmith: For me, the three key elements of superintendence are: superintendence of the policy of the prosecuting authority generally, and I can explain what I mean by that; secondly, the efficiency of the prosecuting authority—it is spending taxpayer’s money and it is desirable that a minister and a parliamentarian has accountability for the way that budget is spent; and yes, thirdly, superintendence involves some degree of oversight of the case decisions that are made, not in the millions of cases that are made, but in some of those cases.

Q680 Baroness Gibson of Market Rasen: Do you think that the provisions in clauses 4 to 6 of the draft Bill setting out the tenure of office of the Directors are appropriate?

Lord Goldsmith: I think it is desirable to have a fixed tenure for the Directors and that is the policy that we had. In the first instance of the present Director, I appointed for three years, not five, and then extended it for a further two, and there were reasons for that at the time. I do not have a particular problem with those provisions.

Q681 Lord Norton of Louth: Can we just very briefly come back to a point you made at the beginning about an annual report. You have made clear that you very much welcome that and, therefore, I presume you are very much in support of the provisions within the Bill itself.

Lord Goldsmith: Yes.

Q682 Lord Norton of Louth: You have indicated as well perhaps then the answerability of the Attorney to select committees. Do you think that is sufficient? From your point of view as Attorney, do you think you were sufficiently subject to scrutiny? You have indicated that you produced a report as well to assist, but do you think that would be adequate and indeed sufficient?

Lord Goldsmith: There were times when I felt I was subject to a great deal of scrutiny. I think the problem was, which is the real issue I came back to, that it was actually quite difficult sometimes to find a way of actually getting inside the decisions because of the difficulty about talking about them publicly, and that is why I think that for some cases a model like the ISC where one can do that would be helpful.

Q683 Lord Norton of Louth: And perhaps would forward itself as the basis on which the Attorney may appear before, say, the Justice Committee to actually explain the role of the Attorney and justify what he has done?

Lord Goldsmith: Yes, I think I was the one who first proposed that there should be a select committee for the Attorney General.

Q684 Lord Norton of Louth: But should it be just for the Attorney or something like the Justice Committee, in other words, it has got a much broader remit?

Lord Goldsmith: I have always taken the view that that really is a matter for Parliament to decide how it wants to structure its committees. It is not for me to say.

Q685 Chairman: I know you have not had a chance to see the Justice Committee Report in full, but one of their particular concerns was that the Attorney General has statutory powers to direct the Serious Fraud Office to stop an investigation, as opposed to a prosecution. Do you have a view on that?

Lord Goldsmith: Yes, I think that is a logical extension of the principle. The Serious Fraud Office is the one prosecuting authority that investigates and prosecutes. With all the others, the investigation is done by the police or some other and it may be the military police, but it is not done by the prosecutors. The way that the Serious Fraud Office does it is that the investigation and prosecution sort of goes very much hand in hand and at any particular point in time it may well be that they are still technically in the investigation stage, but it may be plainly apparent that the case should be stopped, so it seems to be logical that it should extend to investigation as well as prosecution. In practice, of course where you have an investigation, the likelihood is that someone is going to say that it is more likely to be premature to stop it because, if you have not investigated, you do not yet know all know about it and that would be something that I am sure law officers would bear in mind.

Q686 Lord Plant of Highfield: Could I just ask you about the oath of office. Should it be reformed both in terms of substance, and what do you think should be in it if it is going to be, and also procedurally, should it be made into a statutory basis or can it perfectly well be done by non-legislative means, and which is preferable?

Lord Goldsmith: Yes, I think it should be reformed and again I think this was a proposal that I made originally because the present oath is difficult to understand. As to what it should say, I think that the important point, however it is expressed, is upholding the rule of law, making decisions in accordance with the law, however one wants to
24 June 2008

Lord Goldsmith

express it, it seems to me it can be done perfectly adequately without the need for putting it into statute, and I find force in Baroness Scotland’s point that, if you do it without putting it into statute, then you do not have to find parliamentary time to amend it if you find you want to add to it.

Q687 Chairman: Can we thank you very much indeed for being so efficient in your evidence because we have been running over in almost all the other cases, so we are really grateful, but there is just that one final question. If you were adding amendments to the Bill, are there any other reforms to the AG’s roles that are not covered by the draft Bill and that you would like to see in there?

Lord Goldsmith: None has occurred to me. I am very happy to reflect on it further, but none has occurred to me. My biggest difference with the Bill is the point that I discussed with Emily Thornberry about individual cases and how one deals with those.

Chairman: Well, if anything should occur to you within the next few days or weeks, we would be very grateful for that advice. Thank you very much indeed.

Supplementary memorandum by Lord Goldsmith QC (Ev 77)

You invited me to consider whether there were any other amendments to the Bill that I would propose. I identified my disagreement with one aspect of the Bill but apart from that I cannot think of other amendments that I would propose. I shall, of course, be reading the report of your Committee closely when it emerges and following the debate in Parliament. So it may be that I am persuaded that some other changes are desirable. But for the moment I am not.

It did occur to me, however, on re-reading the transcript of my evidence that there are perhaps two ways in which I might be of greater assistance to the Committee.

The first is in relation to the Justice Committee report where I indicated that I had publicly criticized the previous report. I am not sure whether the Committee has seen a copy of the speech I was referring to. I enclose a copy in case it may be of assistance.

Secondly, I fear that I may have been too superficial in my answers in relation to the criminal justice role. I indicated to the Committee my belief that that had been an important part of my role.

If the Committee would allow, I would amplify that answer in this way.

1) Strengthening the prosecution process and the prosecution system was a major, probably the major, item on my agenda from the time I first took office. I was well aware of the criticisms of the Crown Prosecution Service going back to the days of its formation and had been involved, as a member of the Bar Council with that issue. I set about, therefore, a process of reform and strengthening of the prosecution process. I believe that the changes made to the Crown Prosecution Service in terms of management, new powers, new resources and new responsibilities have enabled the Prosecution to emerge as a much stronger, more confident CPS able better to serve the public. It was I who first coined the aspiration that the CPS should become a “world-class prosecuting service” and much of my energy was directed towards the plans and design for that process, including arguing for resources and powers with other ministers and planning with the senior management of the CPS. The CPS is a very different animal today from what it was some years ago. I am absolutely confident that it would not have achieved that status without a strong ministerial champion.

2) One particular example is in relation to charging. Charging is the most important change in prosecuting structure, in my view, since the creation of the CPS. It puts into the hands of the prosecutor the responsibility to make the decision whether, and, if so, whom, to charge in all but the most routine and minor cases. It was a controversial policy when first proposed in the Auld Report and I believe it would not have come into law but for the championing of that proposal which as Attorney General I made in discussions with the then Home Secretary and then more widely within government. It is charging above all which has helped to contribute a more focused prosecution process in which weak cases are weeded out at the outset, and the evidential basis for cases strengthened before charges are brought as opposed to the previous system, under which charges would be brought by the police and the prosecutors would often be running to catch up with correcting defects in the case under time pressure imposed by the Courts. The charging process has both improved the quality of prosecution decisions and proved the cornerstone to further beneficial developments: such as better working with the police, greater championing of victims and an ability at an early point in the case to determine what the requirements of witnesses would be so as to help them present their best evidence to the court.
3) I would be happy to provide the Committee with further information about this and other changes, including the creation of two new prosecuting authorities: that in Northern Ireland and for the Revenue & Customs, should it be helpful. These illustrate, however, the considerable importance of having a minister who champions and can argue at the highest levels within government for the role of prosecutors.

4) I would also not like the Committee to think—which reviewing my evidence might imply—that the only role of the Law Officers in development of criminal justice is to comment or amend proposals made by others. The Trilateral Criminal Justice System, which was started when Lord Williams of Mostyn was Attorney General, proved invaluable in enabling reforms to the Criminal Justice System to be made. Some of these were promoted by the Law Officers working together with the prosecuting authorities. One example of this would be the creation of witness care units up and down the country. These have the responsibility of helping witnesses from an early stage in the process so that they can be protected from intimidation, and be given assistance with practical issues such as childcare, transport or dealing with housing or employment issues so that they are free to give the evidence which is critical. This was very much an initiative driven by the prosecutors and the Law Officers during my time. There are other examples which again I believe could be provided.

It was this sort of matter I was particularly referring to in my evidence by indicating the practical experience of the prosecutors.

5) If the ministerial responsibilities for prosecutors had been with a minister in one of the two other large departments I believe these changes would have been more difficult to pursue. For example, the change in relation to charging would not have happened unless there had been a minister who was able to disagree with the advice being given in the Home Office at the time which was particularly influenced by a perception the police would oppose the change. In the end, as it turned out after initial resistance the police who became involved in the proposal became enthusiastic about it but it was the initial and separate arguments made for it on behalf of the prosecutors which were critical.

I trust that this additional material which the Committee may wish to consider as a supplemental memorandum of evidence may be of assistance in the Committee’s deliberations.

July 2008
WEDNESDAY 25 JUNE 2008

Michael Jabez Foster, in the Chair

Present

Armstrong of Ilminster, L
Campbell of Alloway, L
Hart of Chilton, L
Maclennan of Rogart, L
Norton of Louth, L
Plant of Highfield, L
Tyler, L
Williamson of Horton, L

Mr Alistair Carmichael
Martin Linton
Ian Lucas
Fiona Mactaggart
Mr Andrew Tyrie
Sir George Young

Memorandum by Graham Allen MP (Ev 17)

SUMMARY

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

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

HOW DO THE PROPOSALS SET OUT IN THE DRAFT BILL AND WHITE PAPER FIT INTO THE WIDER CONSTITUTIONAL CONTEXT?

1. The Draft Bill and White Paper address constitutional issues in urgent need of attention, in particular parliamentary involvement in war-making and treaty-ratification; the status of the Civil Service; and the independence of the judicial system. Some of the changes embodied in the government proposals were first called for more than a century ago; and have remained on the agenda thereafter. Events around UK participation in the invasion of Iraq heightened interest in the relationship between the legislature and executive and the relative weakness of the former in influencing the actions of the latter. In 2002 I began tabling motions—with cross-party support—on the Remaining Orders every day, calling amongst other things for parliamentary approval for armed conflict.
2. In the sense that they reflect concerns both of longstanding and current salience the plans set out in the Draft Bill and White Paper are important within the “wider constitutional context”. But they do not fundamentally alter the UK settlement. At best they are a first step towards such a transformation, and a faltering one at that. In its Governance of Britain Green Paper (Cm 7170) published in July 2007 the government held out the possibilities of a Bill of Rights and a written constitution (see pages 60–3). Neither the current White Paper nor Draft Bill come remotely close to achieving these goals; and they fail even to provide a possible route towards them.

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

4. A codified UK settlement would need to address other issues which are nowhere to be found in these documents. They include:
   - The weakness of local government and the lack of democratic accountability within England at regional level.
   - The atrophy of political parties themselves at local and national level.
   - The ambiguous nature of UK participation within the European Union. I have proposed on the Remaining Orders that the government seek the agreement of the House to a British draft Constitution for the EU, to put forward for consideration by member states (but not to mandate our government).
   - The ability of citizens to participate in policy formation at all levels, taking into account in particular the need to involve marginalised social groups.
   - The rights of the individual, including economic and social rights.
   - The Royal Prerogatives that remain personal to the monarch, including the right to choose a Prime Minister and to grant a dissolution. In circumstances of a hung Parliament, with competing credible candidates for the premiership, it is unacceptable that the decision should be made through any means other than a vote in the Commons. On the Remaining Orders, I advocate that within two days of a new Parliament meeting, or within 25 days of the death or resignation of a serving Prime Minister, the Commons should name one of its members and ask the monarch to invite her or him to form a government. Similar arrangements are effective in countries such as Germany; and closer to home, Scotland. Also I have a motion calling for General Elections to take place only every five years, on 1 June—no Prime Minister should have the unfair advantage of being able to determine the date of a Poll by requesting a Dissolution from the monarch.

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

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

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

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1 Taming the Prerogative, HC 422, 2003–04.
A **Constitutional Commission**

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

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

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

**Declarations of War**

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

10. Provision for parliamentary involvement in war-making should be set out in statute, rather than—as is currently intended—a Commons resolution, in order to ensure it is binding and justiciable. (as I have recommended daily on the Commons Order Paper since 2002). Observation of other countries, including the US and Holland, show that more formalised arrangements than a convention are workable in practice. It is proposed by the government that the Prime Minister should be able to bypass the requirement for prior parliamentary approval in an emergency or on grounds of security (“Draft detailed war powers resolution: 3. Exceptions to requirement for approval: emergencies and security issues”). While I accept that there is need for flexibility, there must be provision for rapid subsequent endorsement (or disavowal) by the Commons, which is currently lacking in the White Paper. It is also regrettable that activity by the Special Forces is specifically excluded from the provisions of the draft resolution (“4. Exceptions to requirement for approval: special forces”). Furthermore the Prime Minister should not have full control over the timing of any vote and the information that is made available to Parliament. There is a need for the mandate for any action to be subject to regular renewal. This provision is essential from the point of view of avoiding mission-creep and ensuring that democratic oversight of war-making was an ongoing process, not simply a one-off occasion. It would have to be accompanied by reconfigurations in the parliamentary committee system. In particular there is a need for a properly resourced committee capable of exercising joined-up scrutiny of military activity to inform the plenary in its deliberations.

**Recall of the House**

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

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

CIVIL SERVICE

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

LEGAL SYSTEM

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

PROTESTS AROUND PARLIAMENT

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

May 2008

Examination of Witness

Witness: Mr Graham Allen, a Member of the House of Commons, gave evidence.

Q688 Chairman: Good afternoon. Thank you, Graham, for agreeing to come and talk to us. Indeed, it was an invitation from you to come and we were very pleased to accept it, particularly as we know of your long-standing interest in these issues, both in your writings and, indeed, the comments and issues you have raised in the House. What I would like to ask to kick off, is what your general views are on the draft Bill and whether, in your opinion, the draft Bill presents a coherent package of measures that would renew the constitution, which of course is its purpose. In asking that question can I also invite you to say anything on the generalities of the issues that you think is important?

Mr Allen: Thank you very much. Can I say that I regard it as a great privilege to address the Committee and, I think, be the only Member of the Commons to do so.

Q689 Chairman: Can I interrupt you immediately to say that Members have declared interests relevant to this inquiry and they are available today and on the Committee’s website.

Mr Allen: Very important, and I am sure you all have a very strong interest to declare in making our society more democratic. I guess, probably, my history starts even before becoming a Member of Parliament, in addition to that I was appointed by John Smith to look at constitutional and democratic reform a long, long time ago in the then Shadow Home Secretary, Tony Blair’s, team, and I have had a very strong interest ever since. Pre-legislative scrutiny, incidentally, has been one of the things that I have campaigned for for 20 years, so I am absolutely delighted to be in front of this Committee for that reason as well. Also, I think timing is very important on these things. You only really get fundamental change when there is a change at the top; either when there is a change of party in control or when there is a change of personnel at Number 10 Downing Street, and of course that has happened in the not-too-distant past, and it is possible that it could happen after a General Election. So there is a tremendous opportunity for this Committee to look at some quite radical change and, if I may say so, I think probably there may be a case to be brought by the Trade Descriptions Act if we are talking about constitutional renewal in the very narrow confines that it is laid out in the White Paper. The Green Paper gave a little more scope, and I would hope that the Committee would take the chance to push at the boundaries and actually come forward with a wider analysis, quite frankly: one that does examine the role of our democracy and how we can push it out; one that has a vision for the future of our country as well as, no doubt, the vitally important things of whether someone can camp in a tent on Parliament Square; to be actually very ambitious and examine why our country does not have an effective separation of powers (where that leaves us), and ensure that a number of issues that are missing from the consideration currently are considered. That creative role, I think, is one that those of us who have been with pre-legislative scrutiny right from it being a concept to reality have thought that pre-leg scrutiny should be doing. What is missing? I think some very big things are missing: a pathway towards the possibility of a written constitution for the United Kingdom; a possibility of genuinely independent local government, which is commonplace in most Western democracies but not in the UK; the whole question of the tremendous over-centralisation which has been the hallmark of governments of all colours over the last 30 years, possibly even (though even I tremor at this one) our relationship with Europe and how that might be better defined, and the wider view on prerogative powers. There is mention of some prerogative powers, for example, in respect of the appointment of the Prime Minister, but I think there is a much broader area that can be delved into effectivity, and the national debate that was called for in the original Governance of Britain document could be inspired, I hope, by this Committee. A year ago, those of us who care about democratic renewal were excited in a way that we have not been for ten years; a new Prime Minister had come into office and he chose, when he could have spoken about global warming or any other very important issue, to make his first speech to the House of Commons on the question of democratic renewal. As an internal Labour Party matter, he also only made one commitment in his campaign to become the Leader of the Labour Party, and that was a commitment to legislate on democratic renewal. So I think all of us thought that this was a great new beginning and, whatever our differences, we could actually work together to give a new basis of democratic consensus that could last, perhaps, for a hundred years in our country. I think I would be fair to say that perhaps our expectations either were raised too high or that those expectations have not yet been met. Hopefully, this Committee will be one of the instruments by which we can push that agenda forward. Very specifically, of the evidence that I have put forward to Members of the Committee, the most important thing is the establishment of some form of process which takes your work on when you have finished; that you do not pack up and leave it—that there is a legacy. That legacy, I would suggest, would best be some form of constitutional commission that I would ask that you consider proposing, to look at all those big issues, all those large visionary aspects of democratic renewal which, sadly, are not really touched upon in the White Paper that the
Government has put forward. There is a number of other specific points I could make, Chairman, but perhaps I could conclude my opening remarks there. **Chairman:** It may well be that you will be asked questions on a number of specifics.

**Q690 Lord Tyler:** Before I come to my specific question, can I take it from what you have just said that you would concur with the summary of the Commons Justice Select Committee as follows: “The draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister; it gives greater power to the Executive; and it does not sufficiently increase transparency”? Is that a fair summary, do you think?

**Mr Allen:** I think that is an excellent summary, but it is not necessarily the conclusion of the debate. I hope that Members here realise their own strength and the extensive ability that pre-legislative scrutiny has to actually open up the debate in the way that many of us who are democratic reformers would like to see.

**Q691 Lord Tyler:** In your evidence you give a lot of support to the idea of a statutory solution in a number of fields. You refer to the need to make the process justiciable. What do you see as the benefit of justiciability, and do you have concerns about then the legal liability (for example, in war powers) of those who are serving on our behalf in the Armed Services?

**Mr Allen:** I am a great believer in writing down either what is or what you would like to create in the future, and I think if we continue to operate on the basis of convention—nods and winks—I think the elected element in our democracy is actually weakened. I would rather people know what we are doing in statute law; I would rather that we codified our rights; I would rather that we had in writing, for every school child and Member of Parliament to examine, our own constitution. If we have a constitution let us write it down; let everybody share not only the secret but, actually, the glories of the constitution either that we have or that we could create. Taking something to court is of less concern than actually having it clear. So many of the things in a democracy, particularly when you are talking in the stratosphere of things like a written constitution, are not about the results and outcomes, they are to create the framework. In so many areas in our democracy we do not often know what the framework is; we have to engage in what John Smith called “judicial archaeology”. I think the more we can frame things in statute, the more we can codify things in a written constitution, the clearer the framework for debate will be. Not the answers to all the questions, whether it is on abortion or whether it is on the right to free speech, but the framework, the boxing ring, in which the genuine debate can take place. So I say that is the strength of codification and statutory power rather than, necessarily, that you can run to the nearest judge to referee for you.

**Q692 Lord Tyler:** Do you not think there is a specific risk in relation to the process on war powers if you make the actions of troops in any way subject to legal challenge?

**Mr Allen:** No, because we are not making the actions of troops justiciable, we are making the actions of the Executive justiciable, but making them clear—which is the most important thing. In case there is any misunderstanding, I actually believe in executive power being nimble, flexible and capable of going to war when they see fit. They have to respond appropriately if the nation is under attack, for example. I do not want a debate about that, I do not want us to have a 20-day discussion about that; the Executive have to respond quickly and so they should, but we should know that that is their power and we should also know that to legitimise that action within (I think I said in my remaining orders) 20 days there should be a proper report back to Parliament, and Parliament can then make a decision if it was not involved in the first place in the decision to go to war. On the Iraq example, of course, we did have a discussion before we went to war. So there are many instances where diplomatic pressure is building up, and war is an extension of that diplomatic pressure, and it is possible to debate those issues prior to engagement. However, that is not my standard. My standard is that the Executive have the ability to go to war but then should legitimise it and have a troop deployment ratified by Parliament.

**Q693 Chairman:** You lightly dismiss the potential of servicemen being subject to court orders and the like. How would you avoid it once you have the issue in statute? It is wider than the decisions unless you exempt it by statute itself, is it not? How would you achieve that?

**Mr Allen:** Anyone that would be arraigned under this legislation (and I hope that would never happen) would be the Chief Executive—in our case the Prime Minister—although, of course, you do raise a very important issue there, Chairman, which is about the rights of Members of Parliament in this issue. As someone who was instrumental in organising the rebellion in Parliament on the Iraq war, I attempted to discover what liability I would suffer if I supported an illegal war. Unlike the Government, I was not, as a Member of Parliament, at liberty to hire legal advice. I attempted to do this; I saw the Clerk to the House and I was told this was not possible. So the legislature, when voting for war, does not actually have legal advice of its own. That is a wholly separate point to whether the Government’s legal advice should be in the public domain, and I do not wish to
state a position on that, but I do believe that Members of Parliament should have some form of access to proper legal advice when they are taking decision of that magnitude, which in certain circumstances could lead to those individuals being arraigned before the court if actions were taken which were inappropriate and found not to be legal, ultimately.

Lord Maclean of Rogart: You have said in your introduction, Mr Allen, that you were interested in the wider issues of the prerogative power as being limited and made subject to democratic rule. Do you see the war powers issue as in any way special? Do you think we need a separate statutory provision to deal with war powers from the prerogative powers more generally?

Mr Allen: Since we are where we are I think we can deal with the war powers now, and I would have thought people of goodwill would find a way not to inhibit the Executive but, nonetheless, to have legislative oversight in statute. However, there is a much broader issue about prerogative powers, which are now probably far broader than the ones that led to the Civil War in 1640. They need to be written down. I see that the Government is saying it is actually trying to discover what they all are, and as a backbencher and someone interested in this area I have tried for many years to get a register of prerogative powers, but the key ones I think we know. Probably, above all, we are one of the few countries where our Chief Executive is either not directly elected by the electorate or is not ratified by the legislature. The fact that the appointment of the Prime Minister is still a matter for Royal prerogative, I think, is something that I hope this Committee would at least raise as an issue, if not seek to put a settled solution forward.

Lord Campbell of Alloway: You approach this on the basis I think that we have a written constitution, that the function of this Committee is to move forward away from whatever exists at present, and the separation of powers as it operates is not any good. Then, is this not right, you say that on the business of war you want to have proper advice. I must say, I do not know what on earth you are talking about. There is not such a thing as proper legal advice. All lawyers do their best to give their honest opinion according to their learning and one thing and another, but there is not such a thing as proper legal advice which is in any sense certain, and the only way we will get what you call “proper legal advice” is from the Attorney General, whose duty it is to try and give proper legal advice. What are you talking about with “proper legal advice” other than the Attorney General?

Chairman: Could we ask you to restrict your answer to that specific point because I know we have to move on to a number of other issues.

Mr Allen: Improper legal advice is probably better than no legal advice at all, which is what I and a large number of parliamentary colleagues had in the run-up to the Iraq war. I think the Attorney General has a role in respect of the executive and I also think there is a very strong argument that the Attorney General’s advice should not be made public. There are other arguments, as you know, about it being made public. But I would have thought Members of Parliament acting in their legislative capacity, acting as elected representatives, should be entitled to know, for example, from a credible, independent legal source their legal standing in taking a decision to go to war, to sustain a war, in the very controversial legal standing as surrounded the Iraq war.

Lord Maclean of Rogart: You have given a very positive reason why you prefer statute to resolution, but do you see any negative reasons why Parliamentary resolutions might not be the appropriate way of dealing with war powers?

Mr Allen: Yes, because we do not have a separation of powers; we have a unitary system and government would, essentially, instruct Parliament, as it did through the Iraq war by leverage upon Members of Parliament, on the way to go. I think if you have something in statute then at least it is quite a problem for governments to unpick that conveniently and in the short-term. Whereas resolutions of the House come and go, a whipped majority can pass and unmake resolutions very conveniently. So something that is, at least, at the first stage of being embedded (that is in statute), I think, is a bulwark against arbitrary executive power, should that ever come to this country.

Chairman: Are you saying you think it would be right to at least have the opportunity for alternative advice?

Mr Allen: I think the Clerk to the House should be in a position to give Members of Parliament who wish it in extraordinary circumstances, such as being on the brink of war, what their personal legal position is as legislators. I do not want to be too dramatic but we have seen leaders and legislators in other countries actually brought before the International Court of Justice having made decisions on war-making and the prosecution of war. So at the time, when there was a lot of debate about the executive’s legal advice, I was actually trying to get independent legal advice for the legislature which would give those Members of Parliament who wanted it some degree of reassurance about whatever path they chose in voting for or against a war that many people were saying was actually illegal.
Q698 Lord Plant of Highfield: Could I just take you into the kind of thicket of the relationship between executive discretion and parliamentary accountability, and you have already alluded to this. You have a number of proposals to make, and some of the people who have given and sent in evidence have supported some of the ideas you have, and I wonder if you could just elaborate on this general relationship between discretion and accountability. You say first of all that the Prime Minister should not have full control over the timing of any vote and the information which is made available to Parliament. You have talked about the need for Parliament to regularly renew a mandate for war, to prevent mission creep, and you have given evidence to us about retrospective agreement to military action when a decision has had to be taken quickly, and you have also recommended a scrutiny committee to have oversight of military activity. As I am sure you know, the Government seems to be rather strongly opposed to all of these proposals, so without going into one in any great detail, would you like to talk a little more about how you see the relationship between executive discretion and parliamentary accountability?

Mr Allen: I think we should not forget that on the last serious occasion when troops were deployed, which was the Iraq war, a time of great controversy and of different views, that when this matter came to the House of Commons it did so because of the benevolence of the Government, it did not do so as of right. We could have gone to war, and indeed have gone to war, purely on executive fiat, and there was a great deal of discussion about whether it should go to the House of Commons or not, and some have argued it only went to the House of Commons as a way of management control, let us choose the right time so we can get the result we want. We can all have different views about that but certainly it came to the House of Commons not because the House of Commons had any rights in the matter whatsoever but because Government, since Government controls the agenda of the House of Commons from dawn to dusk, made a decision that it felt it was appropriate for its purposes to put something to the House of Commons. I do not think that is sustainable in a democracy, there has to be a better way. It is not a winner-take-all, that Parliament will therefore be able to have oversight over operational matters or send individual soldiers to court or anything like that, this is about the spirit of a democracy finding form, and finding a form where people of goodwill in a very difficult position can actually find a means of reconciling views when the nation takes the most important decision of all, which is to put its armed services in the firing line. I think therefore it is incumbent upon all of us to find a way forward which meets all those obligations.

Q699 Lord Williamson of Horton: I wonder if I can ask about treaties, not strictly war treaties but other treaties of all kinds. Of course the draft Bill gives statutory effect to the Ponsonby Rule but it does not significantly alter the current mechanisms for parliamentary scrutiny. How do you think the Government’s proposals on treaties could be improved and how could Parliament be more effective in the scrutiny of treaties? I just add that I am aware of course—I think it is in some of your work—that some things are covered by important decisions in, for example, memorandums of understanding which are not classified as treaties, such as putting ballistic missiles in a country, so there are subsidiary points of considerable importance, but basically how do you think the Government’s proposals could be improved?

Mr Allen: I think these are points of interest and I will gladly answer that question, but in terms of the broadest context set by the Government over a year ago, that we wanted to invigorate our democracy, clarify the role of Government both central and local, and rebalance the power between Parliament and Government in order that Parliament can hold Government better to account, this is relatively small beer. I hope that the bigger brewery will be examined by the Committee in its recommendations. On treaty-making specifically, I think there should be debates and votes on treaties. These are said to be extremely important events that bridge different countries, why can the legislature not have a serious impact into this process? Why can there not be interaction at the front end of discussions rather than merely, and often nominally, ratifying things once they have been decided? Other countries, particularly European countries, have found ways of doing this and their civilisations have not collapsed as we know them. Probably finally, the point you made about what is a treaty, currently a definition of a treaty is drawn very, very narrowly and does exclude memoranda, it does exclude non-binding arrangements and declarations. So you can come back from a summer recess as a Member of Parliament and find seven or eight treaties have been ratified in your absence, some of some significance, and that the days that they have lain on the Order Paper have been taken into account as holiday days. That was certainly the case when I last looked seriously at this about ten years ago, and that really is the exact opposite of proper scrutiny and accountability. Gladstone, as in so many areas, got it right, when he said the role of Parliament is not to run the country but it is to hold to account those who do, and I think on treaty-making we have singularly and emphatically failed to live up to that democratic promise.

Q700 Lord Armstrong of Ilminster: I now turn to the Civil Service and perhaps you will understand why I have a special interest in that. You have suggested I think that there should be parliamentary scrutiny of
the Civil Service Codes which are going to be provided for under the proposals in the draft Bill. The draft Bill would require the Codes to be laid before Parliament, they would then be able to be scrutinised by the PASC, of their own mere motion as it were, do you think we should require more than that in terms of some kind of parliamentary approval, or is it sufficient from your point of view for there to be the opportunity for scrutiny created by the transparency of the Codes in terms of being laid before Parliament? If I may put the other point about machinery of government changes, do you feel that Prime Ministers should be required to seek parliamentary approval for changes in the machinery of government? It would be fair to say that a number of our witnesses have said that this is essentially a matter for the Prime Minister who has to be able to act very fast, for instance when there is an elected change of government on an election or indeed after any general election, or indeed when there is a major change which he wants to make, and it would be difficult to do it if it had to wait for parliamentary approval.

**Mr Allen:** Again, anyone who has followed anything I have ever written on this stuff realises that I am not trying to constrain the executive. I am trying to empower the legislature so that proper scrutiny, proper transmission of information takes place. This is almost going from democratic renewal into good manners but I think there should be an interaction between the executive and the legislature and the judiciary that is required. The evidence we have been getting is really to the extent that it is a bit too soon to start making changes to the draft Bill are sufficient. Can you help us with what you think should be there?

**Mr Allen:** On the Codes, I would be happy for that spirit to pervade the discussions around the Codes. I have no strong feelings that the Codes must be done in a particular way, but I think it would be a courtesy not least for the House of Commons to be involved in the process in some mutually acceptable way. I think you would argue similarly for the transfer of functions. No one should, in my opinion, stand in the way of the Prime Minister doing reshuffles and ministerial reorganisations, but of course it would be very helpful for there to be a reporting mechanism, a response mechanism, from the House of Commons on what it felt about the reorganisation. Sometimes these things take forever to catch up. I am minded of the Legal Affairs Select Committee which we now have, that has gone through various incarnations. It failed to be one of the select committees created in 1979, I am told, because at the appropriate Cabinet meeting the then Lord Chancellor, Lord Hailsham, coughed when this particular issue was raised and Norman St John Stevas nimbly said, “But of course it won’t apply to legal affairs” in order to get this through at the first Cabinet meeting.

**Q702 Lord Armstrong of Ilminster:** It was before I became Cabinet Secretary, I must tell you! 

**Mr Allen:** So it took a good 20 years I think for that omission to be put right. So I think there are ways in which that level of interaction can take place. I do not necessarily think that needs big, show-stopping bits of legislation to do it; I think it just needs a better and more co-operative, more of a partnership, arrangement between the legislature and the executive.

**Q703 Chairman:** Should there be a select committee to look after the Attorney General?

**Mr Allen:** I do not have any strong feelings on that, Mr Foster. That is one I would want to think about because, again, I would not want the Attorney to feel under direct parliamentary pressure before offering straight legal advice to the executive.

**Q704 Lord Hart of Chilton:** You have said in your evidence under the heading of judicial appointment proposals that you do not think the proposals provide the full overhaul of the relationship between the legislature and the judiciary that is required. The evidence we have been getting is really to the effect that it is a bit too soon to start making changes to the 2005 Act provisions because they have really only been in operation for 18 months. Given this “full overhaul” you obviously do not think the provisions in the draft Bill are sufficient. Can you help us with what you think should be there?

**Mr Allen:** Yes. As someone who wrote some of the early policy papers on the creation of a Ministry of Justice and a number of other areas, the argument that things happen too soon in the British context gives me reason to have a wry smile, frankly. Someone told me that the seating arrangement in the House of Commons came from a king who gave his chapel to the commoners some 900 years ago and the experiment is still under consideration and we are not quite sure whether we are going to make it permanent or not. I think if you are into democratic renewal in a very serious way and have got a broad vision of where you want to go, then I suspect some quite radical changes will be necessary in the relationship between the judiciary and the legislature and the executive. Much as I am delighted to see what we call the Supreme Court taking shape on the other side of Parliament Square, I think we will probably need to go a lot further. But in the short-term having proper scrutiny of judicial appointments done sensibly, done
after consideration and discussion with the judiciary, I think is a step which we need to take in the very near future.

Q705 Martin Linton: Whose side do you take on the issue of the Attorney General? Should the roles be split: political and legal?
Mr Allen: Again, I do not regard this as one of the keystones of the democratic renewal debate frankly. Where the separation of powers needs to be in the UK, the dissolution of a unitary system, where the elected element in a constitution is actually quite weak, where Members of Parliament are actually quite weak in the shake down of political power, where power is vested largely in a Prime Minister who is not directly elected and a media who of course have no affinity with the ballot box at all, I would have thought those were some of the bigger issues. In terms of the Attorney General’s role, I think the Attorney General must maintain impartiality and independence and I would be loathe to bring forward measures which would compromise that.

Q706 Lord Armstrong of Ilminster: Mr Allen, I was intrigued by your last answer but one and your comments on the present configuration of the Chamber of the House of Commons being as it has been for the last, I think you said, 900 years and I am not going to quarrel with that.
Mr Allen: Probably an exaggeration.
Lord Tyler: 450!

Q707 Lord Armstrong of Ilminster: Are you suggesting you would like to see a semi-circular chamber as on the continental model?

Mr Allen: I would like to see electronic voting, then we would be able to knock out the lobby walls and you could build back a seat for every Member of Parliament and you could then have a proper exchange of views. I think you have already decided in your own arrangements that you get a much better interaction and better body language than when you are in this exchange of artillery fire which we have in the House of Commons. I have often said that I have never actually participated in a debate in the House of Commons as anyone outside would understand the word “debate” in the English language. I have shot volleys across to the Opposition and had custard pies come back in the other direction, but not actually had an interaction and a conversation as we are doing here. I think we let down the electorate, and that is why the forum of British politics has moved from the Chamber of the House to the studios of the Today programme and Newsnight. I think this pre-legislative committee actually can take some quite serious steps to restore the forum of British politics to this House and take other steps to genuinely hold the executive to account. It is a great prize that you have in front of you, I hope you have the boldness to seize it.

Q708 Chairman: Your support for the Lords procedure is noted although I suppose it has to be tempered with the ending of a session. I think we have got to that point. Can we thank you very much indeed for coming and giving your expertise, uniquely, because a number of colleagues have given their written representations but only you, Graham Allen, did we ask to come along to speak to us and we think that was a very good idea. Thank you very much indeed.
Mr Allen: It has been my privilege, thank you.
TUESDAY 1 JULY 2008

Members present:

Michael Jabez Foster, in the Chair
Armstrong of Ilminster, L Campbell of Alloway, L Gibson of Market Rasen, B
Hart of Chilton, L Maclean of Rogart, L Morgan, L Norton of Louth, L
Plant of Highfield, L Tyler, L
Williamson of Horton, L Mr Alistair Carmichael Mr Christopher Chope
Martin Linton Ian Lucas Fiona Mactaggart Emily Thornberry
Mr Andrew Tyrie Sir George Young

Memorandum by the Lord Chancellor and Secretary of State for Justice (Ev 73)

Thank you for your letter of 20 May 2008 seeking clarification on matters arising out of a memorandum from the House of Lords Delegated Powers and Regulatory Reform Committee (“the DPRR Committee”) on the delegated powers in the draft Bill.

Documents to be Laid Before Parliament

The protocol to be prepared under clause 3 of the draft Bill (duty on the Attorney General to prepare a protocol for running of the prosecution services) will not create directly enforceable rights and obligations in a manner which is analogous to a contract or legislative act. However, clause 3(6) of the draft Bill provides that the Attorney and Directors must “have regard” to any relevant provision of the protocol when carrying out their functions. Thus the Attorney and the Directors must properly take the protocol into account in exercising their functions, but will not be bound to act in accordance with it in each and every case. The Government also draws the attention of the Joint Committee to clauses 4(8)(a), 5(7)(a) and 6(8)(a) which provide that failure by the Director to comply with that duty may be taken into account by the Attorney General in determining whether the Director is unfit to carry out the functions of the office.

The Government agrees with the views that the DPRR Committee has expressed in its correspondence with the Joint Committee that clause 3 should not be regarded as conferring a legislative power on the Attorney General.

Clauses 30, 31 and 33 make provision for codes of conduct for, respectively, the civil service (excluding the diplomatic service), the diplomatic service and special advisers. Those clauses also set out the status of each of those codes—namely: they are to form part of the terms and conditions of service of the civil servants covered by them. This means that the codes form part of the contract of employment of those civil servants and are therefore binding on them. As with clause 3, the Government agrees with the views of the DPRR Committee, that clauses 30, 31 and 33 should not be regarded as conferring legislative power.

Clause 40

You have also asked for clarification on the purpose and intended use of this clause. Clause 40 provides that the Minister for the Civil Service and the Civil Service Commission may make arrangements for the Commission to carry out functions in relation to the civil service in addition to those set out in Part 5 of the Bill. As the Joint Committee has noted, paragraph 177 of the Explanatory Notes explains that clause 40 would permit the Minister for the Civil Service and the Commission to agree that the Commission undertake an investigation or inquiry concerning the civil service. Further information is provided on this possible use of clause 40 in paragraph 183 of the White Paper.

Other examples of how clause 40 may be used follow:

— The power will enable the Commission to continue to undertake its existing role in relation to appointments to the most senior levels of the civil service (the “Top 200”).
Wills Michael, a Member of the House of Commons, Minister of State, Ministry of Justice,

Witnesses: Mr Jack Straw, a Member of the House of Commons, Lord Chancellor and Secretary of State for Justice, and Mr Michael Wills, a Member of the House of Commons, Minister of State, Ministry of Justice, gave evidence.

Q709 Chairman: May I welcome you both to our evidence session this afternoon. As you know, we have been hearing evidence from a number of witnesses on the Draft Constitutional Renewal Bill. In this session we are very keen to know the Government’s view on some of the things we have heard, and indeed the purpose of the proposal. You will no doubt also have heard that a number of witnesses whose statements you may have seen have shown down-played the significance of this Bill. I suppose the first question I would ask is: How does the Government respond to the criticism that the draft Bill contains a number of disparate elements that do not collectively live up to the expectation of its title? I know that the suggestion is that you may like to open with perhaps five minutes of putting it in context. If you could deal with that question during your opening comments, that would be helpful. Before I ask you to do that, we do have to say that Members have declared interests relevant to this inquiry and they are available today and on the committee’s website. Please, Lord Chancellor?

Mr Straw: Chairman, thank you very much for the invitation to Michael Wills and myself to come and give evidence to you. May I also thank you all for your labours. This is a collaborative exercise. It will be a year on Thursday to the day since the publication originally of the Governance of Britain report. I shall be issuing a written ministerial statement and a table of the progress that has been made since then, of which this draft Bill forms a significant but by no means exclusive part. The purpose of this programme, which is this stage of what has been a programme of significant constitutional reform going back to 1997, is to seek to invigorate our democracy, to clarify the role of government, to rebalance power between Parliament and the government; alongside that, although separate from what is in this Bill, to develop a stronger sense of what it means to be British and a British citizen. We look forward very much to the result of your labours because I have never suggested that any part of this process is, as it were, a final event. On your question, Chairman, is this just a disparate collection of changes, well they are certainly a number of separate and discrete changes. That is a self-evident truth. Is the whole greater than the sum of the parts? In my judgment yes, because they do represent a significant clarification and shift in power from the executive to Parliament and other changes as well. I have been reflecting, because obviously I have followed not every last word of the evidence but I have seen a lot of the evidence that has come before your committee, on how this and the other changes we have made may be seen in the future. I have been involved in most of the constitutional changes that have taken place over the last eleven and a half years, not all of them but most. On any one of them, one is capable of saying, “Well it was relatively minor, it did not make much difference”, and so on, but if you add them all together what they do represent is a major change in our constitutional arrangements. I note that, quite separately from any evidence he gave to this committee, Professor Vernon Bogdanor said that all of these changes added up to “a quiet revolution”. I am in favour of quiet revolutions rather than noisy ones because that is the British way, but I think that in time they will be seen in that way. There are certainly—and we can come on to the specifics in a moment—very considerable demands for most, if not all, of the proposals which have been included now in the draft Bill.

Q710 Lord Maclellan of Rogart: Thank you very much, Secretary of State. You said this is not a final event. Does that mean that on a particular provision set out in the draft Bill, which presumably has gone through Cabinet Committee discussion and consideration, you do retain some open-mindedness because there is a gap, a wide gap in some cases, between what was originally put forward in what you described as the Governance of Britain programme and the particular measures as they have emerged. This is being done quite quickly by this committee.
Evidence is being put together quite quickly. Can we assume that there will be an open-mindedness to a raft of different possibilities being discussed during the progress of the legislation through the House?

Mr Straw: Chairman, “yes” is my answer to Lord Maclennan. I have to deal with a large number of Bills, both in draft and sometimes without there being a draft, but in every case I have sought to take account of views of select committees of each House, both Houses and on the Floor of the House. Famously, the Freedom of Information Act was a very different animal when it received Royal Assent from how it went in, and that was as a direct result of Parliament acting to change it, but there are plenty of other examples. Everybody around this table is busy. I would be wasting the time of colleagues round this table if I and my colleagues in Cabinet and Michael were not going to take any notice of what you are suggesting. I have never suggested for a second that we have discovered the last word. It is simply not the case. Many of these things involve quite fine measures of judgment as well. I look forward to your views.

Q711 Lord Maclennan of Rogart: You put it forward that this was to be viewed in the context of other reforms that have taken place. In this particular Bill, what substantial changes do you see being made in the balance between the executive and Parliament?

Mr Straw: I see quite a number. For example, on war powers, which we may wish to get on to. I, as Foreign Secretary when it became apparent that we might go to war, felt, along with our late colleague Robin Cook, who was at that stage Leader of the House, that the existing convention, which was that Parliament would obviously be invited to debate a decision to go to war but would not do so on a substantive resolution, was wholly inadequate. So we got the specific and ad hoc agreement of the Prime Minister of the day and Cabinet colleagues that decisions, both in terms of our overall negotiating position in the United Nations and directly with Iraq, should be determined by vote of the House of Commons with the very extensive debate in the House of Commons with the very extensive debate in the House of Lords. And then that the decision as to whether or not to enter into armed conflict should itself be endorsed, in this case in advance, by the House of Commons as it happened to, be but not before the most extensive and electrifying debate on 18 March 2003. I felt that there was a very serious gap in the powers of Parliament over the decision to go to war, that the previous arrangements were inadequate. It has been a personal commitment of mine to ensure that the powers of the elected House should be formalised. There is then a debate about how you do that and whether essentially you follow

the proposals of their Lordships’ Constitution Committee for a resolution approach or the Public Administration Select Committee of the Commons for a more statutory approach. We came down in favour, so far, of the approach by resolution. If you look at, I think it is Annex A of the March White Paper, you see that is very specific. There is provision in respect of treaties. Some of the most contentious treaties are, in any event, subject to parliamentary process because they happen to be European Union treaties, but others are not. I just thought when I found out about the Ponsonby Rule—and it is quite difficult to find out about them actually—and I discovered the Ponsonby Rule when I had a submission about them as Foreign Secretary that they were quaint, to say the least, because Parliament was told about these treaties; it had 21 days to object. But even were Parliament under the Ponsonby Rule to vote against a treaty, it could still be ratified. I believed that to be unacceptable. I still believe it to be unacceptable. Happily, my colleagues have joined me in that. There are some provisions in relation to the Civil Service where we are proposing to put the Civil Service on a statutory basis. With war powers and treaties we are modifying the prerogative; with the Civil Service we are replacing the prerogative basis of the Civil Service with an entirely statutory basis. I think that is very important. Then there is the area of the Attorney General, which I know has been the subject of quite a lot of debate. I think to have a proper statutory framework for the Attorney to remove his or her powers in respect of directions, apart from national security, and to have frankly a more modern approach to the relationship between the Attorney and the prosecuting authorities through the mechanisms that we propose like the protocol is really important. There has never been an occasion up to now where Parliament has had a proper say over a broad prosecuting policy. There will be, should this Bill go through, under the arrangements for the protocol to have to go before both Houses. Those are four examples. I could offer you many more.

Q712 Lord Tyler: You reminded us just now that a year ago the Governance of Britain statement and then the Green Paper gave as its primary objective the invigoration of our democracy. Would you accept that some of the proposals you have outlined in recent weeks which are not in the draft Bill, for example on party funding, on individual registration, on weekend voting—and I would not expect you to include Lords reform or indeed voting reform—those three at least could be said to be much more likely to reinvigorate democracy than some of what our critics who have been in this room before have described as a rather rag-bag of proposals? Would you therefore
consider the possibility that when the Bill rather than the draft Bill comes forward after the Queen’s Speech in December that you could actually make it rather more aligned with that primary objective?

Mr Straw: I think it is a matter of personal choice as to which you regard as more important. The party funding changes are significant, but because we were not able to reach agreement with the other parties, they do not go as far as, say, Hayden Phillips proposed. I certainly stand by them and I am always ready to debate them. I think the much more substantive constitutional change in respect of election arrangements was in the 2000 Act. This particular Bill will build on those arrangements. On individual registration, I think it is important; it is also very important that if and when it is introduced, it is introduced carefully and with adequate financial and administrative arrangements so that it does not lead to under-registration because that would produce a result the reverse of reinvigorating our democracy. I am looking at that very carefully. On House of Lords reform, certainly House of Lords reform is unquestionably a major constitutional change. This has been the subject of considerable debate inside the cross-party group that I have been chairing, on which Lord Williamson sat for quite a long period. I hope that it is of interest when it is published.

Q713 Lord Tyler: And weekend voting?

Mr Straw: I will ask Mr Wills to come in on weekend voting.

Mr Wills: As you know, we published a proposal on weekend voting. I think it will undoubtedly produce very interesting debate. It is a difficult debate to have. There are arguments for it; there are arguments against it in terms of cost and how we deal with people of a religious belief. I think it will also bring into play other ways in which people might want to suggest that we can increase the legitimacy of our election process. We do have a problem that there is a 60% or less turnout in general elections; and we have turnouts in local elections of 20% and 30%. Inevitably, that calls into question the legitimacy of our election system, and that is not healthy for our democracy. I think it is a profound debate that we can have. If I could just add one other point about the Bill, if I may, I think it is a very powerful statement that we believe as a government that this process of accretion of power to the executive, which has been well documented for decades now, actually has gone too far and Parliament needs to reassert its proper role in our constitutional arrangements. When you take all these measures together, that is the fundamental message that we are trying to make here. I think it is a profoundly important one.

Q714 Sir George Young: Could I approach Lord Tyler’s question from a slightly different angle—what ought to be in the Bill. You yourself, Lord Chancellor, said that it contains separate and discrete provisions, which is a politer way of what Graham Allen told us last week, which is that it was a hotch-potch. The question I want to put to you, and you may want to draw on your experience as a former Leader of the House with a nose for business management, is: if, for the sake of argument, someone was to say that parts of the Bill, for example the Civil Service section, are well advanced and have been around for some time in a form in which they could make progress, whereas other parts of the Bill, for example judicial appointments, are not nearly so mature, then it might actually make sense and Parliament might be able to address the issue better if the Bill was disaggregated into component parts rather than put forward as a jumble, as we have discovered on this committee, covering a huge frontier of constitutional issues, some of which bear very little relationship to each other?

Mr Straw: If I may say, Sir George, I like your description of this Bill covering a huge frontier of constitutional issues. I would be very happy to adopt that in place of Mr Allen’s rather pejorative description. So that accepted, good man though he is, there is a common thread, as Michael was rather more eloquently than me suggesting, between all of this, which is about change in the nature of our constitutional relationships and the relationships between the executive, Parliament and the citizen. Of course it would possible, perfectly possible as a matter of parliamentary procedure, to put Part 1, which is about demonstrations in the vicinity of Parliament, into the annual Criminal Justice measure, Part 2 into a law reform measure, ditto Part 3, courts and tribunals. On ratification of treaties there is a big problem. I wanted to do something about this when I was Foreign Secretary, but trying to get a legislative slot when you are Foreign Secretary is very difficult indeed because the Foreign Office is not geared up to do legislation, number one, and, number two, you are often abroad, so it is tricky. That would be a problem. On the Civil Service, of course you could have a separate Civil Service Bill if you wanted but if you did that you would end up putting off these things for further years and years and years. No-one can argue, I think, by the time this is introduced that it has not been the subject of effective scrutiny. The fact of your committee, Chairman, I think makes my point. If I may say so, I have looked carefully because I know that not least Lord Falconer had a slight different of emphasis from me in respect of Part 3. I am happy to take account of what he said and what the committee finally says, but also perhaps more importantly to answer questions on why I think these provisions are good and why I think they would work.
Q715 Lord Norton of Louth: When this Bill was envisaged last year in the draft legislative programme for this session, it was styled the Constitutional Reform Bill, but now it has emerged as a Constitutional Renewal Bill. Clearly titles are important that they have meaning. I am really wondering why it is termed “renewal”. If you take your opening comments, they may relate to constitutional change but it is not clear there is a clear theme of renewable in terms of our constitutional arrangements. Is this just an attempt to hide the disparate nature of the provisions or is there a clear, if you like, philosophical base to the Measure that leads to that title?

Mr Straw: There is a philosophical base to the Measure, and I have tried to describe that, Lord Norton, but I am not going to die in a ditch for the use of “renewal” over “reform”. I was just asking Mr Wills if he remembers why we said renewal and not reform, and the answer, it now comes back to me, was much more prosaic; we were anxious not to cause confusion with the 2005 Act, that was all. But a rose by any other name I think would—

Q716 Lord Norton of Louth: There is plenty of precedent for Bills having the same name as earlier ones, whether it is the Parliament Act or whatever, and it makes more sense to—

Mr Straw: I saw this on the briefing. There is some elaborate answer to this which I could offer you but that is the truth.

Mr Wills: If I may, I think there is a difference and I would characterise it like this. Constitutional reform is continuing. Our constitution continues to evolve; all governments reform the constitution in some way or another. I think what we wanted to do with this Bill was to signal, as it were, a step-change. We have started talking about the Human Rights Bill and the Bill of Rights and Responsibilities and the British statement of values, which is a separate part of this programme. Could I suggest that.

Q717 Lord Norton of Louth: If you take the modest changes to the position of the Attorney General, or who has responsibility for health check on judges, they are minor recalibration; there is nothing fundamental in terms that would lead to say that this is renewing the part of the constitution as opposed to making particular changes.

Mr Straw: The health checks, of course, is a very minor part; there is no way one could adorn that particular change with the title a constitutional measure; it is just an administrative tidying up. In respect of the Attorney I do not accept your description, there are arguments for going further and I would like to share them, but I still believe that the changes that are being proposed in the White Paper in March and the Bill are significant for the reasons I have suggested.

Mr Wills: And I think the Attorney herself suggested that.

Q718 Mr Carmichael: The one thing that really struck me when you were giving the list of merits of the Bill was I think that you used the term “a sense of Britishness”.

Mr Straw: I did.

Q719 Mr Carmichael: This is something which will doubtless be well debated in the streets of Glasgow East in the weeks to come. I look at this Bill and I see the Ponsonby Rule and I see the use of prerogative powers and the war-making powers being given to Parliament. I do not see an awful lot here that is going to have any real resonance in that debate about Britishness.

Mr Straw: I hesitated when I was going through that list of four because the specific proposals in respect of bringing out the great sense of Britishness are actually to do with the Bill of Rights and Responsibilities and the British statement of values, which is a separate part of this programme. Could I say this, Mr Carmichael, about whether this is going to be on the lips of everybody in Glasgow in the next four weeks? Probably not, nor in Blackburn, more importantly, much as I love Glasgow. What is interesting about these constitutional changes is that once they have come in and bedded down, they do make a difference to people. In my constituency surgeries, people do now come and say they want to use their rights under the Freedom of Information Act. No-one spoke about it there, apart from me in my open air meetings in the town centre, and when I did start talking about the Human Rights Bill and Freedom of Information Bill people’s eyes used to glaze over and they would go into Marks and Spencer. Now, they do say they want to make use of their rights under the Freedom of Information Act, and they do, because they have very significant rights in respect of the local public authorities, or for
example, increasingly, not just crooks but good, honest citizens have a sense of their rights under the Human Rights Act. By God, if you suddenly decided to take away people’s rights under the Freedom of Information Act or the Human Rights Act, people would certainly be screaming. Just because not every last detail of procedure in the House is followed publicly does not mean it will not turn out to be important.

Q720 Mr Carmichael: But the Human of Rights Act and the Freedom of Information Act were undeniably significant and substantial pieces of legislation. What here in this Bill is going to strike a resonance in the same way; what is going to be the thing that your constituents and my constituents are going to come to us and say, “This is what we want to use”?

Mr Straw: War powers: there is no greater and more significant issue than that. Not just in Blackburn or Glasgow but across the country people were very exercised on both sides of the argument in 2003 and indeed still are. One of the issues there was who was going to decide. One of the issues which has arisen subsequently is how much information should Parliament have; should Parliament have the same legal advice as is available to the Prime Minister and the Cabinet? These are really important issues, which we are seeking to pin down by the proposals here or any alternative to them. They are of huge importance. In respect of treaties, a large number of treaties are relatively minor in scope and no-one is suggesting that parliamentary time is going to be devoted to those. I personally happen to think that what we sign up to in treaties, even if they do not exercise on both sides of the argument in 2003 and indeed still are. One of the issues there was who was going to decide. One of the issues which has arisen subsequently is how much information should Parliament have; should Parliament have the same legal advice as is available to the Prime Minister and the Cabinet? These are really important issues, which we are seeking to pin down by the proposals here or any alternative to them. They are of huge importance. In respect of treaties, a large number of treaties are relatively minor in scope and no-one is suggesting that parliamentary time is going to be devoted to those. I personally happen to think that what we sign up to in treaties, even if they do not become part of our domestic law to which we are then committed, our commitment is longer lasting in practice than in respect of any domestic legislation because it is so difficult to gain international agreement for anything other than a bilateral treaty; and it is even more difficult to gain international agreement to end that treaty unless it has clauses within it which allow for its own expiry. Getting across to the public that, yes, their re-elected representatives and the people down this end will not only have a say but they will have a decisive say in terms of the House of Commons over treaties is very important. On the Civil Service, at one level it is not going to excite people but people want to know who controls the Civil Service, how it is controlled. I look across at Lord Armstrong and was reflecting on the fact that in the 1970s great scripts were written at the time about how the Civil Service was bypassing Parliament; indeed, that gave rise to the whole Yes Minister series of scripts to our greater entertainment. Life has moved on a bit since then and these days the demons are special advisers or the No. 10 machine or something like that. Anyway, there are always demons to be found, but there was a serious issue there. The proposal for the Civil Service to be put on a statutory footing has been around for many years. We are now doing it. Is that right? I defer?

Mr Wills: Yes. I think it was proposed under Northcote-Trevelyn originally. It was finally completed. Could I add something in relation to this? May I suggest that it is not just the outcomes of these reforms that are important but also the processes that are put in place. I was reminded when I was listening to your question, Mr Carmichael, just now about the select committees. Exactly the same arguments that you have used against this Bill probably could have been used against the introduction of select committees. I do not think anyone looking back on the history of select committees would think they have been anything other than an admirable innovation and have actually directly benefited all of our constituents by subjecting Ministers in successive governments to vigorous and rigorous scrutiny and affecting the way policy has been developed. A lot of these mechanisms, as the Lord Chancellor has just set out, will in time in relation to events that we cannot yet foresee also benefit people precisely by placing Parliament much more centrally in the democratic process than it is at the moment. That, we think, is a good thing.

Chairman: We have an hour left to ask lots of detailed questions. I am going to ask Lord Campbell, then Andrew Tyrie and then Lord Morgan to ask their general questions and then we will come to some detail, please.

Q721 Lord Campbell of Alloway: Sir, it was, was it not, under your aegis when you were appointed Lord Chancellor and Minister of State that these disparate elements were collected and eventually appeared in this Bill? That is right, is it not?

Mr Straw: Yes.

Q722 Lord Campbell of Alloway: Is that right?

Mr Straw: Whether we call them disparate is another matter, but discrete. They are certainly put in the Bill.

Q723 Lord Campbell of Alloway: I shall not entertain a nebulous repetitive conversation. If I may, time is short, I will ask you some questions and if you are kind enough to answer them, I would be grateful. The purpose for which you prepared this, if I have it written down right, was to shift power from the centre to Parliament and achieve a measured change in our constitution. Is that the basic purpose of this Bill?

Mr Straw: It is one of the purposes, my Lord, yes.

Q724 Lord Campbell of Alloway: Thank you. This is something, you said, that may be seen from the future.
Mr Straw: Yes. I think Kierkegaard said that whilst life has to be lived forward, it can only be understood backwards.

Q725 Lord Campbell of Alloway: Which specific provision in this Bill shifts the power—and I am not using the centre, it is the executive and by the centre you mean the executive, do you not—from the executive to Parliament? Which specific provision of the Bill does it?

Mr Straw: Chairman, I have already sought to answer those questions, but briefly those in respect of treaties, the Civil Service, war powers, some in respect of the Attorney General and some others.

Q726 Lord Campbell of Alloway: Which provision is that in the Bill?

Mr Straw: I can give you the sections, or the clauses.

Q727 Lord Campbell of Alloway: Oh, I see, that section. You mentioned war powers twice. Is that an important consideration in the Bill for you in this context?

Mr Straw: It is in the White Paper. It is not currently in the Bill. It could be in the Bill should your committee and Parliament decide that it wanted a statutory basis for war powers rather than the current proposals.

Q728 Lord Campbell of Alloway: So for the purpose of the Bill we can ignore war powers? Mr Straw: No. I do not think you can ignore war powers and there will be a debate I think at Second Reading, and this has already been the subject of consideration by a parliamentary committee, about whether the method we are proposing in respect of war powers, which is to do it by formal resolution of each House, is the appropriate one or whether the proposals in the Public Administration Select Committee for there to be what was called a hybrid arrangement with a broad statutory framework then underpinned by resolution would be better or worse.

Lord Campbell of Alloway: The explanation, sir, again becomes totally nebulous. Where is a provision in the Bill which concerns war powers?

Chairman: I think we probably have had the answer to that, which is that it is in the White Paper.

Lord Campbell of Alloway: It is not in the Bill.

Q729 Chairman: Lord Chancellor, in answer to Lord Campbell, you are saying that if our committee thought that it was a good idea that it should be in the Bill, you would be happy to look at that?

Mr Straw: Of course, and it is perfectly possible because it would be in the scope for members of either House to move that a new part be created in the Bill to provide a statutory framework for war powers.

Chairman: Is that all right, Lord Campbell? Thank you very much.

Q730 Mr Tyrie: There are two quick things: first of all, I had not understood at all why if this Bill were disaggregated into more logical parts it would mean, I think you words were, putting off all the other things—if we were for example to put a Civil Service Bill through—for “years and years”. Why is that? Why can you not introduce discrete Bills for those things that are ready?

Mr Straw: In theory, Mr Tyrie, you can of course; in practice and in my experience it is much more difficult to get parliamentary time and priority for a series of Bills than it is for one Bill. I think that has been a timeless verity. I also think it makes sense, for reasons that Mr Wills has spelt out, since these are parts of a whole and they arose from not separate consideration in different departments but as a result of very concentrated effort about how we did shift power from the executive to Parliament, it is worth putting them in a single Bill.

Q731 Mr Tyrie: They are only part of the whole in a sense that anything to which the word “constitution” can be attached in the vaguest possible way can be linked together. There is very little to connect demonstrations outside Parliament to a Civil Service Act.

Mr Straw: I do not dispute that particular point but I think there is a lot to connect the others as a matter of fact.

Q732 Mr Tyrie: Why do you think it is that Lord Falconer went out of his way not just to say he disagreed a little bit but to take the diametrically opposite view? He said that other than the Civil Service provisions there was next to nothing of significance in this Bill, which he described as a sort of constitutional retreat Bill.

Mr Straw: You will have to ask him why he decided that. I have asked him privately but I am not going into that.

Q733 Chairman: Has he given you an answer you can share with us?

Mr Straw: No.

Q734 Mr Tyrie: Why do you not give us an answer in general terms? You do not have to quote him.

Mr Straw: I am responsible for my views. This is why I disagree with him. I am happy to explain but I think that he is wrong in proposing that the Lord Chancellor of the day should hang on to certain powers in respect of judicial appointments and he is wrong, literally wrong, about the current operation of the Constitutional Reform Act 2005 in believing that the powers in that Act currently provide the
Lord Chancellor of the day with a power to send back appointments if they are not sufficiently diverse; there may simply be an error by him. In a sense he is on the reactionary side there; I am happy to be in the other camp. I also understood him not to be in favour of any significant change as to how decisions on war were determined. Again, by introducing the word in a non-pejorative way, he is very much in the conservative camp on that, whereas I am in a different camp.

Q735 Mr Tyrie: It is almost unprecedented, is it not, while the same party is governing for two Lord Chancellors to have such diametrically opposite views on such major issues? Can you think of any other examples?
Mr Straw: I will have a good think.

Q736 Chairman: I am not sure it matters anyway, not in terms of consideration of the Bill. Is that good enough?
Mr Straw: On the Lord Chancellor, for my prep I will think of examples.

Q737 Lord Morgan: One of the issues that has arisen is whether this recalibration that you define, which is very important, so speak to is more apparent than real. One issue where it has arisen is about for example war powers. How much of a change is this when the Prime Minister can define exceptional circumstances, when the information perhaps given to Parliament forming a view might be very limited and not revealed to them, and whether the timing of a vote also might take place? Does this not perhaps seem like an area where the Royal Prerogative, instead of being given a decent Christian or un-Christian burial, is in fact alive and well?
Mr Straw: My Lord, personally I do not think so. There is certainly a case for the resolution to be strengthened, or indeed for the matter to be placed on a statutory basis, and there are fine arguments on this. Having been involved right at the heart of decisions about two wars in the last seven years, it is my strong belief that not necessarily the outcome of the decision, because I personally happen to think both were justified and I am not in any sense resiling from that, but the process leading up to those decisions and the level of public confidence in them would have been different. With Afghanistan, the decision in any event to enter into armed conflict there was principally based on a United Nations Security Council Chapter VII resolution, which was slightly different in a very specific circumstance. There were debates in the House of Commons; there was not much argument between the parties. Nonetheless, I think it would have been good, even though there was a broad consensus, if Parliament had had the information proposed here. In respect of Iraq, as I say, Robin Cook and I managed to persuade our colleagues as it were to have a bespoke equivalent of what is in this resolution, but I regret the endless arguments about the amount of detail that was provided in respect of legal advice, for example. My decisions at the time were exactly like Lord Goldsmith’s and the then Prime Minister’s but with the benefit of hindsight I think we could and should have provided much more information to the Commons. Could I just make this point about secrecy in emergency: it may be that the view is taken that this resolution, which is down in Annex A of the White Paper in March, does not quite go far enough, but even were this to be done, a Prime Minister would ignore this only at his or her peril. The truth about secret operations and emergency operations is that they are self-defined. It would have been impossible for a Prime Minister to say, “We are going to go to war in Iraq, but by the way, it is a secret”. We were acting out this drama about whether we were going to go to war in public, not least in the United Nations Security Council. Most conflicts in which we have been involved have been preceded by many days, weeks, or months of argument and debate. Sometimes—Suez is the best and in a sense the worst example—that is not the case. If there were a process which would perhaps ensure that were a Prime Minister ever going to go down that route again they had second thoughts, it would be a good thing.

Q738 Lord Morgan: You say, and I understand the point, that issues are self-defined. I wonder if that is true. Do not issues change for example with what is called mission creep? Therefore, is there not a question that Parliament should have retrospective rights to approve measures?
Mr Straw: The issue of retrospection when a specific operation has been launched I think is very difficult because if you then have put your troops in harm’s way, to have questions raised about not only whether they are acting lawfully but whether they are acting with the backing of Parliament is really difficult. I would worry about that a great deal. On the other hand, I accept that you can start in one way and then months down the road say, after renewal of a mandate within NATO or in the Security Council, that what the British forces are involved in is different. My own view about this is that if there is a decision point for the Government about whether to continue, then there would also need to be a decision point for Parliament.
Q739 Lord Armstrong of Ilminster: Do you think that our attitude to this is over-dominated by Iraq? Are we thinking enough about other things that could happen, other conflict situations that can arise? My own experience of course was with the Falklands, which was a very different affair and came out of the blue sky, as it were. I just wonder whether the Iraq experience is colouring the proposal on this to too great an extent.

Mr Straw: I think, my Lord, that Iraq certainly has coloured my judgment at this stage. The answer to that is “yes”. I was in the House when the Falklands War arose, and I supported it. I think we were absolutely right. I thought that on 2 April 1982 and I still think we were right. Your Lordship will recall that the emergency debate, which was on a motion for the Adjournment, only lasted three hours from recollection.

Q740 Lord Armstrong of Ilminster: On a Saturday morning.

Mr Straw: Indeed, on a Saturday morning but since we were all there, there was no reason why it could not go into Saturday afternoon. There was also no reason why the House could not have had a note from the Attorney saying whether it was lawful—it plainly was and there was not any doubt about that—and there have been a resolution about it, which would have been passed. The outcome would have been the same, for sure, but I think the process would have been better. Although now in retrospect people say the Falklands was fine, you will recall even more acutely than me, because you were right in the middle of it in a way that Opposition backbenchers were not, that it was by no means certain that we were going to win. There was quite a lot of controversy about aspects of it right up to the military victory and I think a clear resolution would have been a good idea.

Q741 Mr Chope: How does what the Lord Chancellor has just said fit in with what is happening in Afghanistan where originally when we went in we were told that it was possible that there would not be any British fatalities at all and now we have well over 100 and we are engaged in what most people regard as a war? Is that something of which the Lord Chancellor thinks Parliament should have been involved in expressly approving?

Mr Straw: First of all, as I have said, Mr Chope, the decision to become engaged in Afghanistan arose and continues to arise from specific United Nations Security Council Chapter VII resolutions, so it is slightly different. Although of course I accept the resolution whilst it allows us to take part, it does not require us to take part. Had, say, this resolution approach been already agreed and still more of a statutory basis had been determined, then, yes, there would have had to have been a debate on a substantive motion in respect of Afghanistan, as there was in respect of Iraq—full stop. The process would have been different.

Chairman: We probably do need to go on to the more specific questions.

Q742 Lord Williamson of Horton: As you know, Lord Chancellor, this joint committee has been subject to a bit of competition from the Public Administration Select Committee?

Mr Straw: I am sorry, I genuinely was not aware of that.

Q743 Lord Williamson of Horton: They have published their report now. In that they concluded that unintended consequence of placing prerogative powers on the statute book. They said it would become subject to scrutiny, and I quote “not by Parliament or the people but by the courts”. Would you like to comment on that?

Mr Straw: Yes. I think they are wrong about that, with the usual respect to such an august select committee and good friends on both sides who sit on it, because what is behind that is an implication that the courts only judicially review executive acts if they are based on statute rather than the prerogative, and that to my certain knowledge is not the case. Decisions by, for example the Lord Chancellor, or in this case the Secretary of State for Justice—same person—under the Royal Prerogative of Mercy, which is literally a Royal Prerogative, are and have been judicially reviewable. What the courts look at is not the source of the power, but the fact of the power. In some ways, if you have precision in statute, as opposed to imprecision in prerogative, the courts are less likely to try to second-guess what the executive is doing, provided the decisions have been made fairly.

Chairman: We are going to move on to war powers. Part of it has been dealt with, but Lord Armstrong will carry on with this.

Q744 Lord Armstrong of Ilminster: You say part of this has been dealt with but I do not think we have touched this afternoon on a point that was made to us in evidence that changes here could increase the potential legal risk to individual soldiers and make them more liable to be subject to legal sanctions or criticism or legal prosecution. I wonder what is your assessment of the risk that individual soldiers could face, whether it is under a statutory route or under a resolution as the Government proposes.

Mr Straw: I do not think there is any basis for that concern, I really do not. It can be dealt with. If the approach adopted is one by resolution, then there is no change in the substantive law; there will be a change obviously of parliamentary procedure. Were it to be included in statute, then all the drafts have made it absolutely clear that nothing in the statute...
suggests or implies that there would be any liability falling on individual service personnel. I understand the anxiety but I think that it is not one that could or would arise in practice.

Q745 **Chairman:** Would it specifically provide an exemption from liability if it was determined in that way?

**Mr Straw:** If you went down the route of statute but, as you know, currently the Government’s preferred route is to go down the path of a resolution which is, by definition, procedural within Parliament and non-statutory.

Q746 **Lord Maclennan of Rogart:** You have shown yourself to be quite open-minded, if I may say so, Lord Chancellor, about the issue of statute or resolution. Some of the witnesses we have heard from on the subject have suggested that a resolution is easily alterable by the government of the day under the stress of the circumstances which give rise to its being possibly used and employing their parliamentary majority to do so. In those circumstances, is it not more attractive to have a statutory basis, which is not so malleable in the light of the circumstances?

**Mr Straw:** Lord Maclennan and Chairman, of course that is one of the arguments in favour. That has to be balanced by the arguments the other way, which is that the legislation may be too prescriptive, too restricting of genuine military discretion within the overall political decisions made by Prime Minister, Cabinet and Parliament. I think, however, in practice if Parliament, both ends, had agreed a resolution, it would be a very unwise Prime Minister and Cabinet which chose, when it came to an issue of deployment of British forces and putting them in harm’s way, to ride roughshod over those provisions. It would be a very foolish thing to do. I think it is significant that over Iraq—it was of course intensely controversial—the Government did not have to do anything other than go down the traditional route, which was to have a debate on the Adjournment. In any event, I thought that it was not going to be possible to sustain the legitimacy of the decision if we did.

Q747 **Lord Maclennan of Rogart:** Many other countries do have greater power than Britain and a statutory basis for the exercise of war powers.

**Mr Straw:** They do, and personally I am not scared about this. You simply have to be very careful about what goes into the statute. The alternative we looked at was what we described as a hybrid, which was a light statutory framework with a resolution inside it. It is for the military to speak and not for me, but their anxiety, which I fully understand and indeed in this respect support, is that if you are too prescriptive you can end up in the position that one or two of our European allies are in, where the detailed rules of engagement are the subject of line-by-line debate in their parliament, which then produces almost risible results when we are apparently fighting alongside forces from our European allies who have to be back in barracks by nightfall and who are constricted from when they can let their guns off. So it is a non-trivial issue which has to be dealt with if you were to go down the statutory route.

Q748 **Ian Lucas:** Following on really from that point, some of the evidence we have heard has related to the difficulty in defining terms like “armed conflict” and “armed forces” and how Parliament will be able to deal with issues with difficult definitions. How will Parliament know when they need to make a decision, given that issues like whether deployment is the moment that authorisation is required or whether when armed conflict starts is the issue, when those issues are not clear? How would we know when the decision needs to be made?

**Mr Straw:** Mr Lucas, the definition of armed forces is pretty straightforward. It happens, because I was looking it up earlier, to be in section 374 of the Armed Forces Act 2006. It simply defines what is an airman, what is a sailor, what is a soldier, and so that is pretty straightforward; it is a matter of fact. Armed conflict: there is no specific definition but there is plenty of discussion, including in the Manual of the Law of Armed Conflict, which I have been reading for my prep. For example the following guidance may be given: Any difference arising between states and leading to the intervention of members of the Armed Forces is an armed conflict. An armed conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organised armed groups within a state. In other words, a high state of civil war, as opposed to the much lower level of state insurgency. I think you do know what an armed conflict is when you see one. I accept what Mr Chope is saying that sometimes you get a situation where it may start off as what appears to be peace keeping in a very benign way and then develops into peace making or something greater, or armed conflict, and that is more complicated. Think about the major armed conflicts in which the United Kingdom has been involved in recent years. They have been: the Falklands, the First Gulf War, the Balkans, Afghanistan and Iraq. I think they all were clearly armed conflicts.

Q749 **Ian Lucas:** Do you see any case for coming back to Parliament when the nature of the conflict perhaps changes? I am thinking here specifically about Afghanistan.
Mr Straw: I tried to deal with that in respect of my answer to Mr Chope. It is a fine judgement, and not for someone in my seat but for the Defence Secretary, the Prime Minister and the Chiefs, as to whether it would be highly disruptive but my own rule of thumb is that, if there is a moment where there is a choice before government as to whether or not they could end involvement, then that choice ought to be reflected by parliamentary decision as well.

Q750 Lord Norton of Louth: Coming back to what we were discussing very much at the beginning, which is Parliament’s role in relation to treaties, and you were going through what is included in the Bill in Part 4, if you look at the current practice, we have about 30-odd treaties a year ratified, most of them on technical matters and therefore not likely to come before the House, so it is the exceptions that would be engaged here. If you think about present practice in terms of the Ponsonby Rule, it is not clear from the way that this Part is drafted how much it will actually move us away from the existing practice, in other words, a large part of the provisions appear to embody existing practice. The only difference is the requirement that the House would be able to vote and therefore trigger a certain response from government. How far does it actually really differ from existing practice? The other point I was going to make is, it engages the House if the House votes in such a way, but, coming back to Mr Wills’ earlier point about the importance of embodying processes, there is actually no clear process in the Bill that would ensure the House has that opportunity. How does one deal with the point about if you take 21 days, and if you are going to have a proper parliamentary provision for scrutiny—and one would expect that to be through Select Committees—actually allowing time for that process and then ensuring there is actually time on the floor of the House to consider, say, a proposal not to ratify?

Mr Straw: Lord Norton, the fundamental, substantive difference—and it really is fundamental—is that under the Ponsonby Rule, as I said earlier, Parliament has a vote but it can be of no effect as the executive can go ahead and ratify the treaty. Under this, under clause 21(5)(b), if Parliament votes against the measure, it cannot be ratified. That is a very big difference. I accept, however, the burden of the second part of what you are saying, which is that, in a sense, the arrangements for getting a vote have been left at large, basically for the usual channels and for people to make a noise. It may be that your Committee, Mr Chairman, comes to a view that there ought to be more specific provision in here. I do not think I am giving anything away: the anxiety of business managers, and it will ever be thus, is that if you lay too much down in a Bill in terms of procedure, the discretion of business managers may be limited. There are other considerations as well.

Q751 Lord Norton of Louth: I accept your basic point. In constitutional terms, it is a major change, giving Parliament powers it has never had before, but it could be meaningless if you then do not have the mechanism to give effect to that change. Then there is the allied point which I am going to come on to: you mention not putting too much specific in the Bill, but the Bill then has provisions for exceptional cases, so, in a way, the Government has wiggle room for getting out of it actually being debated. How does one, if you like, entrench the mechanism to ensure that what the Bill seeks to achieve it actually delivers?

Mr Straw: First of all, an awful lot in this place is done by convention and no-one should ignore the power of that. Having been a business manager, it is very powerful. The fact that one has previously done something in the past, unless you have the consent of the House, is a reason for continuing to do so. I accept the point you are making that at the moment the exact procedure for triggering what are substantial powers is not specified. You could either leave it to the usual conventional arrangements, because in practice, where you have a negative resolution in a Statutory Instrument, if enough people complain about it, there is always a vote on it, or you could make provision in the Standing Orders of the House, each House, that if X number said they wanted a debate and vote, there would have to be a debate and vote, and you could also add if you wished that the appropriate subject Select Committee should produce a report on it, or you could embed it in statute. It may be—and I am thinking aloud here—that the second suggestion is the more satisfactory of those three.

Q752 Lord Williamson of Horton: This is a specific point on treaties. We have been told that many treaty-like documents, such as memoranda of understanding, exchange of letters between governments, UN security resolutions and so on, may be more important in their effect than most treaties but do not fall under the Ponsonby Rule. I think, for example, the stationing of ballistic missiles, which is pretty important, was the subject of a memorandum of understanding, exchange of letters between the US and the UK. What steps would the Government foresee to ensure effective scrutiny of such documents? It is a bit weird to settle everything on treaties but to leave out some very important things.

Mr Straw: I think, my Lord, they would have to be done on an ad hoc basis. It is certainly the case that there could be a memorandum of understanding on X, which is a much bigger issue, than a treaty on Y. What, however, we have to deal with here is the legal status of these instruments. Since memoranda of
understanding do not have the same status in international law as treaties, presumably that was why it was chosen to be a memorandum of understanding rather than a treaty, then it would not fall within this area. For the future, I could envisage that, if such a memorandum were disclosable, albeit in confidence, it might be examined by a Select Committee, it might be examined by Intelligence and Security Committee, and certainly would have been examined, I suspect, by at least the chairmen of the relevant Congressional Intelligence and Security Committees.

Q753 Lord Maclennan of Rogart: Lord Chancellor, the Governance of Britain White Paper and this Bill all place great weight on Parliament, but particularly upon the House of Commons, for scrutiny to enhance the role of Parliament. I wonder if any consideration has been given to the possibility of some sort of power-sharing arrangement which recognises that one or other House might more sensibly take the lead in these issues in view of the fact that there is a quite serious possibility of overload for parliamentarians, particularly. I think it has to be said, Members of the House of Commons, with new economic scrutiny committees, subject committees, Public Accounts Committee, treaty committees. Has any thought been given to the possibility of sharing out these roles?

Mr Straw: Lord Maclennan, your specific suggestion is that the load, for example, in respect of scrutinising treaties might be . . .

Q754 Lord Maclennan of Rogart: Yes, this is an example of further overload . . .

Mr Straw: It might be worth a detailed examination. I would have to talk to colleagues about that but, in principle, I think very strongly that the work of the Commons and the work of the Lords should complement each other. I certainly think that the work of the European Committees in the House of Lords has been very significant and complementary to the more partisan scrutiny in the House of Commons. We are open to suggestions on that.

Q755 Lord Hart of Chilton: This is a question about judicial appointments.

Mr Straw: You had better declare an interest!

Q756 Lord Hart of Chilton: My declaration of interest is well there. The work done in relation to the Constitutional Reform Act 2005 was carried out comparatively recently in terms of rebalancing the accountability of the executive and the independence of the judiciary. Central to that was the creation of the Judicial Appointments Commission and it has only really been under its own steam for about 18 months. It is only for about that period of time that its corporate plan has been in existence and there is only one year’s data of its work. The first question is, do you think it is too soon to make changes to the judicial appointments process?

Mr Straw: I think it would certainly be too soon to pull the whole thing up by its roots but these changes that I am proposing are, I think, sensible ones. I do not suggest these ones are earth shattering. Much more significant changes on judicial appointments, the whole relationship between the executive and the judiciary, were made in the 2005 Act, and I am the first to commend my good friend, the noble and learned Lord Falconer, for what he did there. However, what I have spotted is that one or two of the processes, frankly, were over-bureaucratic and it is sensible to streamline them; they just are. As I was reading through Lord Falconer’s evidence, or gobbets of it, earlier today, this may be a consequence of having a Commons Member, with much wider responsibilities than the traditional Lord Chancellor, also as Lord Chancellor, because it was my suggestion, and nobody else’s, that the Lord Chancellor’s power, which is pretty limited actually under section 90 of this Act, to reject or refer back appointments of the judiciary up to and including the level of the circuit bench should be removed. It was just adding another process and delay without any particular benefit. Lord Falconer when he came here suggested that, if I were to give up the power in what is section 90, then I would not have any power left, for example, to refuse a set of selections on the grounds that they were not sufficiently diverse, but when I said in opening, Mr Chairman, that Lord Falconer was wrong about that, he literally is, I think, incorrect in his remembrance of this part of the Act. Section 90 of the Act does give a limited power to refer back a selection, but in respect of an individual, not the whole competition, one individual, and that has to be done on very specific grounds, basically, that they are not qualified for the job. What I am retaining is the power—and it would be slightly modified, if you look at Schedule 3 to the Constitutional Reform Act—in respect of these appointments, circuit judge and below as well as High Court and above, a power to pull the whole process for that particular so-called vacancy notice. So if I judged that, for some reason or other, the Judicial Appointments Commission had come up with a set of recommendations for appointment which were wholly inconsistent with, say, the diversity of the pool of applicants, then I could simply withdraw the vacancy notice. That power is being retained. There are one or two other minor things, like medicals, where it is just silly that too many weeks are elapsing given the current drafting of the Bill although the basic structure of this Act is a sensible one. I have never put an Act on the statute book—and I have put a lot on—which with the
benefit of hindsight could not be slightly better
drafted in one particular or another.

Q757 Lord Hart of Chilton: The weight of the
evidence that we have been hearing is that, quite
right; there are minor changes that could well be
made, but it is not absolutely necessary at this
time to involve legislative change and it would be far
better to wait until you have a few more years of
seeing how the system that was adopted in 2005
beds down and works out.
Mr Straw: I do not think we are really disagreeing.
Lord Hart. I am not proposing to pull up the basic
architecture that is in here; not at all. What I am
proposing to make are some rather limited changes
to streamline the process. In practice, no Lord
Chancellor of the future is going to wish. I think, to
intervene in recommendations about some hundreds
of judicial appointments below the High Court
bench for district judges and, at their level, members
of tribunals and circuit judges. Different
considerations apply in respect of the High Court
because it is only for High Court judges and above
that they have quite the level of tenure, and also that
Parliament is involved in their removal, because it
is they who can be removed only by an address of
both Houses to Her Majesty. Of course, the other
really significant difference between the High Court
bench and the others is that the High Court is a
court of record, so its judgments are binding on all
the other courts. It is a significant difference. I think
the limited powers there in respect of any individual,
as well as the rather more significant ones for the
higher judiciary, ought to be retained.

Q758 Lord Armstrong of Ilminster: If I may, I will
turn to the Civil Service, Lord Chancellor. I do not
certainly want to question the general idea of us
having legislation catching up with Northcote and
Trevelyan, as Mr Wills said just now. There is one
strange point in this, that the Government’s Bill in
2004 specifically excluded from the Ministers’
general power the power to manage, the power to
recruit, appoint, discipline or dismiss civil servants,
or any other power for the day-to-day management
of civil servants, whereas in this Bill the general
power to manage the Civil Service specifically covers
appointment and dismissal and the imposition of
rules on civil servants. This appears on the face of
it to be a very dramatic change—that was the word
used by the Public Administration Select
Committee. Is it as dramatic as it seems?
Mr Straw: I do not think it is as dramatic as it
seems, although I have to say, when I looked at the
wording, I could see why the Public Administration
Select Committee were concerned, and it may be
sensible. Mr Chairman, if I sent to your Committee
a short memorandum about this. My understanding
is that the reason why there is a difference between
the previous draft Civil Service Bill and this one is
because it was originally proposed to retain under
the prerogative powers of appointment and
dismissal, and what we are seeking to do is to have
the powers of appointment, etcetera, in a statutory
framework. At the same time, there has to be a
Minister responsible for the Civil Service to
Parliament but in practice whose powers are very
constrained, and that Minister is the Prime Minister.
I am certainly happy to look at the drafting but it
was put in this way for the best of reasons, not for
the worst. I will, if I may, send your Committee, as
I say, Mr Chairman, a short memorandum about this.

Q759 Lord Armstrong of Ilminster: I think one
aspect of this which concerns me is that this
provision makes the Minister at least technically
accountable for appointment and dismissal of civil
servants, and that this could mean that individual
appointments and dismissals could be the subject of
parliamentary discussion in a way which they
cannot be now. Is that the intention? If it is not the
intention, I think it needs to be made clear.
Mr Straw: I agree with you. As I went in to look
at this, as I say, the intention is clear and there is
obviously no intention whatever that Ministers or
Parliament should be able to argue that X rather
than Y should have been appointed, because that
would take us back to the days before the
Northcote-Trevelyan reforms, so we will obviously
look very carefully at your report and at the current
drafting.
Mr Wills: We can certainly make this intention clear
in the passage of the Bill, just so it is literally clear
in the parliamentary proceedings.

Q760 Lord Armstrong of Ilminster: Yes, but if we
are going to put this in statute, a declaration—
Mr Wills: No, no. We will both look at the drafting.
The Secretary of State has already said that, but we
will also make our intentions absolutely clear,
because I think we are in the same place on this.

Lord Armstrong of Ilminster: Thank you.

Q761 Chairman: What is the justification for the
statutory provision excepting diplomatic
appointments from selection on merit?
Mr Straw: I was about to be facetious but I will not!
First of all, in practice—and this practice has been
under successive governments—there are different
arrangements for the appointment of heads of
mission, Ambassadors and High Commissioners,
which is that the Foreign Secretary of the day and,
of course, for some of the top-level appointments, the
Prime Minister of the day, are much more heavily
involved in those appointments than an equivalent
Secretary of State, and Prime Minister, is in respect of domestic appointments, and there are good reasons for this. You are having to select an individual, and they may be at grade 5, Assistant Secretary or grade 3, Director level, and not at a grade 2 or grade 1 level. They are going to represent Her Majesty and the United Kingdom to government X or government Y, and the political consequences with a small “p”, the diplomatic ones, if you like, of choosing the wrong person, who may be very well qualified in other respects, are far greater than if you happen to put a particular grade 5 into the wrong post in the Ministry of Justice, or even a particular grade 5 into the wrong department inside the Foreign Office. Just so we are clear, it was not that I had when I was Foreign Secretary any involvement in who went in at grade 5 or even grade 3 to particular posts within the Foreign Office, because that was not necessary and it would have been unjustified, but it is in respect of ambassadorial appointments. There was a very formal process: they went through a board, there was discussion on merits. I did not ever act improperly and I am quite sure my predecessors did not, but I did sometimes say “Honestly, given all the things that are going on in this country, this person’s experienced”—I would discuss it with the Permanent Secretary—“My view is we should have X rather than Y.” I think that is a really important discretion for a Foreign Secretary. The other point here is that there are some appointments which have always, frankly, been political. So, for example, Lord Carrington was High Commissioner to Australia in the 1950s, and there were others made by previous Conservative administrations. Under this administration we have had a number. It was an appointment by then Prime Minister Tony Blair that now Lord Goodlad should become High Commissioner again in Australia, and we have also appointed two at the time Labour Members of Parliament to be High Commissioners respectively to Australia in succession of Lord Goodlad and in South Africa, and in previous years you have had sometimes the UK Ambassador to the United Nations being a party political appointment. That happened with Lord Richard and in the Sixties—I will remember his name in a moment but there are plenty of examples, and that is why we want to keep the discretion.

Chairman: Rather than excepting the position, would it not be best to redefine what “merit” meant and actually set out perhaps in the Bill or elsewhere precisely the criteria for such appointments?

Q762 Lord Armstrong of Ilminster: The trouble is, merit implies competition, and in most of the cases you referred to there was no competition.

Mr Straw: Yes. There are two things going on here, Mr Chairman. One is that in the generality of cases, certainly in my experience as Foreign Secretary for five years, there was of course competition. The only candidates presented who one could conceivably have appointed were ones who had come through the Diplomatic Service and who met all the criteria. One never looked at people who were below the line, who were not suitable, who did not have the languages, but quite frequently, as I say, it was X rather than Y, and I think that is a discretion which a Foreign Secretary and, for the top-level appointments, a Prime Minister, would want to keep. On the others, as Lord Armstrong has indicated, it is not that people like Lord Patten, who was appointed Governor of Hong Kong, or Lord Carrington or Mr Boateng and so on, who we have appointed, were unmeritorious, but it is the case that there was not exactly a competition that would be worthy of that name in a formal sense. We can look at the wording of it but my guess is that Prime Ministers of the day, as I say, and Foreign Secretaries would wish to have that discretion available for a very limited number of appointments. It is rarely more than two.

Q763 Lord Campbell of Alloway: I want to ask you a couple of questions about special advisers. The first is, why is there no provision in the draft Bill to restrict the functions of special advisers and the second is, why is there no provision in the draft Bill that would prevent the Government making an Order in Council provision to allow special advisers to be appointed with executive functions? You gather what is behind this, because the Prime Minister’s first act on taking up office in 2007 was to revoke the provision in the Civil Service Order in Council which enables special advisers to be appointed with executive powers. If Mr Brown takes that view and does that, what is the answer to the two questions I have put?

Mr Straw: The answer is, my Lord, that there is no intention for special advisers to have executive powers. We will obviously take account of what your Committee says, Mr Chairman, about the exact wording but there is not any intention for special advisers to have executive powers. When Mr Brown became Prime Minister he revoked those earlier two Orders in Council. You could argue the case for the Orders in Council, which were established in 1997—I will not do that now but anyway, they were revoked. As to the second point, I should perhaps reassure you, Lord Campbell, that the possibility of making an Order in Council, which is essentially under prerogative powers, in respect of special advisers will not exist once the Civil Service, including the employment and conditions of special advisers, is placed on a statutory basis. So it goes. That would be the end of it. The only way of providing for that sort of power would be on the face of the Act.
Lord Campbell of Alloway: It is a little difficult to understand. Can you help on this? I do not know enough about the Civil Service but it seems a bit odd to me.

Lord Armstrong of Ilminster: I think it is being suggested that if there are statutory provisions to cover these matters, you would not then be introducing an Order in Council.

Mr Straw: You could not.

Lord Armstrong of Ilminster: You could not do that and that may be right. I have two points. One point is whether there should be some specific exclusion of any power for special advisers to recruit, manage or direct civil servants, which was suggested to us in evidence, and secondly, why there is no cap on the numbers of special advisers. A number of people in evidence have suggested that there should be a cap on the number of special advisers.

Mr Straw: I do not know the answer to the last question, my Lord, because in practice there is a cap. I think you established the cap originally, Lord Armstrong, because I was one of the first special advisers when you were Principle Private Secretary.

Lord Armstrong of Ilminster: And a very good one too, if I may say so!

Mr Straw: I felt the same way about you. I think I still have the correspondence. I will need to come back to the Committee on the second question. On the first question, again, we can give consideration to this, Mr Chairman, because there is not an intention that special advisers should manage or should have executive powers. I was a special adviser for three and a half years, I have been a Minister now for over 11, and I think the arrangements work very well. It is inappropriate for your special advisers to manage civil servants. You do it in proper order. You make sure that your special advisers, if they come to you, as quite often they may do, and say “Can I get the Department to do X?” I say, “Yes, tell the Principal Private Secretary to advise that out.”

Chairman: From one special adviser to another.

Lord Armstrong of Ilminster: You have in mind. You can sometimes have experts, say, who are called special advisers, and I would not have a problem about their representation in particular cases, but should they act as Ministers, as it were? The answer to that is no.

Lord Maclean of Rogart: In the context of the overarching philosophy, or purpose, if you like, of rebalancing power between the executive and Parliament, which we started out discussing, do you think it would be acceptable to have a provision in the Bill establishing the Civil Service, in the statute, which acknowledges the wider duty of civil servants to Parliament as well as their direct responsibility to Ministers?

Mr Straw: I would be very interested in the idea that lies behind what you say. I think you have to be very careful about the wording because the loyalty of civil servants is to the government of the day. It is not that you are asking civil servants to abandon their opinions; far from it. Indeed, I like officials to have opinions. I would never dream of asking an official how they voted and I do not give a fig about how they vote, but what you want is people who have opinions. I would be very interested in the idea that lies behind what you say. I think you have to be very careful about the wording because the loyalty of civil servants is to the government of the day. It is not that you are asking civil servants to abandon their opinions; far from it. Indeed, I like officials to have opinions. I would never dream of asking an official how they voted and I do not give a fig about how they vote, but what you want is people who have opinions but also can take a detached and balanced view of issues, then when you say “The decision is X rather than Y,” they get on and implement it. At the same time, the loyalty is to the government of the day, not to Parliament. At the same time, I am concerned to ensure that officials and many other people have a sense of rather broader responsibility, a recognition really of the centrality of Parliament in our constitutional arrangements. It is an obsession of mine to ensure in each Department I have worked in...
that officials at every level treat Parliament properly. One of the changes I have always introduced, for example, is to insist that parliamentary questions have to be approved by people at grade 5 or above, as written ministerial statements have to, otherwise they just get handed down, and the moment you get the grade 5 or above having to do that, they start to pay more attention. So, as far as I am concerned, these things matter. I would be ready to look at the wording but we have to make sure it does not collide with, say, the day-to-day duty that officials owe directly to the government of the day.

Q773 Lord Armstrong of Ilminster: Is it not just a matter of loyalty but a matter of accountability?

Mr Straw: Indeed, yes.

Q774 Chairman: Is there not a practical issue, in that if you are on a local council, the council officials talk to you as a councillor, whichever party you happen to be? Civil servants do not talk to parliamentarians, unless their Minister agrees. Is that not a difficulty for parliamentarians who are not members of the government?

Mr Straw: Yes, there is in fact a great deal more discussion these days than there was and, for example, the Select Committee has meant that officials quite often go to Select Committees and give evidence without Ministers being present. Again, I think it varies very much from Department to Department. In a Department like the Foreign Office, officials, members of the Diplomatic Service, who are based for the time being in London, as well as those in missions abroad, are all the time giving briefings to parliamentarians from all parties. There is this difference, Mr Chairman. Local authorities are run in a different way, or a classical British local authority is. Say you have a mayoral system—I do not know this absolutely for certain but I think the relationship between the mayor and his officials in London is similar to that between a Minister and his officials, and both are different from that of a traditional local authority. As I say, I am not certain about that but I am pretty certain. It is difficult to see how the system could operate otherwise.

Q775 Martin Linton: I do not want to cause unnecessary controversy but it has always seemed to me that Ministers could sometimes do with more rather than fewer special advisers. Has there never been a time, particularly when you were Home Secretary, when you could not have done with additional special advisers if it had been possible to appoint more?

Mr Straw: There is an argument that we should move over to something like a French cabinet system, where you bring in a whole raft of people, some of whom are drawn from the Civil Service, whose political views are known to you, and others you have brought in. There is a separate argument to go down the route of the American system, but those are big questions which I do not think one can resolve within a Bill of this nature.

Q776 Martin Linton: There would be an argument against the cap on the number of special advisers.

Mr Straw: It cuts both ways. If you have a lot of special advisers, you also then have an issue of how you ensure their loyalty. There is a management issue if you have too many “irregulars” around the place. My frustration in the Home Office when I was there was that I did not have a speechwriter, because they had never had a speechwriter in the Home Office, and I was pushed through loads of hoops to get a speechwriter. In the Foreign Office they always had a speechwriter and, probably thanks to Lord Hart, the Lord Chancellor’s Department has always had a speechwriter. That is where I felt the real frustration and there is an issue, let me say, also about the intersection between the special adviser who handles the media and press offices, and I do not think we have resolved that properly at the moment. Again, we did it better in the Foreign Office, where my predecessor, Robin Cook, had appointed a man who was actually officially Head of News but it had been a quasi-political appointment. He was running the News Department, and did it very well, but in application of the Civil Service rules, because you need to feel comfortable. Sometimes I do not feel comfortable but you need to feel a sense of ownership for the person who is the Head of the Press Office, but that is another issue.

Q777 Chairman: Some colleagues in the House have suggested that maybe the Bill should also include key values of being a civil servant or a member of the Civil Service, such as competence, efficiency, commitment to delivery, which are sometimes complained of against civil servants. Do you see a place for such a statement of values in a Bill of this nature?

Mr Straw: I am certainly ready to consider it. Without being too picky, the point to emphasise here is that it is the Prime Minister who is the Minister for the Civil Service, so you would need to take his view on that and also the view of the Head of the Civil Service and the Head of the Diplomatic Service.

Q778 Chairman: We do not have very much time left, and one area we have not dealt with is the changes for the Attorney General’s responsibilities. As you know, the Commons Justice Committee has concluded that the Government’s proposed reform of the Attorney General, in their words, “fails to achieve the purpose given to constitutional reform by
the Prime Minister”. You will probably know that even Professor Robert Hazell is somewhat sympathetic to that view, although he supports the views of the Government generally. What do you say about that?

**Mr Straw:** First of all, I think what is in the Bill, and in the narrative in the White Paper, is fully consistent with what the Prime Minister said in the House on 3 July last year and also what I said in the Green Paper. Opinions differ about this. There is a division of view about whether you split the role of the Attorney—you can do it in a number of ways but anyway, whether you split it so you have a senior legal adviser to Ministers and the Government who is not also a politician. You could split it so that the Crown Prosecution Service or the prosecution departments became a non-ministerial government department, a bit like the Revenue. I happen to think that the proposals which are in the Bill—obviously, I do not want to pre-empt your Committee, Mr Chairman—broadly are the right way forward. They provide for the role to continue, which I think is really important, as someone who has never been Attorney, but I have certainly made use of successive Attorneys’ services as a legal adviser. I think it is really important that you have someone who is independent, who can serve you up with the advice you do not want to have— and they do—but who is able to take account of the milieu in which you operate, and, secondly, who is responsible for the work of the prosecuting authorities, because in every system that I know it has to be somebody who is accountable for the prosecuting authorities. In quite a lot of systems it is the Minister of Justice. In our system I think on the whole it works rather better to have a dedicated Minister who is slightly at arm’s length from the rest of us who is handling prosecutions. The other thing we are doing, as I said in my opening remarks, is clarifying the role of the Attorney in respect of prosecutions, ending any power they may have in respect of directions, except for national security grounds, and making a much better set of arrangements in terms of the protocol, which I think is really important. It is a very significant development.

**Q779 Mr Chope:** Can I ask about the scope of this Bill? In answer to an earlier question the Lord Chancellor said that to extend the Bill to war powers would be within the scope of the Bill. Looking at the long title of the Bill, unless war powers were specifically included in it, it would seem to me it would not be within the scope, because the Bill is a ragbag of different provisions, including the reform of the Civil Service. If the Bill’s long title said something like “to make provision for the transfer of powers from the executive to Parliament.” then I could understand the Lord Chancellor’s earlier reply, but it specifically does not do that. It is not a broad Bill. It does not do what it says on the face of it, in other words, to change the constitution, to renew the constitution. Would the Lord Chancellor accept he cannot have it both ways? Either he needs to have a really broad Bill with a broad scope which could enable any of us who can come up with ideas for transferring power from the executive to Parliament to bring forward new clauses which would be within the scope, including perhaps the issue of war powers, or have a Bill which is basically a miscellaneous provisions Bill, a ragbag of odd provisions in relation to the constitution, and a separate Bill relating to the Civil Service. At the moment, we have the worst of all worlds, the prospect of a Bill with lots of individual bits to it, with a title which does not relate to the contents.

**Mr Straw:** I think the contents are what matter rather than the long title itself. As Mr Chope knows, whether a Bill is in scope is a matter for the House authorities, and they are guided by what is in the long title but that is not conclusive, and long titles can be amended. In the light of what you say, Mr Chope, I will certainly look at whether we amend it. Your proposal may be better for the long title. I certainly have no intention that the long title should constrain whether there could be a debate about war powers, for example.

**Q780 Chairman:** Thank you very much. I think we are all very proud to be members of the Constitutional Renewal rather than the Miscellaneous Provisions review, so we will keep it there for the moment. Can we thank you very much indeed for giving such useful evidence over a very long period, and we are grateful to you for what you have said.

**Mr Straw:** Thank you very much, Mr Chairman.
Written Evidence

Memorandum by Mr Anthony Aust (Ev 16)

1. I will deal only with the clauses in Part 4 on ratification of treaties.


3. As with the power to go to war (which is not the subject of the draft Bill), the constitutional power of the Crown/Government to ratify a treaty (generally without the prior consent of Parliament), and the supreme power of Parliament to make laws, is a product of the seventeenth-century constitutional struggle between the King of England and Parliament. This resulted in the power to legislate being almost completely vested in Parliament, yet with the Government retaining certain prerogatives, including the decision to ratify treaties or to go to war. This particular division of powers was inherited by most former colonies of the United Kingdom, the United States being the principal exception.

4. The treaty-making power of the Government is exercised by the Secretary of State for Foreign and Commonwealth Affairs. Although there is no general requirement for Parliament to consent to the entering into a treaty, under a constitutional convention (known as the Ponsonby Rule) a treaty which is subject to ratification, or an analogous procedure, is laid before Parliament with a short explanatory memorandum for 21 sitting days so that Parliament can be informed of the treaty. It may debate the treaty if it wishes, but this seldom happens unless legislation is needed or the treaty is of major political importance, in which case the Government would normally arrange for a debate anyway. If a select committee needs more than 21 days to inquire into a treaty, the Government will usually agree to this; and a copy of the treaty is sent to the relevant departmental select committee. Extra-parliamentary consultations are also held.

5. Many treaties to which the United Kingdom wishes to be bound do not need any UK legislation, or at least no new Act of Parliament; either the treaty obligations can be carried out under an existing Act (see Clause 23(1)) or subsidiary legislation could be made under an existing Act (see Clause 23(2)). In the latter case, Parliament has the possibility of withholding consent to the making of the necessary subsidiary legislation. This is very rarely done, mainly because the subject matter is usually unobjectionable or the Government can, by use of its majority and whipping, force through the matter. But, when a new Act is needed, both Houses of Parliament can debate the treaty and, if necessary, could withhold necessary legislation. This would make it impossible for the Government to ratify the treaty.

6. The purpose of the draft Bill is therefore twofold: to put the Ponsonby Rule on a statutory basis and to enable Parliament to resolve that a treaty may not be ratified.

7. What is not clear is the relationship between the power of Parliament to refuse a new Act (or the making of subsidiary legislation under an existing Act), so preventing the ratification of a treaty, and the new power suggested in Clause 21(4) that either House may resolve that a treaty should not be ratified. It may well be that, in practice, the new power would be exercised before Parliament is asked to legislate (should that be necessary). If so, this should be explained by the Government if and when Part 4 of the draft Bill is presented to Parliament.

8. I have only two other comments to make on the draft clauses. First, although I follow the meaning of Clause 21(5), the wording is not as clear as it might be. Could it be improved?

9. Second, Clause 13(1)(b) largely reflects Articles 2(1)(a) of both the Vienna Convention of the Law of Treaties 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986. But, the Clause describes a treaty as “binding under international law” whereas both Vienna Conventions define a treaty as “governed by international law”. It is not clear why “governed by” is not used in the Clause. Although I consider both terms should mean the same thing, if the Bill uses a different term there could be a problem. When the Bill is debated in Parliament, it might be argued that there is a difference between “binding under” and “governed by”. The point might be raised at the suggestion of an NGO which wants to establish that the phrase “binding under” was deliberately
chosen in an attempt to exclude MOUs which the NGO might argue are within the definition of treaties in the Vienna Conventions.

10. MOUs are international instruments which may look like treaties but are not because the States involved do not intend them to be “governed by” international law. (MOU is short for Memorandum of Understanding, which is what most MOUs are formally called.)\(^1\) If the Bill becomes law, certain acts of the Government in relation to treaties would be open to judicial review, and it would be unfortunate if an applicant were to question whether a departure from the definition of treaty in the Vienna Conventions is material. The matter is important since MOUs are crucial to the transaction of international relations by States, not just the United Kingdom. They are especially important for many defence arrangements, which need to be classified, and so cannot to embodied in treaties.

2 June 2008

Memorandum by Peter C Beauchamp (Ev 11)

THE CONSTITUTION AND WAR-MAKING POWERS.

Thank you for your letter of 16 May 2008.

I would like to submit my evidence hereunder.

War Powers

In the unending experience over Iraq and to some extent over Afghanistan, and with the actions of the Prime Minister then prevailing it is up to us to see that there can be no repetition of the undemocratic mistakes then made by closing off the room for them. However from the tone of the guidance provided with the questions to consider, it is easy to imagine that a consensus of laissez faire has now prevailed.

Q37. I really doubt if the resolution route is the right one. Statutory legislation is needed and should be tabled as soon as possible. This will be particularly important with our armed forces ever-reducing and adopting more and more a training posture (and certainly being unable to maintain an overseas role in strength).

Q38. No the draft Resolution does not give Parliament sufficient control over decisions.

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

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

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

(vi) No but there should be regular reports to Parliament on developments as necessary.

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

A Standing Defence Committee to include some Cabinet and Opposition members, representatives of both sides of the House of Lords and representatives of all three services would be chaired by the Prime Minister, who would of course be their spokesperson in Parliament. It is likely that certain meetings would be held in camera as agreed by leaders of each of the three sectors suggested.

(If our armed forces are to be still further diminished, amounting to little more than ultra-defensive strength, this extra-Houses Standing Defence Committee would seem even more appropriate. When necessary the Prime Minister would come to the House and report the Committees deliberations and proposals.

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

Q40. “Conflict decisions” should be clearly reiterated to include “advance overseas deployment”.

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

19 May 2008

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\(^1\) On MOUs generally, see A Aust, Modern Treaty Law and Practice, 2nd edn, Cambridge, 2007, pp 20–1 and Ch 3. Recent examples of MOUs are the so-called “diplomatic assurances” concluded with certain Arab States. The international lawyer who believes most strongly that MOUs are treaties is Professor Jan Klabbers: see his book, The Concept of Treaty in International Law, The Hague, 1996. Regarding Klabbers’ theory, see Aust, pp 49–52.
Memorandum by Sir Franklin Berman (Ev 34)

1. I am Sir Franklin Berman KCMG QC, and submit this evidence in my individual capacity. From 1991 to 1999 I was the Legal Adviser to the Foreign & Commonwealth Office. Since my retirement from that post I have been in private practice as a Barrister and international arbitrator, and have sat as a Judge ad hoc on the International Court of Justice. I am Visiting Professor of International Law at the Universities of Oxford and Cape Town, and King’s College, London.

2. This submission relates to the approval of treaties only. The comments made in my response (jointly with Sir Michael Wood) to the consultation on the role of the Attorney General are sufficiently well taken care of in the Government’s current proposals that there is no need to repeat them now. The same cannot however be said for the Treaties question.

3. The thrust of this evidence is that it would be by far more productive for both Parliament and the Executive, in place of the Government’s present proposals, to undertake a more thorough and wider-ranging study into the linked questions of the treaty-making process as such and the incorporation of treaty rights and obligations into United Kingdom law.

Treaties

4. I remain firmly of the view that no useful purpose would be served by legislating (as the Government propose) to give statutory effect to the Ponsonby Rule.

5. There are three main reasons for saying so:
   (a) It would be a waste, both of Parliamentary time and of opportunity, to legislate to such minimal effect.
   (b) There is no reason to fear that future Governments of any political complexion would stop complying in good faith with the Ponsonby Rule if it were not incorporated into statute, or would comply with the Rule any better if it were so incorporated.
   (c) Conversely, statutory intervention in this area would introduce an unnecessary, and possibly harmful, degree of formalism into practices whose inherent flexibility has in the past proved useful, both to admit progressive developments to be introduced without fuss, and also to accommodate exceptional cases without the need for obsessive concentration on statutory definitions and their application to particular cases. These problems aside, intrusion by statute will inevitably raise the spectre of future attempts by sectional interests to secure judicial control over what are essentially the details of sound constitutional and/or legislative behaviour.

6. Rather than pursue, largely for show, measures in the area of treaty-making as an occasional item within a heterogeneous list, it would better serve the interests of both the Executive and of Parliament to undertake a more careful and complete study of the treaty-making process with more sensibly ambitious aims. The objective would be both to examine what could reasonably be expected to be the respective roles of executive and legislature in modern-day treaty-making in a democratic State (in the light of the experience of the United Kingdom’s leading partners) and to arrive at a fresh dispensation on the issue of how (and how far) rights and obligations created by treaty should become available in the internal law of the United Kingdom. Although the latter question is one that has by and large been satisfactorily solved for the treaty processes of the European Union, the position in the general international field lags sadly behind, even though it cannot by any stretch of the imagination be thought that the areas or subjects affected by general international treaty-making are less important politically, economically, or socially. The resulting situation can not be satisfactory for the Executive in the broad context of its treaty-making activities; and at the same time it creates unnecessary difficulties for the Courts, and unreasonable trouble and expense for litigants seeking to avail themselves of rights claimed to derive, directly or indirectly, from treaty. Both sides of this proposition can no doubt be verified from practical experience.

7. A thorough study along these lines might well lead to parallel outcomes: on the one hand a fresh view of the balance of the responsibilities that could and should realistically be borne in the treaty-making process by Government and by Parliament (taking account notably of the reservoir of expertise likely to be available in the Lords as well as the Commons), which might well be most suited to be incorporated in the Standing Orders and procedures of both Houses, supplemented if necessary by undertakings by Ministers; on the other

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2 Proper account would of course have to be taken of the position of the devolved Administrations.
3 A study of that kind would be the right place to consider properly the Committee’s question as to whether Parliament should seek to scrutinise draft treaties prior to signature, but I make no secret of my own view that any general practice to that effect is not likely to prove productive.
A well thought-out new dispensation for the relationship between treaties and the law of the United Kingdom, which would indeed form a worthwhile subject for legislation.  

11 June 2008

Memorandum by M J Bowman, Director of the University of Nottingham Treaty Centre (Ev 41)

RATIFICATION OF TREATIES

A. ISSUES OF PRINCIPLE

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

Question 31—Balance of Powers

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

Question 32—Scrutiny Prior to Signature

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

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

(b) The second scenario raises altogether different considerations, however. It is certainly possible in principle, and not uncommon in practice, for consent to be bound by treaties to be expressed by signature alone, at least if the treaty in question does not exclude that option. There is, moreover, nothing to prevent this from occurring in circumstances which raise potentially significant implications for, say, civil liberties. Although the legal consequences (in terms of the undertaking of commitments which are formally binding upon the UK under international law) are the same as where consent is expressed by ratification or accession, the process whereby treaties are accepted by signature alone will not be governed by the proposed arrangements at all—not even the attenuated set of safeguards in section 22(3)—since signature does not appear to fall within the definition of “ratification” in section 24. It may be that a plausible case can be made for allowing this process

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4 I refer in this connection to my response to the Government’s Consultation, which offered the outline of one version of such a new scheme.

5 In the case of the 1985 Council of Europe Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, for example, the UK was one of several countries that expressed its consent to be bound by signature alone. The convention was adopted in great haste in the aftermath of the Heysel Stadium disaster (unusually for Council of Europe treaties, there was no accompanying Explanatory Report) and it was evidently regarded as urgent to bring it into force as soon as possible. This is precisely the sort of context in which a treaty might generate unforeseen and unintended implications for civil liberties (which is not to suggest that it has necessarily done so here), and where some additional element of scrutiny might therefore be regarded as especially important.
to remain unregulated, though I am unsure what it might be. Rather, even without any presupposition of the likelihood of skulduggery, this looks like a significant loophole. It is not clear, however, whether the problem is best remedied by amending section 24 to incorporate the expression of consent by signature—I am inclined to think not, as I suspect it might create considerable practical difficulties. An alternative solution might be to seek to establish criteria to govern the exercise of the power to express consent by signature alone: at the very least, perhaps a provision could be adopted extending the safeguards of section 22(3) to cases where consent is expressed in this way.

*Question 33—Extension of the Statutory Period*

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

*Question 34—Ratification without Parliamentary Approval*

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

*Question 35—Definitions*

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

*Question 36—Parliamentary Mechanisms*

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

Taken alone, this is unlikely to prove sufficient, however, as it will also be necessary to ensure the availability of specific expertise regarding the effective utilisation of the treaty as a technical mechanism for the recognition, protection and enhancement of relevant interests under international law. This expertise will be required to cover both the law of treaties and the practice of treaty-making. My experience of the academic world is that much contemporary commentary on international legal instruments is undertaken by those who are predominantly experts in the relevant provisions of their respective national legal systems (regarding human rights, the environment etc.), with the result that bizarre misconceptions tend to abound when they turn to discuss the specifically international, treaty-oriented aspects of their subject. Even genuine international lawyers tend nowadays to be specialists, with limited awareness of the development of practice regarding utilisation of the treaty-mechanism across the broad spectrum of international law. It is, with respect, difficult

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*The Government itself has doubted the practicability of routine Parliamentary involvement prior to signature, but does not specifically address the (relatively small) sub-set of cases where consent to be bound is to be expressed by that means.*
to believe that those who are not guaranteed to be legal experts at all will be any less prone to fall victim to such misapprehensions; yet failings of this kind could critically debilitate the potential of Parliament to enhance, rather than impede, the prospects of successful participation by the UK in the ever-expanding, rapidly developing and increasingly structurally-sophisticated network of international treaty arrangements. Accordingly, the institutional development of the requisite expertise should be seen as a priority, if not a pre-requisite to the success of the entire operation.

B. Questions of Drafting

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

Section 21

Some minor stylistic problems could profitably be addressed, viz:

Sub-section 1

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

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

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

Sub-section 5(b)

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

This formulation seems flaccid, inelegant and open to possible misinterpretation. If it is thought desirable to invoke the specific provision which is the source of the power in question, would it not be preferable to provide “if the resolution referred to in subsection(4)(b) was that of the House of Commons”? Alternatively, if such invocation is not necessary, might it not be clearer simply to state “if [it was the case that] the House of Commons resolved that the treaty should not be ratified”?

Section 22

There would seem to be some significant substantive problems here.

Sub-section 1

“exceptionally”

It seems surprising, as Question 34 implies, that no criteria of any description are specified to govern the exercise of this discretion. Is there not a risk that some hypothetical future Secretary of State might routinely submit to Parliament all treaties that seem likely to prove unproblematic, but choose to treat as exceptions certain cases where it was suspected that approval might not be forthcoming? It is to be remembered that, by virtue of the current sub-section 3, (s)he will be entitled to delay even laying a copy of the treaty before Parliament until after ratification. Obviously it is not difficult to envisage that situations might arise in relation to treaty ratification where time is of the essence, so that advance Parliamentary scrutiny might become impracticable, but surely it would be possible to cater for these by means of some rather more restricted form of wording, eg, “for reasons of exceptional urgency”. It cannot, of course, be ruled out that there are additional situations apart from pressure of time that legitimately require to be addressed, but it would be useful if some indication could be given of what they might be, so that alternative forms of wording might be considered that would enable them to be adequately catered for, while still falling short of the sweeping terms currently proposed.
Sub-section 2

“But….”

It seems inappropriate to begin a sentence in this way.

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

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

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

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

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

Sub-section 3

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

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

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

Paragraph (b)

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

June 2008

Memorandum by Sir John Brigstocke (Ev 35)

PART 3 JUDICIAL APPOINTMENTS

24. Is it too early to embark on further reform of judicial appointments only 3 years after the new system was established in the CRA 2005? Are reforms necessary to reduce bureaucracy and to streamline the appointments process?

No. As far as I am able to judge there is scope for reducing bureaucracy and streamlining by:

— introducing processes and a speed of response to unexpected requirements more akin to those of a major private sector “head-hunter”; and
— introducing simple, achievable, proportionate processes which are then meticulously applied, documented and recorded. This includes “feedback” to unsuccessful candidates which should be fast, simple, formatted and limited to a broad summary of performance against the “qualities and attributes” assessed. It should be given against acceptance that it is not open for discussion or designed to be easily “challenged”, but rather as guidance on areas where the candidate may wish to concentrate in the future.

25. Are the Governments proposals to remove the role of the PM from the appointments process and reduce the LCs discretion in relation to appointments below the High Court appropriate?

Prime Minister: Yes. The PM’s current role would appear to be essentially presentational, and if otherwise, would sit uneasily with the “separation of powers”.

LC’s Discretion: Yes below High Court. It would not, however, be suitable for those posts which bear responsibility for the wider administration of justice and for establishing case law.

26. Does the reduction in the executive’s role in judicial appointment leave a gap in the parliamentary accountability? The White Paper suggests that this gap might be filled by giving new powers to the LC to set targets and issue directions, and proposes an annual meeting of the Commons Justice Committee and the Lords Constitution Committee. Are these proposals appropriate and sufficient?

27. The Government is proposing to give new powers to the LC including:

(i) Powers to set targets or issue directions to JAC (recognised this is a complex issue);
(ii) power to set non-statutory eligibility criteria concerning, for instance, the qualifications, experience and expertise that is required for a post;
(iii) a delegated power to remove judicial offices from the list that are required to be filled following a selection by the JAC under the CRA 2005; and
(iv) responsibility for arranging medical checks.

Are these proposed new powers appropriate?
— what impact will they have on the independence of the JAC?
— and on the appointments process, including the balance of merit and diversity?

26 and 27: Potentially yes. It would be inappropriate, and unnecessary in the context of the “separation of powers” which has always accepted the need for a degree of overlap, to remove the LC totally from the judicial appointments process as he is the Minister responsible for the justice system. I support the proposals that the LC, in consultation with the LCJ, should be empowered to set for the JAC:

— operational targets;
— targets for representation of women and BME candidates; and
— powers of direction over eligibility criteria.

It is, however, imperative that these powers be limited to “processes” as opposed to individual appointments (except for the most senior appointments where involvement of the LC must be sensible; there is a valid analogy here with the appointment process for the Chief of the Defence Staff).

An annual meeting with the Commons Justice Committee and Lords Constitution Committee would be appropriate and sufficient.

MEDICAL CHECKS

The aim should be to minimise delay to the selection process as far as possible even if this results in a small number of people being subject to medical checks who are not then appointed. Responsibility should rest with the LC’s Department.

28. Part 2 of Schedule 3 proposes a number of key principles that must be taken into account by the JAC and others involved in the appointments process. Are these the right principles? How should they be monitored and enforced?

The “principles” are sound and should not be changed.
29. Should the Government create the JAC Panel? If so, are the provisions in the draft Bill adequate?

30. Is the current size and composition of the JAC Board right? Should the process for reappointing Commissioners be simplified?

29 and 30: The JAC is effectively running a major “headhunting” business and, in this context, the Commission needs to be given a much stronger Governance role (comparable to a Board of Directors) with a clear remit to set business strategy and to hold the executive team to account for “delivery against targets”. To do this effectively, the numbers should be reduced and the composition should reflect the Board’s need, not just for judicial understanding, but also for financial, operational, PR and other skills. This would fit well with the proposed new JAC panel (which I also support). A commercial approach should be taken to the appointment of the Commissioners, and should not include “pre-appointment” hearings.

Sir John Brigstocke KCB
Judicial Appointments and Conduct Ombudsman

Memorandum by Rt Hon Lord Butler of Brockwell (Ev 15)

I welcome legislation to put the Civil Service on a statutory basis and wish to see it enacted. Attempts to over-elaborate it could obstruct this. The best may be the enemy of the good.

Nevertheless, it has taken 150 years to get to this point and it may be a similar period before another opportunity arises. I should therefore like to see the following additions or amendments to the draft Bill:

(i) A duty on Ministers not to impede civil servants in complying with the Civil Service code, as in the Government’s earlier consultation draft.

(ii) A duty on Ministers to give civil servants the opportunity to provide informed and impartial advice on policy and to give fair consideration to such advice.

(iii) Provision for the Civil Service and Special Advisers Codes to be subject to approval or amendment by Parliament by Affirmative Resolution

(iv) Powers for the Civil Service Commission to undertake inquiries into the operations of the Ministerial Code as it applies to civil servants and of the Civil Service and Special Advisers’ codes.

(v) Powers for the Civil Service Commission to prescribe procedures for internal promotion on merit and to initiate investigations in cases of complaint.

(vi) A change in the status of political special advisers so that they are no longer civil servants but are financed by the extension of “Short money” to the Government party. This would have the additional effect of limiting their number. Expert special advisers should be appointed on merit under procedures supervised by the Civil Service Commission.

(vii) Omission of the exception from selection on merit on the basis of fair and open competition for appointments to the diplomatic service as head of mission or as Governor of an overseas territory (Clause 34 (3)(b) of the draft Bill). I fear that this exception would lead to the politicisation of senior diplomatic posts and see no sufficient grounds for distinguishing these posts from other senior Government posts.

Submission by Campaign Against Criminalising Communities (Ev 37)

Should Parliament be treated any differently from any other part of the country in terms of managing protests?

We would emphasise the crucial importance of permitting demonstrations close to the site of Parliament, and believe that this is a fundamental part of the UK’s Parliamentary tradition, reaching back to the 17th century or earlier.

Any honest democracy must admit the possibility of failure of the Parliamentary system; that is, issues or points in time when significant groups of people will become dissatisfied with its actual or expected decisions and turn to more direct means of expression. This is why the right to protest is fundamentally important in a democracy. In these circumstances, people need to be able to voice peaceful protest where their legislators can actually see and hear them on the day of debate, or in order to bring about pressure for a debate, and this is a central part of the function of Parliament Square as a historic site.
We take the view that the best way to secure the right of freedom of expression and association enshrined in the ECHR would be to legislate for a positive right to protest anywhere. This right should over-ride temporary considerations of freedom of traffic circulation, noise control or use of open space, which may be relatively minor issues compared to the matter of the protest, unless there are specific and defensible arguments why a particular protest is unacceptable. In other words, the burden of proof should be on the authorities to show why protest should be restricted, rather than trivial obstructions of the highway or loudspeaker use being assumed to be disorderly unless they have been specifically permitted by the authorities.

The right to protest—anywhere, not merely close to Parliament—should be protected as a positive element of a democracy. Currently, any breach of this right has to be challenged through judicial review, which is time-consuming and costly. There should be a positive right to protest, with a quick, cheap and easy procedure for people to complain against the police or other parties if this right is infringed.

Would the repeal of sections 132 to 138 of the Serious Organised Crime and Police Act give rise to a need for new powers for the police or other authorities?

Generally, we would insist, on the basis of the position expressed in the last paragraph, that the answer is no. Unfortunately, it seems that the City of Westminster and the GLA, either independently or on the basis of encouragement from the police or other authorities, have already taken steps to restrict protest independently of SOCPA which would negate the impact of repealing sections 132–138.

In our recent experience of attempting to organise protests in Whitehall and Parliament Square, we have experienced insurmountable, and in our view unreasonable, obstacles arising from requirements made by the local authority. The City of Westminster requires expensive third party insurance as a condition of any organisation using this area. The GLA also require users of the grassed area in Parliament Square to get permission from them. If the police can rely on the local authority to impose the same type of restrictions, the repeal of SOCPA powers about restrictions on protest close to Parliament will have little effect.

(i) Powers to ensure free access to, from and around the Parliamentary Estate and to enable Parliamentarians to discharge their roles and responsibilities

The majority of protests taking place in or near Parliament Square are in practice very small, at most a few hundred people. On the rare occasions when larger gatherings appear, such as the demonstration by the Countryside Alliance, the more general Public Order Act powers are available. Currently police can impose conditions on a march under section 13 of the Public Order Act 1986 if they think it will entail serious damage to property, serious disruption to life of community, serious disorder, or coercion by intimidation. These conditions can in theory include limitation of the content or wording of placards, etc, as well as conditions about the duration and number of participants in a march. Not only are no new powers required alongside the POA, but we would point out that in the country as a whole, the POA can be and is used excessively. George Monbiot (Guardian 22.2.05, see http://www.guardian.co.uk/politics/2005/feb/22/ukcrime.uk) mentions the prosecution of someone for holding a placard with a picture of a dead cat. Such limits on placards are an unjustified restriction on freedom of speech unless there is a clear case that the placards may infringe the law on incitement to violence or to racial or religious hatred.

(ii) Powers to restrict the use of loudspeakers

We would be very concerned if, even after repeal of section 138 of SOCPA, use of loudspeakers was difficult and costly as a result of the current requirement that organisers seek a licence (at a cost of £200) from the City of Westminster. Currently the local authority has powers to impose its own restrictions of various kinds including the use of loudspeakers.

Being able to project the message above the general noise of the traffic is an important element of a protest and the current inability to do so can render a demonstration ineffective and reduces organisers’ ability to guide protesters.

(iii) Powers to take account of the particular security risk

There is no reason to assume that protests pose any more a security risk to the area around Parliament than any of the other activities that take place there every day. It has been shown in a court case in January 2007 challenging the SOCPA conditions placed upon Brian Haw’s protest that the police actually made very few security checks on his site despite claiming that security issues the main reason why Mr Haw’s protest should
be curtailed. It is vital for democracy that short term and often politically motivated security arguments are not used to undermine fundamental rights.

Again, we point to the availability of POA powers and we cannot see that additional powers are justified.

(iv) Powers to protect Parliament Square as a world heritage site

This question seems to be misconceived. As stated earlier, the character of Parliament Square as a world heritage site includes its historic function as a site of protest, and we consider this to be a central part of Britain’s democratic tradition. Protest is therefore fully consistent with its heritage role and Brian Haw’s display, for example, attracts visitors from all over the world. On the other hand the heavy traffic and the lack of pedestrian crossings into the central grassed area certainly do impede its use by tourists far more than any use by demonstrators.

The proposed plans to redevelop Parliament Square are a significant cause for concern for the continued use of the area for demonstrations. This is based upon the experience of Trafalgar Square where no demonstration, however small, may take place without permission from the GLA. This is also the case for the area of grass in Parliament Square. If the GLA’s plans to redevelop Parliament Square involve them managing a greater area then this will result in similar restrictions on protest as are currently in place with SOCPA.

(v) Powers to prevent permanent demonstrations in Parliament Square

We do not see any necessity for this. The only instance so far has been the protest by Brian Haw. The fact that his placards became the subject of an award-winning art exhibition at the nearby Tate Britain gallery is surely testimony to the cultural and political importance of his actions and his display. Far from being an eyesore, it is properly recognised as a landmark contribution to the culture of British democracy.

(vi) Ensure equal access to the right to protest

We are not aware of any conflict of interest between different organisations in relation to the use of Parliament Square or nearby areas. However, the more extensive the restrictions on the use of space imposed by the police, the local authority, the GLA or any other public authority, the more likely it is that two protests taking place on the same day would compete with each other for space.

The current powers of the City of Westminster to require proof of a Public Liability Insurance Certificate (minimum of £5 million cover), as a condition of using Parliament Square, are clearly discriminatory against protest by under-resourced or ad hoc organisations. Small organisations are unlikely to have suitable insurance in place, but nor are they likely to generate a crowd large enough to damage the grass.

June 2008

Memorandum by the Campaign to Make Wars History (Ev 53)

WAR POWERS

"War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression therefore, is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."—Nuremburg War Crimes Tribunal 1946

SUMMARY

This report focuses on Britain’s antiquated, unlawful, undemocratic war powers arrangements. It identifies the treaties, conventions and laws prohibiting war and the reasons why Britain repeatedly reneges on international agreements outlawing war and requiring disputes to be settled peacefully. It asks why we are taking part in the massacre of innocent Afghan and Iraqi citizens, the worst atrocity in British history, and why our political, civil and military leaders are continuing to commit, and our law enforcement authorities are failing to prevent, the worst crimes known to mankind.
The report ascertains five main causes of these horrific failures, concentrating in particular on the inept decision making systems in use in Parliament and Government. We then answer the joint committee’s questions and finish with seven recommendations to modernise Britain’s dysfunctional war powers arrangements.

What is wrong with Britain’s war powers arrangements?

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

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

What causes these failures?

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

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

   (b) False legal advice. For 50 years law officers in both Britain and America have provided false and misleading legal advice on the legality of warfare and armed conflict to politicians, Governments, the armed forces and the public. The legal advice provided by the Attorney General to the Government and Parliament was false, deceptive and less than 5 per cent correct. That it is possible for Britain’s law officers to deceive the nation over the legality of war is a disgrace and is the worst legal failure in British history.

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

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

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

9 The Universal Declaration of Human rights 1948.
The laws of war

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

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

ARTICLE II The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Why is Britain unable to keep its promises? The Kellogg-Briand Pact is binding international law and it has never been repealed. UK citizens have a right to expect it to be honoured by the inheritors of the solemn promises—the government. If citizens are required to obey the law then so must the government.

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

“War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law . . . We denounce them as law breakers.”—Henry Stimson, USA Secretary of State 1932

“After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such war is illegal in international law; and that those who plan and wage such a war with its inevitable and terrible consequences are committing a crime in so doing. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression therefore, is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole . . .”—Nuremburg War Crimes Tribunal 1946

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

— The Treaty for the Renunciation of War [the Kellogg-Briand Pact]
— The United Nations Charter
— The Judgement of the Nuremburg War Crimes Tribunal
— The Genocide Convention
— The Geneva Conventions
— The Universal Declaration of Human Rights
— The Nuremburg Principles
— The Rome Statute of the International Criminal Court
— The International Criminal Court Act 2001

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

What causes Britain’s poor quality decisions?

8. The problem lies with the outdated inappropriate decision making systems used in Parliament and Government. In comparing modern decision making systems used in industry and commerce with those used in Whitehall and the Palace of Westminster it becomes clear that almost every essential component of a high quality decision is absent from political decisions.
9. The House of Commons debate on the Iraq war exemplifies the poor quality of parliamentary decision making. The resolution was deceptive, complex, contained false statements, lacked reference to the laws of war; lacked guidance on the illegal nature of the use of armed force; lacked guidance on the criminal implications for MPs; lacked reference to peaceful alternatives; lacked consideration of the needs and interests of the Iraqi people; lacked a risks/rewards analysis; lacked consideration of outcomes; lacked discussion of moral and ethical standards and basic human values and took no account of Britain’s largest ever protest march.

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

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

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

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

**DOES THE DRAFT RESOLUTION IN THE WHITE PAPER GIVE PARLIAMENT SUFFICIENT CONTROL OVER CONFLICT DECISIONS?**

12. No.

**SHOULD THE PM DETERMINE THE MOST APPROPRIATE TIMING FOR SEEKING PARLIAMENTARY APPROVAL?**

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

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

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

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

15. No. The Prime Minister cannot be trusted.

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

16. No. If the Prime Minister takes a decision that causes the death of another human being then he and his accomplices must answer to charges of murder, genocide or a crime against humanity in court. Under no circumstances should he or she be able to seek retrospective approval from Parliament. If the PM can claim on the hoof that “exceptional circumstances” apply; it would be a recipe to make unlawful decisions and retrospectively invent plausible justifications.
Should the Prime Minister determine whether the security condition continues to mean that it would not be appropriate to lay a report before Parliament?

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

Should there be a regular re-approval process?

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

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

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

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

20. No.

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

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

Recommendations

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

23. The committee must establish the truth of the allegation that the Attorney General and Prime Minister deceived Parliament, HM Armed Forces and the nation over the legality of the wars with Iraq and Afghanistan. This can be done by identifying the laws governing warfare and armed conflict and establishing actions that are prohibited or required. A summary of war law is attached [Appendix 1] [submitted but not printed].

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

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

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

27. Utilise £5 million from the Conflict Prevention Fund to set up an independent Peace and Conflict Prevention Commission reporting to Parliament and briefed to identify, eliminate and replace the systemic, structural and cultural factors that cause British Governments and political, civil and military leaders to violate the laws of war, renege on international treaties and commit the most serious crimes known to mankind.
28 Finally the committee should recommend new legislation to Parliament governing the conduct of war and the use of armed force. A new War Powers Act should:

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

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

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

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

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

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

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

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

June 2008

Memorandum by R D Cramond CBE MA (Ev 24)

1. I am responding as an individual. My credentials, which can be checked in “Who’s Who?”, are that I have a First Class Honours degree in history, including the medal in constitutional history, and am a Haldane Medallist in Public Administration. I was also a Fellow of the British Institute of Management until I retired. I have been Private Secretary to a Minister and rose to the rank of Under Secretary in the Civil Service. I have held posts at Board level in several non-departmental public bodies, have personally founded and directed a small charity and served as a Trustee or non-executive Director on other charities, and chaired a small private sector business for ten years. I can therefore claim both theoretical and practical knowledge of administration and management in the public and private sectors and in charities.

2. My response is almost entirely about the provisions for the Civil Service. I do not wish to comment in detail on the other provisions but, in reply to “Overarching Question Two”, the subjects are indeed disparate, and it would seem more appropriate for the provisions about Protests, the Attorney General’s role on national security, Treaties and War Powers to be in a separate National Security Bill.

Summary

3. My answers to the Committee’s questions about the Civil Service are as follows:

Questions 4 and 5—Yes. Accountability to Parliament and independence of the Commissioners would be increased, but I suggest some further strengthening of the Draft Bill for these purposes. In particular the Commission should report to Parliament rather than to the Executive.

Question 6—The Bill should provide that the Commission’s recommendations should be made directly to the Public Administration Select Committee (on the Civil Service), with copies to the Minister for the civil service and the Cabinet Secretary. In appropriate cases the recommendations should also be sent to the Committee on Standards in Public Life.

Question 7—Yes. The Commission should be able to initiate investigations.

Questions 8, 9 and 10—The exceptions to appointments on merit in clause 34(3) are not appropriate, the provisions about “special advisers” are inadequate, and the definition of “civil servants” is not appropriate. So-called “special advisers” are not civil servants, and should be called “political advisers” because that is their function. But the exclusions in clause 25 (2) are appropriate.
CIVIL SERVICE ETHOS

4. A Civil Service Act has long been needed to enshrine the political neutrality and ethos of a permanent civil service, independently recruited and promoted on the basis of merit and not political favour. As Baroness Prashar, former First Civil Service Commissioner has urged, it is “no longer appropriate that these core values are regulated by Orders in Council, which can be changed at the whim of any government. We need a Civil Service Act that will provide Parliamentary protection and oversight”.

5. A Civil Service Act was proposed in 1854 on the grounds that without an Act of Parliament the reforms instituted by the Northcote - Trevelyan Report (principally the replacement of political patronage by impartial and politically neutral permanent civil servants recruited by independent competitive examination) would almost certainly be “imperceptibly abandoned” by successive governments. Reports of the Committee on Standards in Public Life and the Select Committee on Public Administration have shared the belief that there should be statutory provision to put beyond doubt the impartiality and political neutrality of the permanent civil service and to maintain public trust in central government and public office holders.

6. In 1969, at the AGM of the First Division Association, the late Derek Morrell spoke about the professional ethic which regulates the work of civil servants. That ethic was commitment to neutrality of process: the principle that public power is not to be used to further the private purposes of those to whom it is entrusted. It is to be used solely for the furtherance of public purposes. So material presented to Ministers by civil servants should be honest, full and objective so that Ministers’ decisions can be well founded. Neutrality of process ends there, because the final decisions remain of course with the elected Ministers, using their political judgement and values.

7. So the government is right to propose that the governance and values of the Civil Service should be put on a statutory basis and not simply managed under the Royal Prerogative. The present system leaves it open for any government “imperceptibly” to abandon the core values and revert to political patronage by Order in Council, without reference to Parliament. However the text of the draft Bill does not appear to mention the core values. I suggest therefore that it should specifically state that the core values of “integrity, honesty, objectivity and impartiality”, as listed in the Explanatory Notes, must be the basis of all work by both the Civil Service and the Commission.

SPECIAL ADVISERS

8. It follows from that ethos that so called “special advisers” appointed personally by Ministers from party political sources, who bring no special professional or technical experience, and whose advice is not objective, should not be described as civil servants. They have no requirement to be impartial, and have no commitment to civil service values. Their commitment is personal and political, in contrast to the professional commitment to public purposes of the permanent and politically neutral service. We should abandon semantic sham and call them “political advisers”, because that is their role, as their Code of Conduct makes clear.

9. Politicians of all parties rightly deplore the cynicism in the media and the electorate about politics and politicians and the poor turn out at elections. May one of the reasons for this be the confusion and distrust generated by the activities of “special advisers”? Probably the most egregious, and certainly the most sustained abuse of non-elected power for political advantage was the constant, disproportionate attempts by Mr Campbell to bully the BBC whenever he thought they were not swallowing whole the line he was spinning. Added to his forceful personality, undoubted ability and commitment to his message was the prestige and authority attached to his position within the No. 10 Private Office. This pressure on a public service broadcaster was neither politically neutral nor a simple attempt to correct error or misunderstanding. But it resulted, in the aftermath of one error in an early morning radio programme, to the resignation of both the Chairman and Chief Executive of the BBC.

10. However the most famous—or infamous—case of undesirable activity by a “special adviser” was the e-mail (“a good day to bury bad news”) by Jo Moore which became the subject of a Parliamentary debate on 23 October 2001. However tasteless and insensitive that e-mail was, can it not be argued that Jo Moore was simply doing the job which she—and Mr Campbell—were paid (by the taxpayer!) to do—ie to give advice for party political advantage? The obvious resultant damage to public trust in government came from the action of this political adviser being seen as inside, not outside, the government machine.

11. The exclusions in clause 25 (2) from references to the civil service and civil servants are inappropriate. However clause 34 (3) (c) of the Draft Bill exempts “special advisers” from the requirement that all civil servants be recruited by fair and open competition and from the code of conduct requiring civil servants to carry out their duties with objectivity and impartiality. If so, they cannot be civil servants and these exemptions cannot be justified. To charge their salaries to taxpayers as if they were civil servants is therefore a concealed
subsidy to the political party in power. To regard them as civil servants, pay them as such and yet exempt them from civil service requirements is either a circular argument or a contradiction in terms. Their salaries should be paid from party sources. In any future discussion of state aid for political parties payments to “special advisers”, running I understand at something like £7 million a year, or over £30 million during the lifetime of an average Parliament, should be taken into account, along with the more transparent “Short” money, as an already existing political party subsidy.

12. The justification given for “special advisers” is that their employment adds a political dimension to the advice and assistance available to Ministers and that they help Ministers on matters where the work of government and government party overlap and where it would be inappropriate for permanent civil servants to become involved. But why do Ministers need political advice within their office? Politics is their own professional speciality and they get advice from party colleagues both inside and outside Parliament, from their constituency parties and from party researchers and focus groups. When a former Secretary of State for Scotland was asked if he wanted a political adviser, his reply was that he did not need anyone to tell him what his politics were! No Minister I served ever asked me to get involved in anything of a party political nature, and if they had I should have immediately reported it to my Head of Department.

13. No political adviser should ever be given line management responsibility over civil servants. This endangers what should be a clear distinction between the activities and advice of politically neutral civil servants and the activities and advice of persons operating for party political purposes. It is the negation of the Northcote - Trevelyan core values and key principles which the government announced in its Green Paper of July 2007 would be enshrined in law and which are now implicit in the Draft Bill. Civil servants should owe neither their jobs nor their prospects to the influence of political parties, lobbyists, business or other interest groups. So if a political adviser is given line management control of civil servants their political neutrality will be endangered and they will inevitably be less willing to give frank advice to Ministers on the practical implementation of their policies, when that advice may not be entirely welcome, or even regarded as obstructive.

14. I have personal experience of giving that kind of advice to two Cabinet Ministers and a Minister of State of different political persuasions. Although they clearly found the advice not entirely to their taste, they listened carefully, in no way resented what I said, and then took their decisions. I then of course implemented these decisions, whether they accorded with the advice I had given or not. That is how the system should work, and I feel strongly that the increasing use of “special advisers” may be threatening that invaluable frankness and objectivity, and will certainly do so if a special adviser is a line manager.

15. I therefore welcomed the Prime Minister’s revocation of the Order in Council which enabled “special advisers” to be appointed with executive powers of line management over civil servants and I note the statement that the draft Bill reafirms this approach. However there seems to be no specific provision in the Bill to prevent “special advisers” from being given such powers. Such a provision should be enshrined clearly on the face of the draft Bill, otherwise a future Prime Minister could give a “special adviser” such powers by Order in Council without any Parliamentary procedure.

16. My dealings with senior public servants in other European countries, when I was in regular negotiations in Brussels, suggest that the ability of a different political administration to move seamlessly into office after a general election in Britain commands universal respect, admiration and even envy. So the Bill should command cross party support by ensuring that the civil service is capable of serving, with equal dedication and commitment, future duly elected and constituted governments, whatever their political complexion. That would be impossible if career civil servants had been subject to political influence by a line manager, and so could be perceived as having been politicised.

17. The Joint Committee notes that the Draft Bill does not define the number or role of “special advisers” and asks whether this is appropriate. My view of their role is given above. As to their number, the Committee on Standards in Public Life (9th Report) recommended that the “total number of special advisers should be contained in statute, with an upper limit subject to alteration by resolution approved by both Houses of Parliament”, and that “pending legislation, there should be a debate on the total number of special advisers that can be appointed within government”. This recommendation should be incorporated in the Bill, debate on which will provide an opportunity for discussion of the number.

CIVIL SERVICE COMMISSION

18. The Civil Service Commission should certainly uphold the ethos of a politically neutral civil service and the constitutional position of the Civil Service should be placed under the direct oversight and protection of Parliament rather than the Executive of the day, as Baroness Prashar urged. The Commission should report to the Public Administration Select Committee of Parliament directly and not to the Executive. Copies should
be sent to the Cabinet Secretary, the Minister for the Civil Service and, in appropriate cases, the Committee on Standards in Public Life.

19. This is because public perception of the independence of the Civil Service Commission would be better secured if the Commission were seen to be responsible directly to Parliament instead of to the Executive of the day. Otherwise the Northcote - Trevelyan fear that successive governments might well “imperceptibly abandon” the political neutrality of the civil service would be realised. The Commission should be put in the same position as the Parliamentary Commissioner for Administration and the Comptroller and Auditor General, in terms of oversight of core values and responsibility to report direct to Parliament.

20. Similarly, recommendations by the Commission on appeals from civil servants should be made to the Public Administration Select Committee of Parliament, with a copy to the Cabinet Secretary. The Commission should also be given the power and resources to initiate investigations without an appeal being made to it. This is because it is possible that a whistle blower or investigative journalist might raise an issue which merits investigation even though no individual civil servant may have lodged an appeal.

21. The Civil Service Commission should have a specific power to investigate the role and function of each ministerially appointed “special adviser”, and report to Parliament on whether that role justifies taxpayer funding.

22. The draft Bill does not specifically require the Civil Service Commission to monitor the training of civil servants. Advising ministers on policy issues is a hard-won professional skill in itself, and improved relevant training is to be welcomed. The process of independent competitive selection on merit should ensure that recruits have the necessary intellectual ability. But they should be trained in matters such as financial management (recognising the distinction between public and private sector financial arrangements and motivations), presentational skills, both orally and in writing, personnel management, and management techniques such as network analysis, critical path, operational research, linear programming, queuing theory, organisational change, logical trees and algorithms and practical advice on appearing before Parliamentary Select Committees. I personally also found Coverdale training in team working and listening skills helpful. The Draft Bill could usefully specifically empower the Commission to exercise oversight of such training.

May 2008

Submission by Professor Eileen Denza (Ev 51)

My comments will be limited to the questions of Treaties and War Powers.

Treaties

1. I agree broadly with the proposals of the Government as to how the Ponsonby Rule should be given statutory effect. It has seemed to me that the current procedures elaborated within the framework of the Ponsonby rule do give Parliament an adequate opportunity to scrutinise treaties which do not require UK implementing legislation and which are not subject to special more stringent requirements. The fact that such treaties have very seldom been challenged is due to the fact that such a high proportion of those treaties follow a standard pattern from which minor deviations and the reasons for them are not readily apparent, together with the lack of a mechanism for systematic scrutiny in Parliament. I do not believe that the history of the operation of the Ponsonby rule shows that there would be advantage in entitling Parliament to request an extension of the 21 sitting day period. Nor do I believe that it would be realistic for Parliament to seek to scrutinise treaties before their signature. I am not aware that such a procedure occurs in any country and it would make the negotiating process very difficult for the executive to manage. Successive Governments have made every effort to apply the Ponsonby rule in good faith, there have been few occasions when exceptional circumstances have been thought to require any departure from the rule and these have usually been accepted by Parliament without challenge. The requirement to lay a statement before Parliament after the event explaining the circumstances together with the steps taken or to be taken to consult by some alternative means seem to be adequate and sufficiently flexible for the purpose.

2. I believe that Parliament could set up a more systematic scrutiny procedure for treaties and the explanatory memoranda now supplied. I would not believe that a new Committee would be appropriate, given the existing specialist Committees. Rather the Foreign Affairs Committee should retain overall control, but a Sub-Committee with an explicit mandate to ensure swift scrutiny of treaties and power to consult with other Committees where appropriate might be needed to ensure that the new blocking power was effectively used.
WAR POWERS

3. Generally I agree with the proposal of the Government that Parliamentary control of the use of military forces in armed forces abroad should be secured by means of a resolution of the House of Commons rather than by any legislative requirement. The procedure for granting parliamentary approval appears to me to be realistic, but would at the same time enhance the responsibility of the Government to Parliament and the possibilities of Parliamentary scrutiny. The proposals seem to me to be consistent with the views I expressed in evidence to the Committee in the context of their enquiry into Waging war: Parliament’s role and responsibility. In particular I believe that the Prime Minister should determine when to seek parliamentary approval and the information to be supplied—given that there are extensive opportunities open to both Houses to offer criticism of the timing or to request more extensive information before giving approval and also to challenge on a retrospective basis any decision not to seek approval.

4. I agree that information should be provided to Parliament on the objectives and location as well as the legal basis for any proposed deployment or action, but that the full advice of the Attorney General should not be made public. Disclosure of the full texts of Law Officers’ Opinions—which can quite properly require frequent modification in the light of rapidly changing circumstances—would open the way to selective quotation by non-lawyers of advice and estimates out of historical and legal context and ultimately to increased reliance by Ministers on oral consultation and advice in place of formal Opinions.

5. I agree also with what is proposed in regard to the involvement of the House of Lords, and that existing Committees of the House of Commons are well able to exercise the new powers which would be offered to give or to withhold approval.

June 2008

Memorandum by Professor David Feldman (Ev 66)

1. I am asked to give an opinion on the following matters:

(a) human-rights implications of a proposal by the Clerk of the House of Commons and the Serjeant at Arms for a ban on permanent and overnight protests outside Parliament;

(b) human-rights implications of a proposal by the Serjeant at Arms and Black Rod for a ban on all forms of protest along the strip of pavement running parallel to the main entrances of the Houses of Parliament and Portcullis House in order to ensure access to those entrances;

(c) the control of noise, particularly human-rights implications of (i) adequacy of powers of the police to control noise in light of the proposal to repeal sections 134 and 137 of the 2005 Act in so far as they concern unauthorized use of loudspeakers and powers to impose conditions as to the maximum level of noise permitted to a demonstration, (ii) a possible power to confiscate loudspeakers, and (iii) the adequacy of other powers to control noise;

(d) the extent of powers of constables to arrest people without a warrant;

(e) the human-rights compatibility of a power proposed in clause 13 of the Draft Bill that would allow the Attorney General to direct prosecutors to discontinue proceedings on grounds of a threat to national security.

A. BANNING PERMANENT AND OVERNIGHT PROTESTS OUTSIDE PARLIAMENT

2. The Clerk of the House of Commons and the Serjeant at Arms propose a ban on permanent and overnight protests outside Parliament on grounds that include their appearance, the possibility of their causing difficulties as more pedestrians are attracted to Parliament Square under the World Squares proposals, and the security threat that they cause.

3. Any such provision would infringe the right to freedom of expression and the right to freedom of assembly under Articles 10 and 11 respectively of the European Convention for the Protection of Human Rights and
Fundamental Freedoms (the ECHR).\(^\text{14}\) Such infringements may be justifiable if they are prescribed by law and necessary in a democratic society for one of the purposes listed in Article 10.2 (in the case of freedom of expression) and Article 11.2 (in the case of freedom of assembly).

4. To be prescribed by law, a restriction must be contained in positive legal provisions that are sufficiently accessible and certain to allow people to know when they are liable to have their rights restricted. There must be considerable doubt as to whether Sessional Orders provide a sufficiently solid legal basis for a restriction to be “prescribed by law” for the purpose of the ECHR, bearing in mind the uncertainty as to the legal status of such Orders and the territorial extent of their authority. In my view, it would be sensible not to rely on Sessional Orders to impose restrictions; any restrictions should be imposed by ordinary legislation.

5. To be necessary in a democratic society for one of the specified purposes, a restriction must be a proportionate response to a pressing social need to take action to achieve the purpose.

6. The question is whether a ban on all permanent and overnight protests would satisfy those criteria.

7. The purposes to be advanced by such a ban are said to be (a) ensuring free access for Members to each House and (b) controlling excessive noise that would disrupt the workings of Parliament.\(^\text{15}\) In a democratic society, there is a clear interest in ensuring that Members of each House can secure access to their respective Houses and conduct their political business once there. Measures to allow them to do so would fall within the legitimate purpose of protecting their rights (and freedoms).

8. I have doubts, however, as to whether a ban on all permanent and overnight protests outside Parliament would be proportionate to that purpose. Such a ban would not be particularly focused on the places and times at which a protest is likely to impede Members’ access to their respective Houses or to give rise to noise at a level that would be likely to disrupt the work of either House. In view of the reduced incidence of all-night sittings since the reforms to House of Commons procedures, there seems to be no rational link between the proposed ban on overnight protests and the purposes which might justify it in human-rights terms. The proposed ban on permanent protests seems to me to suffer from a similar problem: there appears to be no evidence that a permanent protest is disrupting, or is likely to disrupt, the efforts of the two Houses of Parliament and their Members to exercise their democratic functions.

9. The requirement of proportionality carries within it a requirement that a measure restricting a right should be rationally related to (ie likely to facilitate the achievement of) a permitted purpose under Article 10.2 and Article 11.2, and should not intrude on the right more than necessary to achieve that goal. If the rationale for the proposal is to secure access for Members to the parliamentary estate and to prevent disruptive levels of noise penetrating the buildings, measures should be tailored to those purposes. As the Joint Committee on Human Rights pointed out when considering the Bill that became the 2005 Act, there is no justification in Article 10 or Article 11 for restricting freedom of expression or assembly in order to improve, for example, the visual amenity of the area; the same applies to measures to make the aesthetic experience of tourists more pleasant. To the extent that the proposal restricts freedom of expression and freedom of assembly and goes further than necessary to protect Members’ rights by securing access for Members and preventing levels of noise that are likely to disrupt their work, the proposal seems to me to give rise to a significant risk of incompatibility with Convention rights.

10. In evidence to the Committee, Mr Chris Allison, Deputy Assistant Commission of the Metropolitan Police Service, indicated that there are other reasons (apart from disruption to access for Members and disruptive levels of noise) for wanting some controls over protestors in the vicinity of Parliament. In particular, Mr Allison drew attention to the possible threat to security if a person has an installation so extensive that he or she has no control over it or knowledge of what other people have put into it (QQ 303, 318, 321), or threat to public safety from burning flags (Q 311). It would be legitimate to interfere with rights under Articles 10.2 and 11.2 in the interest of public safety and, perhaps, for the prevention of crime. Two points should be noted in this context. First, Mr Allison considered that such risks could be adequately countered by a power to

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\(^{14}\) Those Articles, so far as relevant, provide as follows.

**Article 10 Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others,...

**Article 11 Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others,...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, of the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
impose conditions on protestors. Secondly, a person imposing conditions can ensure that they are tailored to the foreseen threat and are proportionate and rationally related to the nature and scale of that threat.

11. The implication of this for the proposal for a ban on overnight demonstrations is that such a ban would be difficult to defend on human-rights grounds. When the Metropolitan Police Service is able adequately to secure public safety and, presumably, the rights of others by imposing conditions on demonstrations, it seems to me to be very possible that a court, in this country or in Strasbourg, would consider a ban on all overnight and permanent demonstrations to be disproportionate and so not necessary in a democratic society.

B. BANNING ALL FORMS OF PROTESTS ON PAVEMENTS PARALLEL TO MAIN ENTRANCES OF PARLIAMENT AND PORTCULLIS HOUSE

12. The same principles govern the human-rights assessment of the proposal to ban all forms of protests on pavements parallel to the main entrances to the Palace of Westminster and Portcullis House (and, presumably, other buildings in which Committees of either House may sit, such as 2 Millbank) in order to ensure access to those entrances.16

13. If there is evidence that any protest on the pavements parallel to those entrances to buildings unreasonably impedes Members in getting access to the buildings or gives rise to noise of a level that is likely to disrupt the work of Parliament, a blanket ban on processions would certainly be proportionate and serve a legitimate purpose. A problem arises if there is no such evidence, or if disruption occurs only when some kinds of protests take place. In these circumstances it would be more difficult to show that a blanket ban was proportionate to a pressing social need to take action (ie was necessary in a democratic society).

14. The difficulty is that justifying an interference with a human right requires consideration, usually on a case-by-case basis, of the extent of the interference and the weight of the factors advanced by way of justification. A bright-line rule, such as a total ban on protests, is particularly likely to violate rights because it prevents context-sensitive assessment on a case-by-case basis of the impact of the restriction on a proposed assembly or demonstration.

15. Nevertheless, it might be justifiable to introduce a blanket ban on protests at certain points on the pavements parallel to entrances to buildings as being a justifiable interference with rights under Articles 10 and 11 if (i) the areas of pavement affected were carefully selected by reference to the need to maintain access to buildings and (ii) there were sufficient areas remaining in the vicinity where protests could take place to ensure that the ban on parts of pavements did not deprive protestors of the essence of the rights to freedom of assembly and expression. By contrast, if it were to appear that the designated pavements were insufficiently closely related to the need to maintain access to the buildings, or that there was no real need for the ban in order to secure access (giving rise to an inference that the ban had an ulterior and, in human-rights terms, insufficient purpose such as improving the visual amenity of the area), the ban would be unlikely, in my view, to be justifiable under Articles 10 and 11.

C. CONTROLLING NOISE

16. There are different views about the adequacy of existing powers to control noise. Section 134(4)(f) of the Serious Organised Crime and Police Act 2005 allows an authorization of a demonstration in the designated area based on Parliament Square to include a condition as to maximum noise levels, and section 137 makes it unlawful to operate a loudspeaker in a street in the designated area without authority. If those sections were to be repealed, it would be necessary to consider whether other statutory provisions confer adequate power to control noise and, if not, whether it would be necessary and appropriate to introduce new legislation.

17. It is noteworthy that there are great practical difficulties in setting noise levels and in measuring them (QQ 337, 338). It is also correct to point out that there are some limitations on powers of arrest that can make it difficult for the police to take effective action against unauthorized use of loudspeakers, especially as there is no power to seize a loudspeaker that is being used without authority. The significance of this in human-rights terms is limited, however, as the evidence is that at least some loudspeaker equipment does not produce a noise loud enough to avoid being drowned by traffic noise (Q 338), so it would be hard to show that preventing the use of loudspeakers is, as a general rule, a proportionate way of protecting public safety or the rights of others.

18. If sections 334 and 337 of the 2005 Act were to be repealed, some people consider that the police would have adequate powers under other enactments to deal with noise that reaches a sufficiently disruptive level to justify interfering with Convention rights. One of these is the power in section 14 of the Public Order Act 1986

16 I understand that the proposal was initially raised by the Metropolitan Police Service in their response to the Government’s recent consultation, Managing Protest around Parliament, and again by Deputy Assistant Commissioner Chris Allison during his evidence (particularly Q309).
to impose conditions on an assembly (ie two or more people) that is causing or is likely to cause serious disruption to the life of the community. On the other hand, it is correct to point out that there is no power (apart from that under the 2005 Act) to impose a noise-limiting condition on a lone, very noisy demonstrator. If a single member of an assembly were to make excessive noise, a condition imposed on the assembly as a whole would bind the noise-maker, who would commit an offence were he or she to disobey the conditions: section 14(5) of the 1986 Act; but a condition could be imposed only if there were likely to be serious disruption to the life of the community. Noise will rarely amount to serious public disorder, serious damage to property or serious disruption to the life of a community (as Mr Allison pointed out in evidence: QQ 326–330); whilst in the past courts have been prepared to allow considerable leeway to police officers’ judgement as to whether the criteria for imposing conditions under section 14 have been satisfied, they are now, in the light of the Human Rights Act 1998, beginning to insist on reasons being given for officers’ decisions on those matters, and are becoming more rigorous in scrutinizing decisions and the reasons for them against human-rights standards in public-order policing. It would therefore be wrong to assume that section 14 of the 1986 Act could do the job that is currently done by sections 134 and 137 of the 2005 Act.

19. One way of dealing with a lone demonstrator might be to charge him or her with the offence of using threatening, abusive or insulting words or behaviour within the hearing of a person likely to be caused harassment, alarm or distress thereby (section 5 of the Public Order Act 1986). However, the words or behaviour might not be threatening, abusive or insulting: it is the disruptive volume rather than the content or manner of the expression that is the cause for concern here. Furthermore, it is not always easy to establish that someone was subjected to harassment, alarm or distress, as Mr Allison pointed out (Q 343), and where a person is advancing political views it may be a disproportionate and hence unlawful interference with his or her right to freedom of expression to bring proceedings at all.

20. It seems to me, therefore, that, if it is thought that some control over noise is needed, the Public Order Act 1986 would not provide a reliable or comprehensive means of providing it. I have no expertise in the general law relating to noise pollution, and so will not consider that matter, which was explained by Mr Allison and by Mr Dean Ingledew in oral evidence (QQ 337, 338, 342).

21. I am asked for a view as to the human-rights implications, if the relevant provisions of the 2005 Act were to be repealed, of retaining a ban on the unauthorised use of loudspeakers and a power for the police to impose conditions on the maximum permissible noise level of demonstrations.

22. I refer to the principles outlined in paragraphs 3 to 5 above, which are applicable here.

23. In relation to the use of loudspeakers, there is, in my view, a necessary implication in Article 10 of the ECHR that, in imparting information and ideas, one is entitled to use mechanisms to ensure that one is heard above the hubbub. It is strange to require authorisation to be given for use of a loudspeaker at a demonstration, and I find it hard to take seriously the suggestion that it would be necessary and proportionate in pursuit of a permissible objective under Article 10.2 to prohibit the use of loudspeakers save in extraordinary circumstances. There may be legitimate reasons for regulating the type of loudspeaker that can be used in public or the volume at which it can be used. For example, it might be necessary to impose limits to protect people’s hearing against damage, or to allow them to go about their work without having their own speech drowned out by mechanically assisted speech. Such regulation would be legitimate to protect health and the rights of others. However, a blanket ban on the use of loudspeakers at demonstrations, or a power to ban their use, would face problems in relation to the proportionality of and necessity for the interference with freedom of expression.

24. A power to fix a maximum noise level for a demonstration would be a great deal easier to justify in human-rights terms and would, in my view, present no serious legal difficulty, although as noted above the practical difficulties involved both in selecting an appropriate level and in policing it would be considerable.

25. A power to confiscate loudspeakers that are being used unlawfully has been suggested. As noted above, the right to freedom of expression can carry with it a right to impart and receive information and ideas by means of a loudspeaker. Assuming that the unlawfulness stemmed from the use of a loudspeaker without authorisation, the compatibility of a power to confiscate the loudspeaker with the right to freedom of expression would, in my view, depend on whether the refusal of or failure to grant authorisation to use the loudspeaker was justified on the facts of the case as a proportionate response to a pressing social need to pursue a permitted objective under Article 10.2 of the ECHR. When making this assessment, it would be relevant to consider the strength of the evidence for claiming that measures short of prohibiting the use of the loudspeaker would have been likely in the particular case to be insufficient to avert a harm falling within Article 10.2.

17 See R (on the application of Brethony) v. Chief Constable of Greater Manchester [2005] EWHC 640 (Admin), Bean J.
19 See Dehal v. Crown Prosecution Service [2005] EWCA 2154 (Admin), Moses J.
26. Confiscating the loudspeaker would be likely to interfere with the right to property under Article 1 of Protocol No. 1 to the ECHR, but it would often be possible to justify the interference and I do not anticipate serious problems under that Article. A confiscation would also be likely to interfere with the civil rights (in this case, property and possession rights) of the person who owns or was in possession of the loudspeaker. It would be necessary to allow the aggrieved person to test the legality of the confiscation before an independent and impartial tribunal (ideally a court) in order to comply with the fair-trial requirements of Article 6.1 of the ECHR.

D. ARREST WITHOUT WARRANT

27. I am asked for my view as to whether, after the amendments made by the 2005 Act to section 24 of the Police and Criminal Evidence Act 1984, a constable can no longer arrest without a warrant an individual who is committing a minor public-order offence, such as using an unauthorised loudspeaker, if the constable knows the person and so would be able to serve a summons on him or her.

28. The form in which the question is put is based on a misconception. Before the amendments made by the 2005 Act took effect, the position was as follows.

(a) A constable was allowed to arrest, without a warrant, a person whom the constable suspected on reasonable grounds to be about to commit, in the act of committing or have committed an “arrestable offence”, ie an offence for which the sentence was fixed by law (murder) or which carried a maximum sentence of imprisonment for five years or more. This had been the position since 1967, and reflected the belief that it was not appropriate to deprive a person of his or her liberty, a fundamentally important interest, unless there were good grounds for suspecting that person of a serious criminal offence. However, there was no test of necessity to justify the arrest; an arrest for an arrestable offence would be lawful unless it was unreasonable.

(b) Since 1 January 1986 (when section 25 of the Police and Criminal Evidence Act 1984 came into force) a constable had also had power to arrest without a warrant a person who was suspected of committing a less serious offence if the constable did not know who the person was or where he or she lived. This was a special provision designed to overcome the problem arising where a suspect gave a false name and address and could not be tracked down later, frustrating efforts to serve a summons.

(c) Numerous statutory provisions creating less serious offences contained individual powers to arrest without warrant. These powers were subject only to an unreasonableness test for the lawfulness of their exercise until 2 October 2000.

(d) On 2 October 2000 the Human Rights Act 1998 came into force. Thenceforth a constable, as a public authority for the purpose of the Act, would act unlawfully if he or she exercised a power of arrest in circumstances where the arrest violated a person’s Convention rights, including the right to liberty under Article 5 of the ECHR and the rights to freedom of expression and freedom of assembly under Articles 10 and 11. These safeguards supplemented those in the various statutory provisions authorising arrest, and called for the exercise of judgement by both constables and reviewing courts.

29. The effect of the 2005 Act on powers of arrest (and other investigatory powers, such as search of premises and seizure of property) was to abolish the distinction between arrestable and non-arrestable offences, and to allow the powers to be exercised in respect of all offences, however minor. However, recognising that this would authorise a very serious interference with a very important right—the right to liberty—and that such interference needed to be justified by reference to a compelling social need, the Act provided that the power to arrest could be exercised only in specified circumstances, designed to ensure that the arrest would be a proportionate way of achieving one of the purposes regarded as justifiable by Article 5.1 of the ECHR, particularly securing the fulfilment of an obligation imposed by law, the lawful arrest or detention of a person effected for the purpose of bringing him or her before a competent legal authority on suspicion of having committed an offence, or when it is reasonably considered necessary to prevent the person committing an offence or fleeing after having done so. Other grounds for arresting are concerned with the obligation of the police under Articles 2 and 3 of the ECHR to take reasonable steps to protect the life and health of people at risk (including those at risk from themselves).

30. This short historical account shows that it would have been open to the drafters of the 2005 Act to attach a power of arrest to the offence of operating a loudspeaker without authorisation, subject to any necessary restrictions to accommodate justifications for interfering with the right to freedom of expression. The drafters did not do so, and the Bill was not amended in this respect in either House. Nevertheless, the powers of constables in this regard are wider than they would have been before the amendments made by the 2005 Act to powers of arrest: there is now a power to arrest without warrant for very minor offences of this kind, but the power is very properly limited to ensure that it is used to interfere with people’s fundamental rights only...
when necessary to achieve purposes justified under the relevant Articles of the ECHR. It is mistaken to suggest that the 2005 Act limited powers of arrest in respect of very minor offences. It considerably extended them, but subject to conditions.

31. In view of the conditions imposed by the 2005 Act on the power of the police to arrest for very minor offences I am asked whether, in my view, it would be appropriate to extend current police powers of arrest or to review powers of arrest in the near future. This is a matter that calls for political judgement, but it seems to me that judgement needs to be informed by the following considerations.

32. First, the power to arrest without a warrant for very minor offences has already been extended very widely by the 2005 Act. (By contrast, it is arguable that the power to arrest for very serious offences has been subjected to some increased safeguards for rights.) It seems to me to be questionable whether we should be continuing to extend coercive powers in respect of very minor offences, particularly considering the huge expansion in the number of such offences over the past two decades.

33. Secondly, suggestions for extensions need to be examined particularly critically where they would be aimed at people exercising a fundamental democratic right to assemble peacefully and impart information and ideas on political matters. Bearing in mind that many people have limited access to other means of communicating information and ideas to a mass audience, given for example that the Communications Act 2003 maintains a total prohibition on political advertising on radio and television, that private owners of print media have no obligation to allow proponents of ideas opposed to their own to publish in their outlets, and that some points of view are effectively excluded from broadcast media on grounds of taste, public assemblies and loudspeakers continue to serve a very important political function in our democracy.

34. Thirdly, the limited evidence I have seen does not seem to me to make a strong case for establishing a pressing social need for this sort of action in pursuit of any legitimate aim under Article 10.2 or Article 11.2 of the ECHR. There might be much evidence which I have not seen, but in my view, as at present advised, the idea that there is a pressing social need to extend police powers for this purpose in order to secure a legitimate aim falls somewhere on the scale between unpersuasive and fanciful.

E. Directions by Attorney General to Discontinue Investigations or Prosecutions on Grounds of National Security

35. Clause 12 of the Draft Constitutional Renewal Bill would give power to the Attorney General to direct the Director of the Serious Fraud Office not to investigate specified matters in England and Wales, and to direct prosecutors not to bring proceedings or to discontinue proceedings in respect of a specified matter or offence, where the Attorney is satisfied that it is necessary to do so for the purpose of safeguarding national security. If in any proceedings a question arises as to whether the direction is or was necessary for the purpose of safeguarding national security, clause 13(5) would allow any Minister to issue a certificate that would have to be taken as conclusive evidence that the direction was so necessary.

36. I am asked whether the power to issue a direction would be capable of being reviewed in the courts (a) generally, and (b) if a certificate were issued, and whether ouster of judicial review would be vulnerable to a declaration of incompatibility under section 4 of the Human Rights Act 1998.

37. The answer to the general question is that the direction should, in my view, in principle be amenable to judicial review in the same way as any other exercise of statutory power by a public body. The discretion of a prosecuting authority to continue a prosecution inconsistently with a settled policy developed by the Director of Public Prosecutions in the public interest or otherwise unreasonably is reviewable. A decision of the DPP not to say before an offence is committed that the potential perpetrator would not be prosecuted was rejected on the merits but not, apparently, on the ground that the court had no power to review. The jurisdiction to review a decision relating to prosecution is exceptional, and courts have been reluctant to engage in it. However, very recently, the Administrative Court has reviewed a decision of the Director of the Serious Fraud Office to discontinue an investigation into alleged bribery because of claims that continuing the investigation would prejudice national security. Clauses 12 and 13 of the Bill appear to be a direct attempt to head off future challenges of that kind.

38. In some cases in the past the fact that a decision has been taken by the Attorney General rather than a statutory decision-maker has been treated as conferring a presumptive immunity from review, as the Attorney exercises common-law or prerogative powers in the public interest and is accountable to Parliament for the

21 R. (on the application of Pretty) v. Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800, HL.
22 R. (on the application of Birmingham) v. Director of the Serious Fraud Office [2007] QB 727 at paras. 63–64 per Laws LJ.
23 R. (on the application of Corner House Research) v. Director of the Serious Fraud Office [2008] EWHC 714 (Admin).
exercise of those powers. However, since the House of Lords held in Council of Civil Service Unions v. Minister for the Civil Service that reviewability depends on the public-law nature of a power rather than the source of it, so that prerogative powers could be reviewed unless there was a good reason for not doing so, there is no reason to exempt decisions by the Attorney from review in suitable cases. In any case, the power under clause 12 would be a statutory power rather than a prerogative power, reinforcing the desirability of maintaining review of it to uphold rule-of-law principles.

39. If there were to be a ministerial certificate under clause 13(5), would it make review impossible? That would depend on the approach of the courts to the certificate. The certificate seems to me to be similar in nature and purpose to a public interest immunity certificate. The courts have held that they can satisfy themselves that such certificates have been properly issued. If there is evidence of improper purpose or of an attempt to mislead the court, a court can disregard the certificate, as in the trial of directors of Matrix Churchill on charges relating to the export of dual-use equipment to Iraq. However, there will rarely be such evidence.

40. Would the use of a certificate to cut off judicial review of the Attorney’s direction violate human rights? In principle, a certificate is capable of depriving litigants of the right to a fair and public hearing before an independent and impartial tribunal for the determination of criminal charges or civil rights or obligations. However, for there to be a violation of that right there must be a victim of the violation. In a case like that involving the discontinuance of the investigation into allegations of bribery, the person whose criminal charge or civil right or obligation would be determined will be the potential defendant in criminal proceedings, and it is hard to see how he or she could be regarded as a victim of a violation of his or her right as a result of a decision by the Attorney to direct the discontinuance of an investigation or prosecution. If the offence involved harm to a person giving rise to a risk of death or degrading treatment or infringement of other rights, the victim could claim to have a genuine interest in seeing the case come to trial, and might suffer a violation of the right to life or to be free of degrading treatment if the state failed to prosecute the suspected offender. However, that would give rise to a separate cause of action against the Attorney General, potentially sounding in damages. In my opinion, it would not give rise to a violation of Article 6 of the ECHR unless the victim were to be prevented in some way from claiming for violation of another right, and the more appropriate basis of challenge to such a step would be to rely on the right to an effective remedy for violation of a Convention right under Article 13 of the ECHR, not to claim a violation of Article 6. Article 13 has not been made actionable in the courts of England and Wales: it is not one of the Convention rights covered by the Human Rights Act 1998.

41. In my view, it is therefore very unlikely that the use of the certificate under clause 13(5) would give rise to a declaration of incompatibility under section 4 of the Human Rights Act 1998.

July 2008

Memorandum from Maria B T Gallasteguz (Ev 49)

In a free and just society, there should be no restrictions on people to have access to places where people can meet, associate, assemble, with legitimate cause.

When we have created a “fear society” brought about by “illegal wars” and “illegal occupation” of Iraq and Afghanistan, Parliament would naturally want to stifle legitimate protest. In the normal course of events Parliament would have nothing to fear, and indeed, its Prime Minister should be able to walk from No 10 Downing Street to the House of Commons without the shameful, embarrassing United States style cavalcade.

In the last two years, I have lived outside Parliament, opposite the House of Commons, at the Peace Campaign and I have never seen any snipers or felt any threat from “terrorists” other than the fear that has come from within the House itself, opposite.

I do not support any ban or indeed any restrictions on loudspeakers, for again, we the ordinary people, need to be heard by the Government of the day. It is healthy for a living breathing democracy. We would not be crying out, but for the great emergency that is happening in Iraq and Afghanistan in the name of “Liberty”. We insist the people must be heard! Parliament will find it annoying if they are shown publicly to be making unpopular, illegal decisions. Regarding the “World Heritage Site”, it is a great privilege to live in, and around Parliament Square. When we compare the town square in Baghdad, which we have turned to rubble, I believe people could not have much to complain about. Indeed the tourists love the “peace campaign” and it is photographed practically every minute of the day.

“We are the occupational force, occupation our own square, in our own town, in our own country, in order to liberate our square from the oppressive regime, which is our own Government”. We will not surrender.

24 See the discussion in Gouriet v. Union of Post Office Workers [1978] AC 435, HL.
25 [1985] AC 574, HL.
26 Tinnelly and Sons v. United Kingdom (1998) 4 BHRC 393, Eur. Ct. HR.
In the question of access, if people are very upset, they naturally rally to the “door” where the problem originated from. This is expected and all the humans throughout history behave in this way. Surely the question should be the other way round. If good decisions were being made, then people would not need to come to the door to vent their upset, because of bad decision making. Remember, we were once “proud to be British” and we were (supposedly) a model for fairness and justice. If we go back to the “rule of law” and apply it equally, then the ongoing campaign would at some point, come to a natural end. Campaigns for justice only come about because people have been ignored, treated unjustly, and the “system” has let them down. There is nowhere else to go, nothing more to lose, only to gain...

Let’s get back to a fair society, following National and International law, and then, only then, can we all move forward.

12 June 2008

Memorandum by Global Witness (Ev 39)

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

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

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

GLOBAL WITNESS’ CONCERNS REGARDING PART 2 OF THE BILL

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

Section 2 Ban on directions in individual cases

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

Section 3 Protocol for running of prosecution services

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

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

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

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

Sections 12–15 Safeguarding of national security

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

— 12(1)—There are no limits with respect to the types of prosecutions that can be stopped since this power of direction can apply to *any* prosecution and SFO investigation.

— 12—There is no regular review of the Attorney General’s directions to stop any prosecutions and SFO investigation.

— 12(2)—The terms upon which the Attorney General can withdraw a direction are not stated and therefore cannot be scrutinised.

— 13(3)—There is no provision for the Directors or any prosecutor to oppose a direction once issued by the Attorney General; furthermore that individual can be subjected to criminal prosecution if s/he refuses to provide requested information.

— 13(4)—The role of the court is unclear with respect to situations where a prosecutor fails to comply with a direction issued by the Attorney General.

— 13(5)—The terms regarding the certificate are weak and insufficient, particularly as there is no built-in peer review mechanism of the basis on which the chosen Minister of the Crown issues it. This is especially disconcerting given that the certificate serves as conclusive evidence as to whether or not the direction was necessary for the purpose of safeguarding national security in the first place. For these reasons, Global Witness believes that the use of certificates should be withdrawn or revised.

— 14—There is no specified timeframe or limit for the Attorney General to provide a report to Parliament. There are also no requirements to include in the report the nature of the information that caused the direction to be brought in the first place; in fact, the relevant information can be omitted. Without this information the report would in essence be a statement of fact advising Parliament that the Attorney General had issued a direction.

— 15—The power of the Attorney General to request information is absolute and any person refusing to do so “without reasonable excuse” would be subject to criminal prosecution.

**Section 16 Annual reports on exercise of Attorney General’s function**

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

**Section 17 Interpretation**

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

**Global Witness’ Concerns Relating to Repercussions of the Bill**

Global Witness believes that the introduction of this Bill would have a seriously negative effect on the UK’s ability to investigate and prosecute a large variety of crimes. The power of the Attorney General to halt any prosecution and SFO investigation without clearly defined limits, oversight and accountability is a dangerous precedent that we believe the UK Government would object to in other jurisdictions.

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

— The efforts to both launch and operationalise the now international effort to create transparency for revenue streams from the extractive sector: The Extractive Industries Transparency Initiative (EITI). Though the EITI Secretariat has now moved from its London DFID base to Oslo, the UK has continued to play a very constructive role in this process.

— The establishment of: i) the City of London Police’s Overseas Anti-Corruption Unit to investigate allegations of bribery offences committed by UK companies in foreign jurisdictions; and ii) the Metropolitan Police’s unit that investigates and uncovers the proceeds of corruption in London in cooperation with anti-corruption commissions in the country of origin.

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

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

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

— It is possible that the Attorney General could block an investigation into bribery by UK oil companies for new oil concessions, out of concern about security of oil supply as a matter of national security. Global Witness can already point to some examples where such investigations should have been conducted. If this Bill passes, would it undermine the possibility for any prosecution and SFO investigation?

— What position would the Attorney General take regarding the potential for money laundering investigations into key well-connected brokers, currently residing in the UK? Here we are referring to individuals we have identified in our investigations as playing key roles in the brokering of illegal arms deals and the asset-stripping of foreign countries. Very often such individuals also play a brokering role for access to concessions in corrupt countries for UK (and others) companies—could such matters be defined by the Attorney General as matters of national security because of their commercial “interests” and the importance of the “relations” with the said country?

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

June 2008

Memorandum by the Lord Goodhart QC (Ev 05)

THE ATTORNEY GENERAL

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

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

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

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

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

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

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

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

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

May 2008

Memorandum by General The Lord Guthrie GCB LVO OBE (Ev 33)

WAR POWERS AND TREATIES

Thank you for the opportunity to give written evidence to your Committee. I have little to add to what I actually said in the Debate we had in the House of Lords on Thursday 31 January 2008.

The excellent and helpful consultation paper produced by the Ministry of Justice states:

“The power to send men and women abroad into a situation of armed conflict is one of the most important decisions a government can ever take”.

In a democracy, it is surely desirable that decisions by Governments to use Armed Forces extensively and substantially be taken on the basis of thorough and accurate information made publicly available, and of candid and consistent explanation by Governments, fully involving Parliament in advice and decision. However, although it is highly desirable, can it be fully entrenched in our constitutional practice?

We should be cautious in letting the experience of the Iraq war, which has undoubtedly given impetus to the discussion, over-influence our deliberations. Recent armed conflict has taken many forms. The background and run-up to the Korean War, Suez, the Falklands, the Balkans, Kosovo, Sierra Leone, Afghanistan, Iraq and Special Force operations have all been different. Often, the nature of the conflict has quickly and dramatically changed, and the rules and objectives of our Forces have had to be amended. What I think is certain is that historically it has not been easy to predict armed conflicts far in advance of hostilities, and I do not think it will become easier in the future. New threats can emerge very quickly.

The Armed Services want to know that the country is behind them before they are committed, that they are supported by Parliament and that what they are being asked to do is legal. Parliament’s stamp of approval is important but Parliament must not run the risk of hazarding the lives of service men and women. Secrecy, security and surprise are critical to many operations and if, for instance, one day it became necessary militarily to pre-empt an enemy attack—and that is not inconceivable—how would Parliament debate the actions in advance? Parliament is unlikely to have all the necessary intelligence to have a fully informed debate. This, of course, may not always be essential and this problem may well be solved by the existing or a new parliamentary committee or committees.

Should Parliament rely on a member of the Government, the Attorney-General’s Legal advice? Should there be other, more independent, advice to Parliament which may be contrary? It would be unsettling for those deploying to hear of lawyers expressing contrary views and introducing uncertainty. The prosecution of members of the Armed Forces who take action in good faith would be wrong.

The deployment of a Military force for armed conflict is complex and takes, as it did for Iraq or Afghanistan, considerable time. Of course the very deployment before hostilities can be a deterrent in itself but our current arrangements allow quick decisions to be made and we have been able to act quickly, often before the situation on the ground has deteriorated. The armies of other countries, notably the Germans and the Netherlands, are envious of our current procedures. We are likely to work in a coalition or in an alliance and when I was Chief of the Defence Staff in the Kosovo crisis in 2005 it was very noticeable how the United Kingdom forces could be assembled and deployed quickly in circumstances in which other countries’ forces could not respond because of their Parliamentary procedures which had to be observed.

As a member of NATO, we are committed to aid other members who are attacked, and the United Nations charter mandates countries to undertake operations should the Security Council require them. As a signatory of NATO and UN treaties we are expected to commit troops quickly when called upon to do so. We also have to recognise the difficulties that arise once a force is deployed. Circumstances change. Humanitarian and peacekeeping operations can suddenly become peace enforcement and develop into armed conflict. All four of these states can take place in a theatre at the same time. Deployments lead to unforeseen consequences and mission creep. I well remember visiting troops delivering cups of tea and medical assistance to elderly ladies at one end of a village when suddenly their comrades at the other end were attacked with great ferocity. Afghanistan is an interesting example. Many failed to predict the intensity of operations there and I suspect that some would not have been so keen on deployment if they had realised what that commitment was going to be.
Formal declaration of war has been described by some as an historical anachronism and it is difficult to see occasions when it would happen. I understand why many think that the royal prerogative being the legal basis for the Government’s war powers is an outdated state of affairs in a modern democracy. Having said that, it has not served the country all that badly over the years.

I do not believe that one should legislate and have a statutory solution. Deployments vary so much and are accompanied by much uncertainty. One template would rarely work for all situations. I see the best solution being a formal but non-statutory convention. It would be necessary, whenever it was possible and sensible, to seek parliamentary approval for deployment before service men and women were committed, but there is a need for some flexibility and it would not always be wise or practical to debate prior to deployment, even though government parliamentary debate and approval would be highly desirable. It would also be reassuring for the Armed Forces. I do not see it as particularly helpful for the House of Lords to vote but it would be of immense value if they were to debate, preferably before the House of Commons had their debate, and were able to inform them and the Government of their views. There is much experience in the House of Lords which should be used.

If for some reason armed conflict or substantial deployments occur without Parliament’s approval, it would be important for Parliament to meet at an early opportunity to endorse the decisions which had been made. I also see a necessity for Parliament to watch and discuss the progress of a campaign from time to time, always bearing in mind the effect such a debate would have on our troops in the field. It is almost inconceivable for the Prime Minister and Government to commit troops without thinking they had the backing of Parliament. We should be concerned that parliamentary oversight could, unless we are careful, lead to pressure to debate how operations should be conducted. Parliamentarians are not qualified to do this and they must avoid micromanaging and taking tactical decisions. These are the province of the commanders on the ground. What Parliament should debate are the objectives, the legality of what our forces are being asked to do, and in very general terms the size of a deployment and likely direction. These last two are notoriously difficult to predict, depending very greatly on the actions of the ill intentioned that are causing the problem in the first place. We are not in control of what their reaction to us will be.

This is a difficult and complex but very important subject which needs debating. We must avoid an overly prescriptive solution and maintain flexibility. Slavishly following a parliamentary statutory procedure on every occasion, whatever the circumstances, could endanger the very people we are trying to help.

June 2008

Memorandum by Dennis Harrison
Clauses 12 and 13 (Ev 48)

Summary
1. I am the former town clerk and chief executive of Chesterfield, Derbyshire, who retired in 1986, having acted as a prosecuting solicitor extensively in the first half of my 40 years in local government.
2. I protest strongly at the inclusion in the Constitutional Renewal Bill (the Bill) of Clause 12, which gives power to the Attorney General (AG) to halt prosecutions and investigations which put national security at risk, and Clause 13, providing a system of ministerial certificates, precluding the questioning of that issue.
3. The present procedure, by which the Director of the SFO has exclusive control over prosecutions and investigations which put national security at risk, and Clause 13, providing a system of ministerial certificates, precluding the questioning of that issue.
4. The proposed power for the AG would also encourage other States, whose public officials are being investigated by the SFO, to make threats involving national security if an investigation is not halted. As the procedure became known, such threats could grow significantly. The result could be a serious erosion of the rule of law.
5. The certification procedure would allow a direction of the AG to go unquestioned, even if made on inadequate grounds. States such as the US, on which this country relies heavily for its national security, and Italy, which is highly prone to criminality, could make successful threats to our Government, resulting in an escalation in the occasions for the use of the power without any scope for judicial reviews.
6. In framing this Bill, the Government has again failed to heed the past recommendation of the House of Lords Constitution Committee that the AG’s responsibilities should include the protection of the rule of law.
7. There is no reference in the White Paper or draft Bill to the Government’s obligation under the OECD’s relevant Convention that decisions of States to halt prosecutions and investigations should not be influenced by a relationship with another State.

8. Failing the most desirable withdrawal of both clauses, an amendment should be adopted which excludes the use of the power under Clause 12 if any threat has been made to the rule of law or legal system, and also where the OECD’s Convention could be infringed. That would guarantee that no such threats were ever again made, so protecting that rule. Clause 13 should not be accepted by the two Houses of Parliament, as being inimical to good government.

9. These arguments are much reinforced if these proposals of the Government are closely contrasted with the sub-rules of the rule of law, as postulated by a leading authority on British law, Lord Bingham.

Main submission

1. The writer is the 78-year-old retired town clerk and chief executive of Chesterfield, Derbyshire. When I retired in 1986, I was also the Honorary Secretary of the East Midlands Branch of the then Association of District Councils. During the first half of my forty year career in local government I prosecuted in criminal cases extensively, before the introduction of the Crown Prosecuting Service, mainly in Norwich, where I was the senior solicitor to the City Council, leading a team of four prosecuting solicitors for part of my time. I then moved as deputy town clerk to Chesterfield, where I was later promoted to town clerk and chief executive.

2. My purpose in making this submission is to protest as strongly as I can against the inclusion in the Constitutional Renewal Bill of Clauses 12 and 13, the former conferring the power on the Attorney General to give directions to prosecutors, including the Director of the Serious Fraud Office, to halt investigations and prosecutions on the ground of potential harm to national security, and the latter, by means of a certification procedure, to prevent such a direction being open to judicial review.

3. The present statutory system (under S.1 (2) of the Criminal Justice Act 1897) for the control of investigations by the Director of the SFO, under which he has the sole discretion in these matters, is entirely satisfactory, if decisions are made in accordance with any principles established by the courts under judicial reviews. Subject to that compliance, the decisions are made under the Code for Prosecutors of 2000, which refers specifically to a wide range of factors in favour of and against prosecutions. For instance, the Code identifies the danger that “details may be made public that could harm sources of information, international relations or national security”.

4. There is, however, a key difference between the Director of the SFO and the Attorney General. Unlike the former, the latter is a member of the Government, over which the Prime Minister has the ultimate control. He or she has a political role as well as a legal one. His or her tenure of office lies entirely at the discretion of the Prime Minister, who can terminate the tenure if there is a sufficiently serious failure to do as the latter wishes. If Clause 12 is enacted, the Prime Minister would so be able, under an express or implied threat of loss of office, to compel an Attorney General to halt an investigation, if it could be claimed, with or without full justification, that continuance would carry a risk to national security, which, if a ministerial certificate were issued, could not be questioned.

5. The cases in which Clause 12 could be used would be outside the full control of the Attorney General, apart from any involvement by a prime minister, and could snowball, as foreign countries came to recognise the effectiveness of threats leading to recourse to this procedure. The largest and most powerful country, with great influence on our national security, would be the USA, but one in which criminality is rife is Italy, which could be almost equally influential, especially under its present prime minister, who is not renowned for his integrity. It is all too easy for a state which wishes to maintain good relations with another state whose official is under investigation to identify some potential damage to national security should good relations deteriorate, all the more so where that other state is powerful and of strategic importance.

6. It is a salutary thought indeed that, if these two clauses become law in their present forms, judicial reviews of decisions to halt prosecutions and investigations on ground of national security could never again occur as they have in the past, even if the decisions are made on spurious grounds. Autocracy could start to run riot. For instance, the two statutory provisions could be a recipe for the Government being allowed continually and silently to truckle with impunity to an oil-rich despotic regime, such as Saudi Arabia’s, with its corruption-riddled business methods, pushing a horse and cart through our rule of law, without limit.

7. It is no coincidence that the past recommendation of the House of Lords Constitution Committee that the Attorney General’s responsibilities should include the protection of the rule of law has again been ignored in the compilation of this Bill.
8. The Conservative Party, from what the Shadow Attorney General has told me, so far it seems, intends Clause 12 to go forwards unchallenged by that Party, but it intends to oppose Clause 13. The preservation of the right of recourse to judicial review, would, of course, be very desirable, but it will not provide a fool-proof protection against the misuse of the power to halt an investigation or prosecution where national security is claimed to be at risk, for judicial review is a gamble upon the availability of a challenger who is willing and able to take the risk, in terms of legal costs, of opposing the Government.

9. This country is a participant in the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. Article 5, amongst other things, states that investigations and prosecutions in such cases “shall not be influenced by the potential effect upon relations with another State”. It provides no exclusion for cases in which national security could be harmed. It is a serious deficiency of both the White Paper and the draft Bill that there is no reference to the Convention in either document.

10. There is an unanswerable case for the entire abandonment of Clauses 12 and 13, not least by reason of the scope they provide for political interferences, and for the precedents they would provide for new attempts to escape our rule of law. If, nonetheless, there is a determination by the Government to whip support for Clause 12, if not Clause 13, a means should be sought to prevent the new power being applied where there has been a threat to the rule of law or legal system, and also to exclude cases which could infringe the terms of the Convention concerning relations with another State.

11. May I therefore ask the Joint Committee to consider the introduction of an amendment to Clause 12 in a form such as the following:

“(2) The power conferred by Subsection (1) shall not be available in any instance:
(a) where the Government has received, or become aware of, any threat to national security from a source outside it which is capable of being viewed as having been made for the purpose of challenging or eroding the British rule of law or legal system, or
(b) where the exercise of the power could be viewed as infringing any provision for the time being binding on the Government pursuant to the Convention of the Organisation for Economic Co-operation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, or any provision in force which replaces such a provision.”

12. Such an amendment should be accompanied by the deletion of Clause 13 in full, to allow judicial reviews to be retained here. The freedom from restraint the clause would give to the executive would be inimical to good government.

13. A columnist in The Times, Rachel Sylvester, on 3 June, writing on Labour’s flaws, said that the party was divided in several ways, one being between “those who believe civil liberties are sacred and those who are willing to sacrifice ancient rights on the altar of national security”. If this is a reference to this present controversy, one can only hope that the first group will prevail, with the outcome being the protection of the rule of law.

14. The retention unaltered of these two clauses in the Bill would constitute a highly undesirable shift of power from the judiciary to the executive, and a serious erosion in the rule of law, the origins of which go back to Plato and Aristotle. “The rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure. The principle is intended to be a safeguard against arbitrary governance.” (Wikipedia, internet.)

15. A fundamental principle in the framing of statutes must be that they should not run counter to the rule of law. Lord Bingham, in a speech on 16 November 2006 for the Sir David Williams Lecture in the Law Faculty of Cambridge University, postulated eight sub-rules of the British rule of law. It can be argued, with varying degrees of force, that Clauses 12 and 13 of the draft Bill fail to comply with no less than six of these sub-rules, as follows:

1. “The law must be accessible and, so far as possible, clear and predictable”: a law dependent on the arbitrary judgements from time to time of the Attorney General (or behind him or her, the Prime Minister), is neither accessible nor predictable.

2. “Questions of legal rights and liabilities should ordinarily be resolved by application of the law and not the exercise of discretion”: the liability to prosecution should not hinge on the discretion even of the Attorney General (or of the Prime Minister).

3. “The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”: how can the law of the land apply equally to all if some are freed from criminal liabilities at the discretion of the Attorney General?
4. “Ministers and public officers at all levels must exercise the powers conferred upon them reasonably, in good faith, for the purposes for which the powers are conferred and without exceeding the limits of such powers”: how can the courts test whether this sub-rule has been complied with if they are stripped of the powers of judicial review?

5. “Adjudicative procedures provided by the state must be fair”: likewise, as to judicial reviews.

6. “The state must comply with its obligations in international law, the law deriving from treaty or international custom and practice governing the conduct of nations”: the most relevant treaty here is the OECD Convention against the bribery of foreign public officials. There should be no statutory provision which would prevent information on compliance being available to the public and other states.

16. If the rule of law is to have any application at all here, the two clauses in question should be rejected on these grounds alone, or, at the very least, Clause 12 should be amended along the lines I have suggested, with Clause 13 being entirely rejected.

Adherence to the rule of law is a prime difference between a democracy and a dictatorship. These two clauses therefore go the heart of the British Constitution.

17. The Joint Committee should make it clear in its report that the sub judice rule is preventing it from referring to any current related legal proceedings, and that, being hamstrung in this way, any conclusions will be of limited benefits to the recipients. Unless Clauses 12 and 13 are withdrawn, it would be of advantage to all MPs and peers if the introduction of the Bill to Parliament could therefore be delayed until any such legal proceedings have been completed, to allow full consideration to be given to this part of the Bill, without any such constraints.

June 2008

Memorandum by the House of Commons Foreign Affairs Committee (Ev 75)

SCRUTINY OF TREATIES

The Foreign Affairs Committee has discussed the provisions in the Government’s draft Constitutional Renewal Bill relating to the parliamentary scrutiny of treaties, and wishes to draw the following comments to your Committee’s attention in advance of the evidence session with the Lord Chancellor on 1 July.

1. The draft Bill contains provision for placing the Ponsonby Rule on a statutory footing, and provides that a treaty should not be ratified (other than in exceptional circumstances) if either House has resolved that it should not be ratified. However, we note that it is not proposed that decisions on ratification will automatically be put before Parliament. The situation will therefore presumably remain as it has been since the Ponsonby Rule was first announced, that the Government will find parliamentary time for the discussion of a treaty, if “a formal demand for discussion [is] forwarded through the usual channels from the Opposition or any other party”.

We further note that if either House is invited to take a decision on ratification, the draft Bill does not specify the procedures which would be followed (nor indeed would it be appropriate for it to do so, as it is for each House to determine its own procedures).

Our view therefore is that the provision in the draft Bill is unlikely to result in any change to the existing practice, under which treaties are debated in Parliament very infrequently. The Joint Committee may however wish to raise with the Lord Chancellor how he envisages the House of Commons will be invited to take a decision on ratification on the rare occasions on which this happens, eg, what will be the likely length of debate, will it be on an amendable motion, and will it be taken on the Floor or in committee?

2. We note that these proposals relate only to scrutiny of a treaty once signed, and do not offer any greater opportunity for Parliament or its committees to scrutinise the negotiations which precede signing. It could be argued that this is a significant weakness with the existing Ponsonby arrangements, as is the fact that many “treaty-like” documents (such as memoranda of understanding, exchanges of letters between governments, EU common positions and UN Security Council resolutions) may be more important in their effects than most treaties, yet are excluded by the Ponsonby Rule.

3. Finally, we note that there is a capacity problem with regard to Parliament’s ability to scrutinise individual treaties. Although departmental select committees have the power to examine individual treaties, where relevant to their order of reference, other demands on committees’ time mean that in practice only exceptionally important treaties—such as the Lisbon Treaty on which we reported in January 2008—receive scrutiny. The Joint Committee may therefore wish to consider whether to recommend that the House of Commons Modernisation or Procedure Committees should revisit the idea of a “sifting committee” which
could give initial scrutiny to all treaties and make recommendations either to select committees or to the two Houses that particular treaties merit further examination and debate. (This however should not debar a departmental committee, and in particular the Foreign Affairs Committee, from scrutinising a particular treaty at any point in time.)

Mike Gapes MP
Chairman of the Committee
19 June 2008

Memorandum by the House of Lords Constitution Committee (Ev 71)

INTRODUCTION

1. In the Committee’s Seventh Report of Session 2006–07, The Governance of Britain (HL 158), we acknowledged that the Government’s reform agenda has “profound constitutional implications which will require detailed consideration” (para 3). We therefore welcome the opportunity to contribute to the work of the Joint Committee by commenting on some aspects of the Draft Constitutional Renewal Bill and the accompanying White Paper.

2. In due course, when the bill is introduced to the House of Lords, we will carry out our usual detailed scrutiny of its provisions and report to the House. In this memorandum we confine our remarks to five main areas on which we feel able to comment at this stage. These are: the process by which constitutional change is being implemented and the scope of the draft bill; the proposals in Part 2 of the draft bill on reform of the Attorney General; the proposals in Part 3 on judicial appointments; the proposals in the White Paper on war powers; and the proposals in Jack Straw’s statement of 25 March 2008 in relation to the Law Commission.

PROCESS AND SCOPE

3. We welcome in general the process by which the Government are taking forward their proposed reforms. The Green Paper in July 2007 (Cm 7170), the subsequent consultation papers—on managing protest around Parliament (Cm 7235), the role of the Attorney General (Cm 7192), war powers and treaties (Cm 7239) and judicial appointments (Cm 7210)—and most recently the White Paper, draft bill and analysis of the consultation responses (Cm 7342) have laid the ground for effective pre-legislative scrutiny. Legislation introducing constitutional changes of first-class importance ought in our view always to be subject to wide consultation, to be published in draft and to be subject to pre-legislative scrutiny. This has not always happened in the recent past.

4. While we have no doubt that the Joint Committee, which met for the first time on 6 May 2008, will discharge its role effectively, we note that it has been asked to report to each House by 18 July 2008. The Cabinet Office’s Guide to Legislative Procedures accepts that “a committee will normally require at least three to four months to carry out its work” (para 18.1). Given the wide scope and general importance of the draft bill, we are disappointed that only two months have been allowed for pre-legislative scrutiny.

5. The draft bill, though relatively short, deals with five completely separate areas of proposed reform: demonstrations in the vicinity of Parliament (Part 1); the Attorney General and Prosecutions (Part 2); courts and tribunals (Part 3); ratification of treaties (Part 4); and the civil service (Part 5). Whatever may be the underlying themes of the Government’s Governance of Britain reform programme, the draft bill is in truth a miscellaneous provisions bill. While we accept that a single bill may be the most convenient vehicle for implementing those aspects of the reform programme that require primary legislation, we are concerned that there is a risk that in this conglomerate of topics, the separate parts—each important in its own right—may be subject to less effective scrutiny than might otherwise be the case.

6. The inclusion of civil service reform as Part 5 of the draft bill is of particular concern to us. On the one hand, we are pleased that the Government have stopped their prevarication over when to bring forward legislation on this aspect of the constitution. On the other hand, we are unconvinced that these important reforms can receive the attention and scrutiny they require, either inside or outside Parliament, if they continue to be part of a larger bill dealing with a range of other important issues. A separate Civil Service Bill is in our view needed. The draft bill should be amended to give effect to this. This is not merely a matter of process but also of substance. While we have not carried out any detailed scrutiny of the provisions of the draft bill relating to the civil service, it is plain to us that there are constitutionally significant gaps in what is proposed. For
example, the constitutional requirement for a politically neutral civil service ought to be enacted in primary legislation, as should an obligation for civil servants to act lawfully. It is in our view insufficient for such requirements to be placed in a code.

PART 2 of the Draft Bill: The Attorney General

7. We trust that our recent report Reform of the Office of Attorney General (Seventh Report of Session 2007–08, HL Paper 93) will prove to be a useful handbook for the Joint Committee. It is accompanied by evidence from Baroness Scotland of Asthal and papers from two constitutional experts with sharply divergent views (Professor Anthony Bradley and Professor Jeffrey Jowell QC). Without seeking to resolve the debate on the future of the Law Officers—that will ultimately be a matter for each House—we give an account of the role of the Attorney General and offer analysis of the main arguments for and against change in three distinct areas: legal advice, prosecutions and criminal justice policy. We also consider the question of accountability.

8. There are three points we wish to make in relation to the provisions of the draft bill relating to the Attorney.

Legislating on rule of law responsibilities

9. First, the draft bill makes no express provision on the Attorney’s role in relation to the constitutional principle of the rule of law. The Constitutional Reform Act 2005 section 1 makes express reference to the Lord Chancellor’s role: “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”. It would in our view be odd for the Lord Chancellor’s role to be acknowledged in this way but for the statute book to say nothing about the Attorney’s role. Both of these great offices of State have rule of law responsibilities and this should be acknowledged.

10. How might this be achieved? Section 3(1) of the 2005 Act makes plain that “The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary” and under section 3(6), the Lord Chancellor must have regard to “the need to defend that independence”. Consideration should be given to a similarly worded statement in relation to the rule of law, with all ministers and civil servants having a duty to uphold the rule of law and the Lord Chancellor and Attorney also having a greater duty to defend the rule of law. We see merit in the idea that the Attorney’s responsibilities in relation to the rule of law—and possibly the responsibilities of other ministers—should be acknowledged in legislation. The Constitutional Renewal Bill would seem to be a suitable vehicle.

Oath of office

11. The Government are proposing a new oath of office for the Attorney and suggesting that the form of the new oath does not need to be contained in legislation on the ground that the current oath is not prescribed by statute. When new oaths were required for the Lord Chancellor and Lord Chief Justice of England and Wales following the 2005 reforms, amendments were made to the Promissory Oaths Act 1868. A similar approach ought to be taken in relation to the Attorney’s oath for reasons of consistency and accessibility. We agree that the oath of office for the Attorney needs to be updated. This should be done through primary legislation rather than executive action. This would also give Parliament a welcome opportunity to debate and approve the oath. This is particularly important if the Constitutional Renewal Bill (contrary to our suggestion) makes no express reference to the Attorney’s rule of law responsibilities.

Annual report

12. We welcome the proposal in clause 16 of the draft bill to create a statutory requirement for the Attorney to lay an annual report before Parliament. This would be a useful way of enhancing the accountability of the Attorney.

13. Clearly it will be for Parliament to devise effective procedures for ensuring that the growing number of annual reports relating to the administration of justice are scrutinised appropriately—notably, the annual report of the Judicial Appointments Commission for England and Wales, the Lord Chief Justice’s Review of the Administration of Justice in the Courts, the annual report from the chief executive of the Supreme Court and now the annual report by the Attorney. Scrutiny should be approached in a proportionate way that avoids
committees of each House merely duplicating the work of others. We do not regard it as part of our remit routinely to carry out oversight of these reports; that is, in our view, a responsibility best carried out by the Commons Justice Committee.

**PART 3 OF THE DRAFT BILL: COURTS AND TRIBUNALS**

14. As a preliminary point, we note that part 5 of schedule 3 to the draft bill (removal of the Lord Chancellor’s functions in relation to lower-level judicial appointments) makes a large number of small amendments to provisions contained in the Constitutional Reform Act 2005. In our 14th Report of 2003–04, *Parliament and the Legislative Process* (HL Paper 173), we recommended that “where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and this should be included in the Explanatory Notes to the bill” (para 98). It would be helpful if the Government were to produce a Keeling-type schedule relating to part 5 of schedule 3 to the draft bill and to include that schedule in the Constitutional Renewal Bill’s Explanatory Notes when it is introduced to each House.

15. Save for one matter, we do not at this point wish to make detailed comments on the substance of the proposals in relation to courts and tribunals. In our 6th Report of 2006–07, *Relations between the executive, the judiciary and Parliament* (HL Paper 151), we surveyed the changing constitutional landscape in which the judiciary operates. We did not, however, focus on issues relating to judicial appointments.

16. The one point we do want to raise concerns the proposal in part 4 of schedule 3 to the draft bill in relation to the filling of judicial vacancies in England and Wales other than by recommendation of the Judicial Appointments Commission. The provision is a Henry VIII clause which would empower the Lord Chancellor, after consulting the Lord Chief Justice, by order (subject to affirmative resolution in both Houses) to amend schedule 14 to the CRA 2005. Schedule 14 lists the judicial offices which must be filled by recommendations from the JAC. The Explanatory Notes do little to explain why this provision is included; there was no discussion of it in the consultation paper. This provision seems to relate to an idea reported at para 138 of the White Paper, said to have emerged “in discussions with the judiciary and JAC”. The policy goal seems to be that some judicial vacancies, especially in the tribunal system, should where possible be filled by redeployment of currently serving judicial officeholders rather than by a competition for a new recruit run by the JAC. The White Paper states “The Government therefore proposes to enable the Lord Chancellor to transfer a number of appointments to the Senior President of Tribunals but with a longstop provision requiring a JAC selection where the deployment arrangement is not possible”. As this proposal was not covered in consultation, the Joint Committee will no doubt want to scrutinise it with special care.

17. We are concerned by the apparent breadth of the Henry VIII power, which seems far more extensive in its potential operation than is necessary to give effect to the proposed policy. The substance of the proposal also appears to us to have constitutional implications. Powers to redeploy judges always carry with them a risk to the principle of the independence of the judiciary. It is important that there should be effective safeguards so that judicial independence is not compromised.

**WAr POWERS**

18. Although there is nothing in the draft bill about war powers, the accompanying White Paper announces the Government’s intentions on this issue and we understand that the Joint Committee will be considering these proposals. The Committee has considered this issue in great depth and produced two reports: *Waging War: Parliament’s Role and Responsibility* (15th Report of Session 2005–06, HL Paper 236) and *Waging War: Parliament’s Role and Responsibility—Follow-up* (Third Report of Session 2006–07, HL Paper 51). In light of this, we wish to make the following points to the Joint Committee.

19. First, we very much welcome the general thrust of the Government’s war powers proposals as set out in the White Paper. Adopting a “detailed resolution” on parliamentary approval of the deployment of troops into armed conflict would, in our view, be an effective way of introducing a new convention similar to that which we recommended in our 2006 report. For the reasons set out in that report (para 104), we believe that putting the deployment power on a statutory basis would be inadvisable.

20. Second, we have three concerns about the draft resolution contained in the White Paper.

   — First, we are concerned that the draft resolution states that the House of Commons “may” send a message to the House of Lords asking for its opinion on a proposed conflict decision. We believe that any resolution should include a requirement that the Commons must (except, perhaps, in certain very carefully defined circumstances) await the opinion of this House in respect of the proposed deployment before making its final decision. Either way, it needs to be established what is meant by the “opinion” of the House of Lords, since this implies a formal decision—which may involve a vote.
Second, we regret that the draft resolution does not provide for retrospective approval of deployments in cases where forces have been deployed without prior parliamentary approval for reasons of urgency or national security. We reiterate our belief, set out in the 2006 report, that if troops have to be deployed without prior parliamentary approval, “the Government should provide retrospective information within seven days of (the deployment’s) commencement or as soon as it is feasible”, at which point parliamentary approval should be sought in the normal way (para 110(3)).

Third, we are concerned that the draft resolution omits any requirement for a re-approval process, even if a deployment’s nature, scale or objectives alter significantly. We believe that, in addition to keeping Parliament informed of the progress of deployments, the Government should be required to seek a fresh approval if the nature of the deployment changes substantially. This is vital if “mission creep” is to be avoided.

LAW COMMISSION

21. There is nothing in the draft bill or the White Paper about the Law Commission, but in his statement to the House of Commons on 25 March 2008, Jack Straw announced that the Government “intend to strengthen [the Law Commission’s] role by placing a statutory duty on the Lord Chancellor to report annually to Parliament on the Government’s intentions regarding outstanding Law Commission recommendations, and providing a statutory backing for the arrangements underpinning the way in which Government should work with the Law Commission” (col 23). Following Lord Hunt of Kings Heath’s repetition of the statement in the House of Lords, Lord Norton of Louth sought clarification about whether the Law Commission proposals were to be included in the Constitutional Renewal Bill. Lord Hunt replied that “we will need to feel our way forward as to how best to take forward Law Commission proposals” (col 474).

22. This Committee strongly supports the work of the Law Commission and has long been concerned about the number of their reports that appear largely to have been ignored or forgotten by the Government. Indeed, our former Chairman, Lord Holme of Cheltenham, wrote to Baroness Ashton of Upholland on 24 October 2007 suggesting that the Government should respond to each Law Commission Annual Report by setting out the reasons for the delay in responding to or implementing any outstanding reports. We therefore strongly support the proposed annual report by the Lord Chancellor and the idea of putting the relationship between the Law Commission and the Government on a statutory basis. We further believe that these provisions should be included in the Constitutional Renewal Bill when it is introduced to Parliament.

May 2008

Memorandum by the House of Lords Delegated Powers and Regulatory Reform Committee (Ev 70)

DRAFT CONSTITUTIONAL RENEWAL BILL: DELEGATED POWERS

1. This memorandum responds to your invitation of 13 May to the Delegated Powers Committee to contribute to your Committee’s scrutiny of the draft Constitutional Renewal Bill. The Committee considered the draft bill at its meeting this morning. We have been assisted by a memorandum by the Ministry of Justice about the delegations in the draft bill.

2. We value the opportunity to contribute to the pre-legislative scrutiny of this draft bill and set out below an overview of our opinion on the proposed delegations. In making these observations, our opinion should not be taken to prejudice our position should a bill be introduced: we will report to the House at that stage on whether its provisions inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny. I should also note that we have considered each issue purely as a question of delegation and not of policy.

DOCUMENTS TO BE LAID BEFORE PARLIAMENT SUBJECT TO NO PROCEDURE

3. The bill requires a number of documents to be laid before Parliament (subject to no procedure) and we have considered whether four of these provisions amount to delegations of legislative power. The documents are the protocol for the running of prosecution services at clause 3 and the codes of conduct for the civil service, diplomatic service and special advisers provided for by clauses 30 to 33. As currently drafted, the protocol which would result from clause 3 appears to us to be a non-binding statement of how the Attorney and each of the Directors will usually relate to each other when carrying out the functions allocated to them elsewhere in statute, rather than a document which would create enforceable rights or duties. The codes of conduct
provided for by clauses 30 to 33 appear to us to be management documents. None of these documents, as currently provided for, thus appears to us to amount to a delegation of legislative power. If, by time of introduction, the Government intend more than this, we would welcome that clarification.

**Henry VIII powers**

4. The draft bill contains eight delegated powers, including the usual commencement order power (clause 44). There are four Henry VIII powers in clauses 8 and 43 and in paragraphs 18 and 70 of Schedule 3, all of which are affirmative: we consider clause 43 below, but the others do not seem inappropriate in terms of their scope or parliamentary procedure.

**Civil Service Commission: additional functions—clause 40**

5. Clause 40 enables the Minister for the Civil Service and the Civil Service Commissioners to make arrangements for the Commission to carry out functions in relation to the civil service in addition to those conferred on it by Part 5 of the draft bill. The memorandum does not address the purpose of this power and, in view of clauses 26(4)(b) and 40 (2), we would expect it to do so were such a provision to appear in a bill before the House.

**Power to make consequential provision—clause 43**

6. Clause 43 enables provision (including transitional, transitory or saving provision) to be made by order in consequence of the bill, and subsection (2)(a) enables the order to amend, repeal or revoke any provision made by or under an Act. Such an order is subject to the negative procedure unless it amends or repeals an Act, in which case it is affirmative. This is well precedented and not inappropriate. We suggest that the power at clause 43(2)(a) should expressly be confined to the amendment of Acts passed before or in the same session as the bill. While that paragraph does not include the words “whenever passed”, the specific power conferred by clause 8(1) is limited to the amendment of an “existing enactment”, which might raise the inference that the unqualified reference to “an Act” in clause 43(2)(a) is intended as a reference to any Act. It should also be made clear whether incidental or supplementary provision may be made under subsection (1).

Lord Goodhart

14 May 2008

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Memorandum by ILEX (Ev 54)

**ROLE OF THE ATTORNEY GENERAL AND JUDICIAL APPOINTMENTS**

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

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

- advice and representation to clients accused of serious or petty crime;
- advice and representation to families with matrimonial problems;
- handling various legal aspects of a property transfer;
- assist in the formation of a company;
- be involved in actions in the High Court and county courts;
- draft wills; and
- undertake the administration of oaths.

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

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27 For the nature of consequential provision see *Craies on Legislation*, 8th Edition (Ed Greenberg), paragraph 14.3.11.
Executive Summary

Role of the Attorney General

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

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

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

Powers of the Attorney General

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

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

Cabinet Meetings

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

Attorney General Legal Advice

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

Role of the Attorney General

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

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

(i) overseeing prosecutions

(ii) imparting legal advice to the government; and

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

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

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

“Allegations of political bias, whether justified or not, are almost inevitable given the attorney general’s seemingly contradictory positions”28

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

28 Constitutional Affairs Committee—Constitutional Role of the Attorney General HC 306.
1.5 The important issue is striking the right balance between someone wholly independent and someone with a good grasp of policy considerations who is at the heart of government, and accountable to Parliament. ILEX is of the view that an AG with a good grasp of governmental policy issues does not necessarily mean that an AG would be susceptible to undue political influence. As the paper “Governance of Britain—Constitutional Renewal” points out there has been no suggestion that any law officer in modern times has in fact taken a decision on the basis of political considerations has been substantiated.

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

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

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

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

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

2.3 ILEX also notes that the power to stop a prosecution on National Security Grounds will, however, be put on a statutory footing under the proposed Bill. ILEX has no objections to this as long as there is proportionate transparency having regard to the full circumstances of the case and for the public to know why a particular decision was taken in those exceptional cases (see below).

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

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

3.2 As Lord Falconer rightly observed:

“In every other area the person who is accountable is not the person who gives the advice but the person who takes and acts on the advice”

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

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

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

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

29 The Governance Of Britain—Constitutional Renewal—Policy Proposals p20
30 21 May per Lord Falconer—Joint Committee on the Draft Constitutional Renewal Bill questions 141–216
4.3 In view of the above, ILEX recognises that the AG is in the best position to ensure that prosecution decisions are fully informed by relevant considerations without being subjected to improper pressures political or otherwise.

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

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

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

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

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

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

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

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

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

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

9.1 No comment.

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

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

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

“The three things we all want before we use force is parliamentary support, public support and it is clear that it is accordance with international law”.

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

Judicial Appointments

In terms of the proposals relating to Judicial Appointments, ILEX makes the following general observations: The Constitutional Reform Act 2005 (hereinafter the 2005 Act) made significant constitutional changes to the system of judicial appointments. Essentially, it took away the Lord Chancellor’s power to appoint judges and placed the power in the Judicial Appointments Commission but with proper accountability. This involved a

31 Ibid question 203.
detailed process with proper consultation, together with the setting up of a unique Select Committee in the House of Lords.

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

— that there are problems with the new system;
— change is needed to reduce bureaucracy; or
— there is a need to streamline the appointments system.

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

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

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

June 2008

Memorandum by the Joint Committee on Human Rights (Ev 78)

Thank you for your letter dated 18 June 2008. I am sorry not to have been able to reply by 3 July as requested.

Your letter seeks my Committee’s views on the human rights aspects of two proposals which have emerged during the course of your Committee’s work: a ban on permanent and overnight protests outside Parliament and a ban on all forms of protest along the strip of pavement outside the Houses of Parliament and Portcullis House.

As you are aware, our inquiry into Policing and Protest, which extends beyond the issue of protest around Parliament alone, is still in its early stages. We issued a Call for Evidence on 24 April 2008. We have received a number of written submissions and anticipate receiving more written evidence throughout the course of our inquiry. We held our first oral evidence session on 24 June 2008 where we took evidence from Liberty and Justice on the scope of the right to protest and the proportionality of current legislative measures which restrict protest or peaceful assembly and their operation in practice. A copy of the uncorrected transcript of this session is attached. Last week, we visited Spain and France to learn more from similar European countries on their approach to policing and protest. We anticipate holding further evidence sessions after the long recess and concluding our inquiry with a report before Christmas.

Given the fact that we have only just started taking oral evidence and are continuing to receive written evidence, it is fairly difficult for us to respond in detail to your specific questions. However, we are able to do so in general terms on the principles which inform our inquiry and the evidence we have so far received. I hope this will be helpful.

The Committee’s inquiry proceeds on the basis of the relevant human rights standards, most significantly, Article 11 of the European Convention on Human Rights (which deals with freedom of peaceful assembly). This Article sets out the principle of non-interference with Convention rights, unless it can be shown by those seeking to interfere with the right that the interference is both necessary in the pursuit of a legitimate aim (which are set out in an exhaustive list32), and proportionate. As the European Court of Human Rights stated, in a recent judgment:

In view of the essential nature of freedom of assembly and its close relationship with democracy, there must be convincing and compelling reasons to justify an interference with this right.33

32 “national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

33 Makhmudov v Russia App. No. 35082/04, 26 July 2007, para. 64.
According to the Judicial Committee of the House of Lords:

These rights [Articles 10 and 11 ECHR] are fundamental rights, to be protected as such. Any prior restraint on their exercise must be scrutinised with particular care. The [ECHR] test of necessity does not require that a restriction be indispensable, but nor is it enough that it be useful, reasonable or desirable.34

A number of witnesses to our inquiry speak in strong terms of the fundamental nature of the right to protest in a democratic society. Some witnesses note the significance of Parliament and the importance of being able to protest in its vicinity.

We asked the witnesses, during our recent evidence session, specifically about protest around Parliament. Liberty and Justice both expressed opposition to a ban on the use of loudspeakers in Parliament Square, although they accepted it might be appropriate to regulate the manner, place and time loudspeakers are used, if used disproportionately. However, the witnesses were not convinced that this was currently an issue.35 In relation to a question on access to Parliament, the witnesses said:

**Dr Metcalf:** I think it would be perfectly appropriate, in times of very vigorous protest, for example, to establish a cordon to ensure that the driveways around Parliament and the public access, the footpath on the Parliamentary side of Parliament Square, remains open.

**Lord Bowness:** ... it is actually not quite as simple as that, is it? It is no good putting a cordon around the gates, if you cannot come over Lambeth Bridge or whatever, whether you are on foot or in a vehicle, it is not just keeping the gates open, is it? It is people actually getting to the gates.

**Dr Metcalf:** Right. I think it is difficult to discuss outside the context of a particular case. You know, in any large scale protest, always require at least one viable route or more than one viable route, that seems to me the kind of manner and form of restriction that you would impose on any large scale gathering, simply in order to manage a large scale protest successfully. It certainly does not seem to me a basis for the kind of blanket restrictions that always seem to be bandied about.

**Mr Welch:** I am not sure that the provisions of the Serious Organised Crime and Police Act add anything to the powers which would exist under section 14 of the Public Order Act anyway. The power to impose restrictions under the two provisions are very similar, slightly wider in relation to under the Serious Organised Crime and Police Act, but if there were a large gathering of people outside the Houses of Parliament, and they were blocking access to Peers and Members of Parliament, access to the building, then the police could impose a restriction at that time under section 14 of the Public Order Act to allow access. The practicality is whether the crowd would actually obey, but I am not too sure that you need the whole edifice of SOCPA in order to ensure that that will not happen.36

Article 11 and established caselaw require that any restrictions on protest around Parliament must be both necessary and proportionate to a legitimate aim. As the above quotation from the House of Lords decision in Laporte makes clear, this is a high threshold and does not permit restrictions which are merely convenient or helpful. If measures already exist (such as under the Public Order Act 1986) which could adequately deal with protests around Parliament, this would significantly reduce the likelihood that additional restrictions would be considered to be necessary and proportionate.

We wish your Committee well with the remainder of its deliberations on the Draft Constitutional Renewal Bill and look forward to reading its Report.

*Andrew Dismore MP*
Chair, Joint Committee on Human Rights

*8 July 2008*

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**Memorandum by JUSTICE (Ev 45)**

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

2. JUSTICE makes the following comments.

34 R (Laporte) v Chief Constable of Gloucestershire Constabulary [2007] 2 All ER 529, para. 52 (Lord Bingham).
35 Q22.
36 Qs 445 and 45.
PART 1: DEMONSTRATIONS IN THE VICINITY OF PARLIAMENT

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

PART 2: THE ATTORNEY GENERAL AND PROSECUTIONS

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

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

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

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

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

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

10. Accordingly, JUSTICE welcomes:

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

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

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

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

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

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

13. Accordingly, the consequential notifying powers in clause 13 should be deleted.
14. Implicit in the provisions of the draft bill is that the Attorney will remain with her current roles both as minister of the government and as its chief legal adviser in addition to the superintendence function over prosecution. JUSTICE believes that this is inherently unsatisfactory.

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

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

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

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

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

PART 3: COURTS AND TRIBUNALS

20. JUSTICE agrees with:

   (a) The removal of the Lord Chancellor from the selection of posts below that of the High Court (Clause 19 and schedule 3, part 5). Indeed, JUSTICE originally argued for a Judicial Appointments Commission on such a “hybrid” model for the Commission.37

   (b) Amendments to appointment procedures (Schedule 3, part 2). However, s 64 Constitutional Reform Act 2005 should be expanded in the terms set out below in paragraph 13 ie the Judicial Appointments Commission should be required to have an overall strategy to improve diversity in the judiciary. Accordingly, it should be seen not simply as responding to those who apply for posts but for proactively encouraging applications.

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

21. JUSTICE disagrees with:

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

22. JUSTICE is currently unpersuaded by:

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

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

PART 4: RATIFICATION OF TREATIES

23. JUSTICE supports the provisions in clauses 21-24 on the ratification of treaties which, effectively, put into statutory form the “Ponsonby Rule”, formulated in 1924 and operated since 1929. The House of Commons Information Office noted that this has “gradually hardened into constitutional practice, observed in principle by all governments, except in special cases, for instance in an emergency”.38

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

WAR POWERS AND THE PREROGATIVE

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

Where it is proposed to commit the United Kingdom to direct participation in any way, international armed conflict or international peace-keeping activity.39

PART 5: CIVIL SERVICE

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

PART 6: FINAL PROVISIONS

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

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

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

June 2008

Memorandum by The Law Society of Scotland (Ev 30)

The Law Society of Scotland’s Constitutional Law Sub-Committee has considered the above Call for Evidence and has the following comments to make:

The Draft Bill covers the following issues:

- Part 1—Demonstrations in the vicinity of Parliament.
- Part 2—The Attorney General in Prosecution.
- Part 3—Courts and Tribunals.
- Part 4—Ratification of Treaties.

38 P3, Factsheet P14, November 2006.
39 This formulation is taken from Clause 3(4)(a)(i) Executive Powers and Civil Service Bill proposed by Lord Lester of Herne Hill QC in December 2003.
The Joint Committee raises the following questions:

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

   The Sub-Committee considered this issue. The wider constitutional context is very dynamic at the moment, particularly in the Scottish context with the following issues under consideration:
   - The National Conversation.
   - The Commission on Scottish Devolution chaired by Sir Kenneth Calman.
   - The Governance of Britain agenda directed by the Ministry of Justice.

   Other constitutional issues currently under contemplation include:
   - A Bill of Rights for Britain.
   - Reform of the House of Lords.
   - The establishment of the United Kingdom Supreme Court.

   Accordingly, the Constitutional Renewal Bill does not fit particularly well into the wider constitutional context. Changes to the role of the Attorney General and putting the Civil Service Commission on a statutory footing are not in the same context of constitutional reform as some of the other reforms which have been undertaken or are pending.

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

   The Sub-Committee is of the view that it is perfectly appropriate for one Bill to deal with a number of disparate subjects, although such a “miscellaneous provisions” Bill would normally not carry a title such as this Draft Bill. Given that the range of issues covered in the Draft Bill is so extensive, it might be appropriate to rename the Bill so as to more closely reflect its contents.

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

   The Sub-Committee was of the view that, to a limited extent, the Government’s aim is achieved in relation to bringing Ministers to account. This is most specifically seen in terms of part 4, Ratification of Treaties. However, putting the issues contained in the Draft Constitutional Renewal Bill on a statutory footing is not the only way to hold Government to account. Ensuring that Ministers react positively to consultation and Parliamentary debate on issues of policy is by far a better way to create the accountability which the Government seeks. Generally speaking, of course, the Sub-Committee approves of legislation or changes in practice which would make Ministers more accountable to Parliament. However, that aim needs to be seen in the context of the legal, political and practical circumstances which relate to each proposal.

   The Sub-Committee draws attention to the extent provisions in clause 44 of the Draft Bill. In the Sub-Committee’s view, these should be more specifically drafted to ensure that the ordinary reader of the Bill would know which provisions apply in which part of the United Kingdom.

**Civil Service**

Under the Scotland Act 1998, schedule 5, part I, paragraph 8, the Civil Service of the State is a reserved matter subject only to Sheriff Clerks and Procurators Fiscal and officers of the High Court of Justiciary and the Court of Session.

In that context the provision of legislation for the civil service is a reserved matter which is within the province of the Bill. However, some highly placed commentators have indicated that, in the light of the SNP’s commitment to seeking “a wholly devolved Scottish civil service” and relationships between the Scottish Government and Whitehall, it may be the case that a gulf could emerge between London and Edinburgh officials. It is important, that any changes to the organisation of the civil service take into account the complexities which devolution introduces.
In relation to protests, I attach copy of the submission which the Society made to the consultation on Managing Protests Around Parliament [Submitted but not published]. In relation to Treaties, I attach a copy of the submission which the Society made to the War Powers and Treaties: Limiting Executive Powers consultation [Submitted but not printed].

The Society has no comments on the role of the Attorney General or the issue of judicial appointments.

June 2008

Memorandum by the Local Government Association (Ev 27)

A NEW POLITICS: LOCALISING THE CONSTITUTION

1. INTRODUCTION

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

2. SUMMARY

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

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

— A statutory duty to ask government departments and agencies at all levels periodically to review their functions and ensure that power is exercised at the lowest effective and practical level;
— Establish a powerful Parliamentary committee charged with pre-scrutinising legislative proposals with local government implications and promote the deregulation of councils and the reduction of consent regimes;
— Allow councils to introduce Public General Acts to Parliament;
— The Audit Commission, like the NAO, to become directly accountable to parliament; and
— The right of councils to nominate a proportion of members to local public bodies.

How would councils like to see the bill improved?

3. LOCAL GOVERNMENT MUST BE AT THE HEART OF CONSTITUTIONAL RENEWAL

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

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

3.3 We are looking for a draft Constitutional Renewal Bill that reflects this and believe there is a strong case for legislation in five areas.
4. LEGISLATIVE EMBODIMENT OF THE PRINCIPLE OF SUBSIDIARITY

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

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

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

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

5. ESTABLISH A POWERFUL PARLIAMENTARY COMMITTEE CHARGED WITH PRE-SCRUTINISING LEGISLATIVE PROPOSALS WITH LOCAL GOVERNMENT IMPLICATIONS AND PROMOTE THE DeregULATION OF COUNCILS AND THE REDUCTION OF CONSENT REGIMES

5.1 Too often, Parliament legislates on the basis of central government’s proposals, to impose new tasks on local councils which have been inadequately thought through for their cost or their ease of implementation. Sometimes the result is unanticipated cost on the council tax payer. Sometimes it is chaotic implementation. In many cases—as with the 2003 Licensing Act—it is both. In either case, local communities are left disillusioned as Ministers’ policy commitments fail to materialise in line with the vision they have set out. This contributes to disengagement with the political process and low citizen satisfaction. Better scrutiny would help to create a more consensual and realistic political climate, as well as improving actual policy delivery in communities.

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

6. ALLOW COUNCILS TO INTRODUCE PUBLIC GENERAL ACTS TO PARLIAMENT

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

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

6.3 There would be three operational parts to this proposal:

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

   — Equip councils to promote a Bill collectively through a new joint arrangement.

   — Change the Sessional Orders that allocate legislative time so that the government takes a smaller share of time, allowing enough time for debate on Bills promoted under the new procedure.
6.4 This proposal would allow new legislative ideas to come from communities themselves, not from government with its automatic majority, and on subjects that were not part of the government’s programme. Without eroding the authority of the government’s mandate in the Commons, it would restore the perception that Parliament was a place of genuine debate on real issues arising in parts of the country outside the Westminster Village.

7. THAT THE AUDIT COMMISSION, LIKE THE NAO, SHOULD BECOME DIRECTLY ACCOUNTABLE TO PARLIAMENT

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

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

— establish that all taxpayers’ money was subject to the same standard of value-for-money and probity;
— reestablish that audit and inspection of local government was about value for money and probity rather than also being about compliance with Ministerial policy; and
— demonstrate that taxpayers are equally respected as taxpayers whatever tax they happen to be paying.

7.3 It would require repeal of the 1998 Audit Commission Act and amendment of the 1983 National Audit Act (possibly by simply adding councils and the NHS to Section 7).

8. THAT COUNCILS BE GIVEN THE POWER TO NOMINATE A PROPORTION OF MEMBERS SERVING ON LOCAL PUBLIC BODIES

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

9. ABOUT THE LGA

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

Memorandum by the Local Government Information Office (Ev 26)

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

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

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

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

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

THE WIDER CONSTITUTIONAL CONTEXT

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

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

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

   — the majority of interactions between individuals, communities and the state are local;
   
   — participative processes increasingly encourage people’s involvement with local government as a means of influencing the services they receive and their quality of life; and
   
   — responsive multi-purpose representative local democracy is a precondition of effective local participation.

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

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

CENTRAL-LOCAL CONCORDAT

5. In December 2007 the Local Government Association (LGA) and Secretary of State for Communities and Local Government signed a central—local concordat, as envisaged in *The Governance of Britain* Green Paper. The concordat gives a degree of recognition to the central-local relationship, setting out broad principles which are indications of intent rather than solid commitments. Indeed, government compliance with the
draft constitutional renewal bill: evidence

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

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

PRINCIPLES OF LOCAL DEMOCRACY OR SELF-GOVERNMENT

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

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

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

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

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

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

40 “LGA accuses government of breaking central/local deal” (over an amendment to the Planning Bill) Local Government Chronicle (LGC) 14 February 2008; “Quango sparks concordat row” (over the draft strategy for the Local Better Regulation Office) LGC 3 April 2008.
41 The UK signed and then ratified the Treaty in 1997–98.
LOCAL ACCOUNTABILITY

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

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

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

June 2008

Memorandum by The Lord Chief Justice, the Rt Hon the Lord Phillips of Worth Matravers (Ev 56)

I am writing in response to the Joint Committee’s call for written evidence. These comments relate to the Government’s proposals on judicial appointments in Part 3 of the draft Bill, and follow the series of questions posed by the Joint Committee.

24. Is it too early to embark on further reform of judicial appointments only 3 years after the new system was established in the Constitutional Reform Act 2005? Are reforms necessary to reduce bureaucracy and to streamline the appointments process?

It is too early to embark on any radical or fundamental change to an appointments system which only came into force on 3 April 2006 and was not fully operational for some time after that. The new system had no period of shadow running and there were inevitable teething problems, in particular relating to the time taken for some vacant posts to be filled. To some extent, by requiring that all posts be filled on the basis of selection by the JAC, the new system inevitably takes longer than the old, in which the Lord Chancellor always had the option of simply inviting someone known to him or his officials to accept an appointment.

It is important to note that the JAC has done much with the judiciary and the Ministry of Justice to improve and speed up the system, but there are some minor technical changes which require legislation, and the draft Bill is an opportune vehicle for these changes.

The JAC has also made strenuous efforts to increase the diversity of the pool from which selections are made. It is a partner, with the Ministry of Justice and the judiciary in the trilateral diversity strategy, and has engaged in considerable outreach work and publicity to attract applications from a more diverse pool and to encourage suitably qualified lawyers to consider a judicial career. In general, its first two years can be counted a success, and appointments to tribunals and the lower tiers of the judiciary have been noticeably diverse. There is of course further to go, especially in relation to more senior appointments, but the JAC necessarily, and rightly, selects the best and most qualified candidates from among those who apply to it. The JAC is seeking to work with the legal profession, the judiciary and the Ministry to consider what can be done to change the factors which mean that, for example, there are relatively few women or ethnic minority senior partners or QCs, despite the much larger proportion they form of new entrants to the profession.

The statutory role of the JAC is, and should be, to pick the best candidates who apply, on the basis of merit alone, while encouraging applications from as diverse a field as possible. In this way encouraging diversity, by widening the pool of available talent from which selections are made, can help to improve standards overall.
25. Are the Government’s proposals to remove the role of the Prime Minister from the appointments process and reduce the Lord Chancellor’s discretion in relation to appointments below the High Court appropriate?

The recommendations from the Lord Chancellor to Her Majesty The Queen in respect of the appointments of Lords Justice and Heads of Division are currently routed through the Prime Minister, although the Constitutional Reform Act does not explicitly provide for this and gives him no say in these appointments. The Constitutional Reform Act requires that recommendations in relation to the Justices of the Supreme Court must be made by the Prime Minister, but gives him no choice; he is obliged to send forward the recommendation he receives from the Lord Chancellor (see s. 26(3)). Removing the Prime Minister from these processes altogether would therefore make no difference to the results, and, since approving the appointments is therefore not an effective use of his time (and the same applies to his officials), he can sensibly be removed from the process.

The Lord Chancellor has a much more direct involvement in judicial appointments, since he makes the majority of appointments himself, and recommends the others to The Queen. In addition, the Constitutional Reform Act provides that when the JAC makes recommendations to him, he has a limited right to ask them to reconsider or to reject an individual candidate, giving reasons for doing so (ss. 73–75; 82–85; 90–94), as well as a power to reject a whole competition if it seems to him after consulting the Lord Chief Justice that the process was not satisfactory, or not applied satisfactorily (s.95(2)(c)). The draft Bill would leave in place his powers to make or recommend judicial appointments, and his power to reject whole competitions, but would remove his right to reject or to ask the JAC to reconsider its decisions in relation to individual candidates below the High Court.

This proposed change is not one of fundamental constitutional significance (since the Lord Chancellor retains his ultimate role in these appointments) but is more a pragmatic recognition of the fact that, following the Constitutional Reform Act, the Lord Chancellor may well be an MP with no legal background who is very unlikely to have heard of or have any views about the hundreds of names put before him for appointment to tribunals or the lower tiers of the courts judiciary. He can usually add nothing in practice. Removing this stage of the process therefore removes nothing of significance and may help to speed things up.

If the Lord Chancellor was concerned not about an individual, but about a whole selection process, he would still have the right to reject that process as a whole, after consultation with the Lord Chief Justice. This power is actually more important, in preserving accountability to Parliament, through him, than his current power to reject or query individual candidates, because accountability to Parliament ought to be in relation to the selection and appointment process, not about decisions whether or not to appoint individual candidates.

The position is different in relation to senior appointments to the High Court and above. These are a relatively small number of constitutionally protected appointments of fundamental importance, and the office holders concerned can only be removed on an Address from both Houses of Parliament. The small number of these appointments made each year means that the Lord Chancellor can directly engage with the process, in a way he could not be expected to for the numerous more junior appointments, and it seems right that the Lord Chancellor should retain the limited right he has to query or reject, for good reason, the selections made by the JAC in these cases even if, in ordinary circumstances, he will have no view on the respective merits of different candidates.

26. Does the reduction in the executive’s role in judicial appointments leave a gap in Parliamentary accountability? The White Paper suggests that this gap might be filled by giving new powers to the Lord Chancellor to set targets and issue directions, and proposes an annual meeting of the Commons Justice Committee and the Lords Constitution Committee. Are these proposals appropriate and sufficient?

The removal of the Prime Minister from the most senior appointments makes no difference to Parliamentary accountability, since he currently has no power to reject or query the appointments, but can only forward them to The Queen. The Lord Chancellor’s accountability to Parliament is, and should be, in relation to the overall appointment processes, rather than individual selection decisions, so it is not fundamentally affected by the proposed reduction in his role in relation to Circuit Bench appointments and below. He will retain the right to reject a whole competition if he considers the processes were unsatisfactory or were not applied satisfactorily.

In addition, the Lord Chancellor already has a power in the Constitutional Reform Act to issue guidance to the JAC about its procedures, subject to consultation with the Lord Chief Justice and Parliamentary approval (s 65–66). He also has a power to issue directions in relation to the JAC’s costs and expenditure, and may require them to follow specified procedures in relation to any or all of its costs and expenditure (Sch.12, para 30). He has not so far exercised these powers, so it is not clear why new powers to set targets and issue directions would be more likely to be useful, or used.
These powers to issue guidance about procedures and to give directions in relation to costs and expenditure are appropriate, but have not in fact been used. It is not clear, therefore, why the Lord Chancellor would need further powers to set targets and issue directions.

To the extent that this is driven by a concern to speed up and improve the performance of the judicial appointments system (which does not of course only involve the JAC, but also the Tribunals Service, Her Majesty’s Court Service, the Ministry of Justice and the Judiciary), this would perhaps be better achieved by agreeing a properly funded work programme, with a regular cycle of selection exercises over a three-year period, as was originally envisaged in discussions prior to the JAC beginning its work in April 2006. The programme would set out an agreed sequence for the competitions that the JAC was to carry out, what other work was needed and provide for the necessary degree of flexibility to cater for one-off appointments, the need for and timing of which could not be predicted. Work should be done to try and improve the forecasting to underpin the programme.

In fact progress is being made on such a programme, and it is to be hoped that one can be in place for appointments from 2009–10 onwards. As this will have been agreed by all parties, there would be no question of the independence of the Commission being in any way called into question. Such a programme would provide a clear means of explanatory accountability, as it would be the JAC’s task to carry out that programme and report on it each year; if for some reason there were problems in carrying out the programme, the JAC would in its report give an account of the reason why the programme had not been carried out.

The White Paper also seems to contemplate allowing the Lord Chancellor to set targets for the JAC in relation to the outcomes of its competitions. This is wrong in principle and would compromise the independence of the JAC and its duty to make selections on the basis of merit alone. As things stand, the Lord Chancellor is free to make clear his concerns about matters such as diversity, and has properly done so, without any need for the formal imposition of targets. Setting a formal target must imply either that the JAC was obliged to set out to deliver the target regardless of selection on merit, which would be wholly wrong, or that it was still bound to select on merit alone, and was thereby put at risk of “failing” to meet a formal target, with perhaps the implication that “corrective” measures would be taken. It is hard to see how either result could improve the judicial appointments system; on the contrary such a policy would undermine the standing and independence of the JAC.

If there were, contrary to the views I have expressed, nevertheless to be a system of directions and targets, perhaps for use in an emergency, these should only be imposed with the agreement of the Lord Chief Justice and after approval by Parliament under the affirmative procedure.

It is for the two Houses to decide whether there should be a joint annual meeting of the Commons Justice Committee and the Lords Constitution Committee to discuss judicial appointments, but this seems a potentially fruitful idea; it would be a body to which the JAC could answer questions on the report of its work and the carrying out of its work programme.

27. The Government is proposing to give new powers to the Lord Chancellor, including:

   (i) Powers to set targets or issue directions to the Judicial Appointments Commission (which the White Paper recognises is a complex issue).

   (ii) Power to set non-statutory eligibility criteria concerning, for instance, the qualifications, experience and expertise that is required for a post.

   (iii) A delegated power to remove judicial offices from the list that are required to be filled following a selection by the Judicial Appointments Commission under the Constitutional Reform Act 2005.

   (iv) Responsibility for arranging medical checks.

Are these proposed new powers appropriate? What impact will they have on the independence of the Judicial Appointments Commission and the appointments process, including the balance of merit and diversity?

(i) See my response to question 26 for my view in relation to the setting of targets.

(ii) Non-statutory eligibility criteria may either be of general application (such as the requirement that applicants for salaried judicial office should normally have fee-paid experience) or relate to specific posts.

For example, all High Court judges are appointed to the same office, and all have the same powers, but in fact the work of the High Court is divided between three Divisions and within each Division there are different specialisms. So, when a High Court post falls vacant, it is not simply a matter of asking the JAC to recruit a new High Court judge: the vacancy notice will also specify which Division the judge is needed in and which
specialism is required; which might be crime, or defamation, or intellectual property, or ancillary relief. Nor is it simply a matter of replacing the expertise of the judge who has gone: the needs of the court may have changed, so that we need to replace a defamation specialist with someone who does construction cases or commercial work. The same issues arise in different forms at each different level of court or tribunal. In some cases other characteristics not directly related to legal expertise may also be relevant, such as the need to ensure that there are sufficient Welsh-speaking judges in Wales to allow litigants and defendants to exercise their right to be tried in Welsh if they wish.

The JAC cannot determine these matters, since it is not responsible for the running of the courts and tribunals and cannot determine their needs. In this respect it is in a somewhat analogous position to any other appointing body or a recruitment agency, which must respond to the needs of the client’s business; but those needs must be judged and articulated by the business, not the recruitment agency. In practice these requirements are considered in discussions between the judiciary and HMCS or the Tribunal Service, and set out in the vacancy notices which are agreed by the Lord Chancellor and Lord Chief Justice, or their delegates; the changes in the governance of HMCS embodied in the Framework agreed with the Lord Chancellor should also improve the day to day working of the system.

If explicit statutory provision is to be made for this, it would be essential that these requirements should have to be agreed by the Lord Chancellor and the Lord Chief Justice, or the Senior President of Tribunals, as appropriate, or their delegates.

(iii) The Lord Chief Justice has power to deploy existing judicial office holders to vacant posts where the post held is the same; so for example, the Lord Chief Justice can transfer a Circuit Judge from one Circuit to another, or to a different post on the same Circuit. What would be helpful in addition would be a power to fill vacancies by deploying an existing judicial office holder at the same or a higher level but not already holding the same post. So, for example, some Circuit Judges also sit on the Mental Health Review Tribunal, and in particular on its Restricted Patients Panel; they do so as a public service, and are paid no extra for doing so. It is incongruous to expect them to apply for membership of the tribunal as though they were applying for a first judicial post: we need and want their services, and their suitability is demonstrated by the fact that they are Circuit Judges. In these circumstances it should be possible to fill posts by deploying existing judicial office holders, with the agreement of the Lord Chancellor, Lord Chief Justice and Senior President of Tribunal as appropriate.

This should not apply, however, where the judicial office holder would be promoted or paid more as a result: it should not be possible to deploy a District Judge or equivalent into a Circuit Judge vacancy or equivalent.

The White Paper approaches this issue by suggesting that the Lord Chancellor should have a power to remove posts from the list in Schedule 14 of the Constitutional Reform Act of those which require JAC selection. This would only be suitable in the case of those tribunals where it was decided that in principle all appointments ought to be of existing judges. But this does not entirely meet the problem: in most cases we will still want to recruit ordinary members of the tribunal concerned, and the JAC should select them. What is required is a power for the Lord Chief Justice to recommend to the Lord Chancellor that an existing judicial office holder be appointed to fill a vacant post at the same level, with the agreement of the Senior President of Tribunal as appropriate.

(iv) The proposal to transfer the responsibility for arranging medical checks to the Ministry of Justice is sensible and should help to shorten the selection process.

28. Part 2 of Schedule 3 of the Draft Bill proposes a number of key principles that must be taken into account by the Judicial Appointments Commission and others involved in the appointments process. Are these the right principles? How should they be monitored and enforced?

The principles seem unobjectionable, but it is not entirely clear what is gained by stating them in legislation. If it was ever suggested that the JAC used selection processes which were not “fair, transparent, efficient, flexible, proportionate and effective” it would presumably be open to disappointed candidates to seek judicial review of its proceedings, and they would also be able to complain to the Judicial Appointments and Conduct Ombudsman.

The quality of the JAC’s performance generally is subject to monitoring by the Judicial Appointments and Conduct Ombudsman, on the basis of the complaints he receives. If a more thorough or systematic investigation of the JAC’s performance is thought to be required, the Lord Chancellor already has the option of asking the Ombudsman to investigate any matter relating to the procedures of the JAC which he refers to him (s 105 CRA).
In addition, there is a constant process of review and discussion in relation to all selection processes, and regular trilateral meetings between the Chairman of the JAC, Lord Chancellor and Lord Chief Justice to discuss any concerns.

29. Should the Government create the Judicial Appointments Commission Panel? If so, are the provisions in the draft Bill adequate?

This is really a matter for the JAC. If they would find it helpful to have a statutory panel of this kind, then I would defer to their view. At the moment, however, it appears that they do not take this view.

30. Is the current size and composition of the Judicial Appointments Commission Board right? Should the process for reappointing Commissioners be simplified?

It is far too early in the operation of the JAC to consider such a proposal.

If consideration is to be given, it is the judiciary’s view that there would have to be very strong reasons for change as the composition of the JAC was agreed as part of the constitutional settlement set out in the Concordat and enacted by Parliament. No reasons, let alone any strong reasons, have been put forward for changing the settlement so recently agreed by the three branches of government.

We are currently fortunate to have a JAC which includes members with a wide range of different experience and expertise at the highest levels and of the greatest distinction. With 15 members including the Chairman, it is probably at the upper limit of its size if it is to be an effective executive body. The current composition carefully balances lay members with the judiciary, and includes members from tribunals, the magistracy, and professions. It should not be changed.

However, if change were needed, the Lord Chancellor already has a power in the Constitutional Reform Act (Sch 12, para 5(1)) to vary the size and composition of the JAC, with the agreement of the Lord Chief Justice. No reason has been put forward for amending this power which is a necessary safeguard to the independence of the JAC and thereby the judiciary.

It should be possible in accordance with general public appointment principles to re-appoint the Commissioners for a further term (up to the statutory maximum of 10 years set out in Sch 12, para 13) without making them apply in a further competition. This seems to have been an oversight in the drafting of the Constitutional Reform Act.

June 2008

Memorandum by Lord Mackay of Clashfern (Ev 47)

1. I was Lord Advocate for five years and Lord Chancellor for 9½ years and in both of these positions was in close touch with the Attorney General and the Solicitor General. In the former I experienced the functions of a Law Officer.

2. In paragraph 75 of the White Paper the Attorney General is described as an independent lawyer. I believe this to be correct and all I have known including those who have held office since 1997 fully merited this description.

3. The provisions of clause 2 of the Bill move the ultimate responsibility for decisions to prosecute from an independent lawyer who is a Member of Parliament to an official who is also an independent lawyer but who is not directly accountable to Parliament for those decisions. I cannot see how this can be an improvement.

4. If the Government view is that because an independent lawyer is a member of the Government he cannot be trusted to take proper decisions on prosecution cases, why can members of the government generally be trusted to take quasi-judicial decisions in planning matters, and indeed in the whole range of vitally important matters where are the responsibility of Government?

5. Decisions in particular cases depend on there being sufficient evidence to justify a prosecution or that a prosecution is in the public interest. I cannot see why an official can be better placed to judge the public interest than a member of the government who is an experienced lawyer with qualities that qualify him or her to be a member of the Government.

6. My understanding is that the Law Officers are not members of the Cabinet, to underline the fact that their decisions are theirs alone and that the Cabinet do not have responsibility for them. This I think clearly recognises that their decisions are taken upon proper grounds and not to be influenced by the various considerations of a political character which are proper to be taken into account by a Cabinet decision.
7. The Directors are to have the security of a five year appointment but it is obvious that for most of the early part of their tenure the question of re-appointment will be a live issue. If this is an issue for the Attorney General it could be provided that the Prime Minister is not to remove the Attorney General from office without the consent of the office holder except for such reasons as are provided in clauses 4, 5 and 6 for the removal of Directors.

8. The exception provided in clause 12 surely suggests that the fundamental premise of clause 2 is unfounded since considerations involved in national security can be just as political as in other cases. If the Attorney General is to be trusted with decisions in cases of national security why not in cases that do not involve such considerations. I have no doubt that the Committee will have in mind a recent case in which national security considerations were clearly involved.

9. With the removal of the power to enter a nolle prosequi, how can private prosecutions not in the public interest be brought to an end?

10. I submit that it is undesirable to remove altogether the responsibility for appointing senior judges from a Minister of the Crown. Again I feel that this is prompted by a feeling that Ministers are not to be trusted to discharge such responsibilities without improper regard for political considerations.

June 2008

Memorandum by the Baroness Miller of Chilthorne Domer (Ev 23)

INTRODUCTION

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

1.2 It focuses on Part 1 of the Draft Bill.

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

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

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

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

OVERARCHING QUESTIONS

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

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

BALANCING OUR DEMOCRATIC RIGHTS

3.1 The Call for evidence asks:

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

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

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

Have we been too cautious . . .? I believe that we have. If we have, we need to go one stage further and say that we are prepared, even the Government are prepared, from time to time to admit that we have legislated a step too far . . . Now let us step back and restore those standards that we regard as essential in our precious democracy. [Official Record, 26 Jan 2007: Column 1379]
3.4 The European Convention on Human Rights set out the right to freedom of expression (Article 10) and freedom of assembly and association (Article 11).

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

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

3.7 The government has argued that the legitimate aims behind the SOCPA laws were:
   (a) protection of Parliament’s right to operate unhindered; and
   (b) national security.

3.8 I would suggest that the SOCPA powers failed this necessity test for three reasons:
   (1) The powers were not necessary for the smooth operation of Parliament because other, less restrictive but equally adequate powers were already available. Moreover, I suggest, the work of Parliament is in some ways enhanced by the presence of demonstrations, both spontaneous and planned.
   (2) The powers were not necessary for national security because there is no evidence of the threat posed by demonstrations and no evidence of the effectiveness of the SOCPA powers for dealing with the supposed threat. In fact, the powers were nigh unworkable.
   (3) The powers disproportionately curtailed the freedom to demonstrate outside Parliament.

3.9 I shall elaborate on each of these points:

4.1 (1) The effectiveness of Parliament

I would suggest that Parliament’s role of calling government to account and Parliament’s legislative role require that Parliamentarians be in touch with the views of the British public.

4.2 Certainly, in the modern age, there are all sorts of routes of access to lobby Parliamentarians: we have e-mails and easy access to mass media and printing. But the right to peacefully demonstrate remains vitally important.

4.3 Many lobbying channels can be dominated by organisations, NGOs, the private sector. Many have great resources and dedicated Parliamentary liaison workers.

4.4 The right to stand up and demonstrate remains a direct and relevant form of political expression for ordinary people. We saw this in 2001 at the demonstrations concerning the Iraq War.

4.5 In particular, the right to stand up and demonstrate is important for reacting very quickly to events as they happen. This is the most transparent way for the mood of the public to be conveyed to Parliamentarians unfiltered by media or corporations or who can afford what.

4.6 For these reasons, I suggest, far from impeding the work of Parliament, the right to freely demonstrate actualenhances the work of Parliament and the vibrancy of our democracy.

4.7 Of course, it is appropriate that this right should be fairly available to all and not monopolised by a few. Nor should demonstrations overstep certain boundaries of noisiness or disruption. However, powers to control serious infringements were already in place before SOCPA.

4.8 The Sessional Orders, which are renewed each session at the Opening of Parliament, require that the Commissioner of the Metropolitan Police ensures that access to Parliament is kept free. Sessional orders are able to apply to members of the public, not just Members of Parliament. For example, an order is made giving the police the power to hold up the traffic outside Parliament in order to let MPs get to the House to take part in debates or to vote. Although the Sessional Orders do not confer any special powers of arrest on the police, we believe that they are sufficient to deal with all ordinary circumstances.

4.9 In the case of persistent obstructions, general powers such as the power to arrest for obstructing a police officer in the execution of his duty, for breach of the peace, or for public order offences come into play. For larger gatherings, the Public Order Act 1986 provides powers to prevent disruptions to the life of the community, for example. In addition, the Greater London Authority has authority over the central gardens and Westminster City Council has responsibility for the pavements, which can be exercised in the event of serious obstructions.
5.1 (2) National security

I recognise that by necessity we live in a time of heightened security. Since the September 11th attack in the U.S. and the July bombings in this country, it is incumbent on us all to maintain a heightened vigilance. We are not, however, convinced of the case for special limits on demonstrations around Parliament as part of the response to the terrorist threat. The police have a variety of powers to guard against the terrorist threat.

5.2 For example, under the Terrorism Act the police have powers to stop and search in the designated area, and between January and July 2006, 714 searches took place within the government security zone around Westminster and Whitehall and a further 4,465 people were spoken to about their activities [Official Record, 26 Jan 2007 : Column 1369]. As already outlined, the police already have powers under the Public Order Act and a variety of civil remedies for ordering demonstrations that get out of hand.

5.3 We have been made aware of no evidence, apart from anecdotal assertions, of a link between the presence of demonstrators in the Designated Area and any increased security threat. Nor is there any evidence that SOCPA 2005 has helped to improve the security situation around Parliament.

5.4 On the contrary, attempts to enforce the almost unworkable SOCPA laws have taken up large amounts of police time and resources. For example, policing of the “Sack Parliament” protest of October 2006 cost £298,000 [Official Record, 30 Nov 2006 : Column WA76]. The Liberal Democrats are of the opinion that a free and active democratic right to demonstrate is part of the solution to potential danger. An open, active civil society promotes social strength from within that cannot be achieved by legislation.

6.1 (3) The “chilling effect” on political participation

The restriction of rights to freedom of expression and freedom of assembly led to the erosion of democratic participation among vital third sector organisations, such as charities, and among the general public.

6.2 Moreover, by the conflation of the question of appropriate demonstrations with the issue of security, the SOCPA powers created highly disproportionate penalties that led to criminal charges for very minor infringements. This has compounded the deterrent effect on public democratic involvement.

6.3 According to the Metropolitan Police Commissioner, between the enactment of SOCPA 2005 and March 2007, 91 individuals were arrested for demonstrations outside Parliament [Official Record, 28 Mar 2007 : Column 1649W].

6.4 These include the cases of Milan Rai and Maya Evans who were both convicted for unauthorised “demonstrations” drawing attention to the victims of the Iraq war. Mark Barrett was arrested for holding a tea party outside Parliament which, according to the police, constituted an illegal demonstration.

6.5 The inconsistency with which the law has been applied has been highlighted by the work of comedian Mark Thomas (http://www.markthomasinfo.com/) whose Mass Lone Demonstrations have shown the arbitrary application of the law and the ridiculous situations that have arisen from the unnecessarily strict and shoddy drafting of SOCPA s 132–138. This was confirmed by District Judge Purdy in Westminster Magistrates Court who found difficulties in both the letter of the law and its application [Regina v. Brian Haw, 22/01/07].

6.6 In addition to these obvious effects of the law, there may also have been a deeper effect on the democratic participation of British citizens, who have been caused to doubt their right to demonstrate because of SOCPA and these high profile cases. Although sheer number of demonstrations has remained high, this is partly due to the resolve of those who have been trying to draw attention to the problems caused by SOCPA.

6.7 It is impossible to tell how many ordinary people have decided not to exercise their democratic right to demonstrate because of the “chilling effect” of the SOCPA laws. As I said in the 2nd Reading of the Public Demonstrations (Repeals) Bill, which proposed the repeal of SOCPA 132–138, “People are now afraid that they will get a criminal record for simply holding a placard or even wearing a T-shirt with a slogan on it anywhere near Parliament” [Official Record, 26 Jan 2007 : Column 1368].

6.8 This view was corroborated by the Advisory Group on Campaigning and the Voluntary Sector, chaired by “Baroness Kennedy QC, which supported my Bill in its May 2007 report on campaigning and the voluntary sector.
SPECIAL CONSIDERATIONS

7.1 The call for evidence asks whether there ought to be special provisions for access, loudspeakers, heritage, permanent demonstrations and equal access. I have dealt with several of these questions above.

7.2 As with the work of Parliament, I believe that democratic participation actually enhances the status of Westminster as a World Heritage site. One of the cultural criteria of World Heritage is “to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs”. The idea of democracy is closely connected with the idea of an active citizenry, taking part directly in the working of a legislative assembly. As such, the opportunity to express a political opinion outside Parliament makes the site one of living heritage, not just a historical spectacle. Only the most extreme aesthetic offences should be controlled and then using existing laws.

7.3 I do not think that new laws are necessary to control permanent demonstrations, but I do agree that we must allow for other people to have access to the prime “opposite parliament” space too.

7.4 With regard to Brian Haw’s encampment, I would agree with Lord West’s statement that “responsibility for the management of the grass area of Parliament Square and the enforcement of by-laws falls to the Greater London Authority under the GLA Act 1999” [Official Record, 12 July 2007: Column WA246]. Both the authorities and demonstrators must be reasonable and where one group monopolize access to Parliament existing by-laws should be utilised to provide for fair access.

7.5 In the case of loudspeakers, I believe that there are already sufficient laws in place to prohibit excessive noise. For example, section 2 of the Noise and Statutory Nuisance Act 1993 amends the Environmental Protection Act 1990 as follows:

Noise in street to be a statutory nuisance

2 Noise in street to be a statutory nuisance

(1) Section 79 of the 1990 Act (statutory nuisances) shall be amended as follows.

(2) In subsection (1) (list of statutory nuisances)—

(a) for “Subject to subsections (2) to (6) below” there shall be substituted “Subject to subsections (2) to (6A) below”;

(b) after paragraph (g) there shall be inserted—

“(ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;”, and

(c) after “section 80 below” there shall be inserted “or sections 80 and 80A below”.

(3) After subsection (6) there shall be inserted—

“(6A) Subsection (l)(ga) above does not apply to noise made—

(a) by traffic,

(b) by any naval, military or air force of the Crown or by a visiting force (as defined in subsection (2) above), or

(c) by a political demonstration or a demonstration supporting or opposing a cause or campaign”.

7.6 Nuisance use of a loudspeaker in a demonstration outside Parliament would be covered by the definition of nuisance noise from “equipment” caused “by a political demonstration or a demonstration supporting or opposing a cause or campaign”.

CLOSING COMMENTS

8.1 The repeal of SOCPA 2005 is a very welcome step and certainly represents a renewal of our constitutional right to peaceful demonstration, which has recently been eroded.

8.2 Demonstrations add to the vibrancy of our democracy, they do not detract from it.

8.3 I submit to the Committee that the repeal should return the situation around Parliament to the status quo ante. We do not need to create any new rules at this time.

Baroness Miller of Chilthorne Domer
Liberal Democrat Home Affairs Spokesperson

June 2008
Memorandum by Joe Parker (Ev 31)

1. This document was prepared as a written submission to the Joint Committee on the Draft Constitutional Renewal Bill (CM7342.) I assert the right to be identified as the sole author of this work.

2. SUMMARY

This is a response to the “Protests” section of the draft Bill. I am not affiliated to, or member of, any political organization and this is a personal submission based on my experiences.

3. EXPERIENCE

1. In January 2008 I was part of a small group of journalists and activists that carried out 24 separate protests in a single day in order to explore the implementation and effect of the legislation and to gather material for a feature piece.

2. Although all our demonstrations were lawful and carried out with authorization and knowledge of the Metropolitan Police Events Unit at Charing Cross Police Station, we encountered frequent stops, searches and questioning from uniformed police and security personnel (under both Government and private contract.).

3. We had planned a total of 26 demonstrations but were prevented by uniformed police from completing one. We voluntarily cancelled subsequent demonstrations while we contacted our legal advisor to clarify our position.

4. RESPONSES TO THE CALL FOR EVIDENCE

4.1 Regarding Point 11

The right to protest will be adequately balanced against the effective unhindered operation of Parliament by repeal of s132–138 SOCPA (2005). Sufficient powers to manage protests already existed (see Point 13) and no other statutory legislation was ever needed.

4.2. Regarding Point 12

4.2.1 Free access—Adequate security measures exist to ensure the personal safety of Government personnel (or any member of the public.) Parliamentarians specifically can and should expect to be confronted by members of their public from time to time.

4.2.2. Loudspeakers—existing anti-social behaviour order and environmental legislation is adequate.

4.2.3 Security Risk—It is widely known that the roads around Parliament Square (and other buildings) present a far greater risk to the physical security of Parliament/Government than small static groups of protestors. I have been advised that this is so because a quantity of explosives or WMD may be far more easily, rapidly and stealthily delivered to a target area by vehicle than on foot or bicycle. Large assemblies or demonstrations require advance notice/organization in any case.

4.2.4 Heritage site status: Parliament Square is a world heritage site specifically because of our democratic tradition and in particular its reputation as “cradle of modern parliamentary democracy”. It follows that unless that tradition has become a sham and a gimmick, its function as a forum for expression must not follow the form of a “living museum”.

4.2.5. Permanent demonstrations—In what sense are permanent demonstrations undesirable? If they are unsafe or causing direct distress personally or environmentally, other powers are adequate (as discussed elsewhere.) If an aggrieved individual or group perceive that the matter they take issue with is unresolved, they should be free to continue to protest as long as that is the case. To make a spurious example, if I oppose London buses being coloured red, how long am I allowed to demonstrate? For a day? A week? Until the Government promises an enquiry into bus livery? Until that enquiry reports? Or as long as buses are red and I believe they should not be?

4.2.6 Equal Access—From our experiences (see above) it is apparent that the current legislation presents a substantial bar to equal access to protest. We were unable to carry out all our intended demonstrations despite extensive research and specialist legal advice. It is unreasonable, unrealistic and undemocratic to expect that every citizen in the country who spontaneously decides to express a grievance or opinion should be so prepared.
Unaware of the law, many individuals will be unable protest since an ad-hoc demonstration is illegal; when asked to leave by the police they will do so quietly and invisibly. They will not apply through the statutory channels and return another day. (since simply turning up to protest is a substantial investment of time and effort in of itself for working people); their rights of free speech will have been curtailed. Protesting should be a human right, not a specialist sport.

4.3 Regarding Point 13

I consider that, in conjunction with existing statutory environmental and anti-social behaviour and public order legislation, Sessional Orders are an appropriate means to manage protests around Parliament.

This is an individual submission entirely authored by me,

June 2008

Memorandum by Mr David Pybus (Ev 29)

1. I am writing in support of the repeal of those sections of the SOCP Act which banned unauthorised protest around Parliament.

2. Although Parliament is enormously important in the life of this country, and worthy of protection, I believe that it should be the right of anyone or any organisation to engage in non-violent demonstration outside it and any office of government, with or without authorisation.

3. SOCPA was a mistake in making legal the possibility of criminalising such demonstrations.

4. I submit that no such provisions should be made in the Constitutional Renewal Bill.

5. During the last three decades I have attended several peaceful demonstrations in central London. Before SOPCA, I did not witness any events that would lead me to believe that Parliament, its members or staff, were in danger from such protests. Nor did I see more than one organisation trying to hold demonstrations there at the same time, so liaison with the police must have been adequate within existing law.

6. I think the protest by Brian Haw has been commendable.

7. Political demonstration should be a right in this country. Of course it is therefore a duty beholden on demonstrators to not engage in violent acts.

8. Unless Parliament is prepared to trust the citizens of this country, to listen when they wish to express opinions in collective demonstration, then Parliament has failed part of its role, to promote democracy.

June 2008

Submission by Mohammad Abdul Qavi (Ev 43)

My name is Mohammad Abdul Qavi. I wish to submit the following on the right to protest outside Parliament for consideration of the Joint Committee:

1. Parliament is the focal point of people’s aspirations for a fair and equitable system of laws that govern our daily lives. When the elected representatives, under political pressure, consider legislation that is against the well being of the people and not in the national interest the people must have the right to come to Parliament to protest. To illustrate the point: the resolution passed on 18th March, 2003 to attack Iraq, based on false premise and against the expressed will of the people, caused the death of countless human beings and wrought death and destruction to our own shores.

2. Sections 132 to 138 of Serious Organised Crime and Police Act—as is common knowledge—were specifically aimed at removing Mr Brian Haw from the Parliament Square. Thanks to our judicial system the Executive has not succeeded in removing him yet. Mr Haw has not ever obstructed or hindered free access to and from the Parliament. I say so from first hand observation and experience of my own 7 year long vigil outside the Parliament.

I am a witness, on many occasions, to his presence in Parliament Square proving the cooling balm to the feelings of outrage at our government’s various actions since 9/11 in the country and around the world. He alone by being there, round the clock in cold and rain, has been a deterrent to all the hotheads who might have wished harm. He has proved to be the best security for the Parliamentarians.

3. This sceptred isle of ours has a historical tradition of independent minds and lone voices of protest against Authority. In this lopsided world of globalized markets where a Rupert Murdoch or a Bernie Eccelstone have privileged access to the Prime Minister to influence government policy to their corporate advantage, a Brain
Haw’s right to come to the Parliament and give voice to his pain at the hurt the government’s actions inflict on his “children” must not be circumscribed on the ground of security. My security is dependent upon my neighbour’s security—it is not subjective and cannot be compartmentalised.

4. The label of “world heritage site” should not be the subterfuge to curb the right of freedom of speech. Freedom of speech is what makes me proud to be British. A right and privilege that is priceless and dearer than life.

5. “They that can give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety”—so said Franklin in an age when a repressive and intolerant society on these shores was forcing the non-conformists and Brian Haws of their day to seek refuge elsewhere. We are living through similar times and we must not allow ourselves to become the shadow of tyrannical regimes of our “moderate friends” in the Muslim and Arab world.

June 2008

Memorandum by Kiron Reid, School of Law, University of Liverpool (Ev 22)

The consultation paper Managing Protest around Parliament followed the Governance of Britain Green Paper (Cm 7170) in which the Government committed to consulting on the sections of SOCPA covering demonstrations near Parliament. This was one of the first acts of the Gordon Brown Government in July 2007. The White Paper, The Governance of Britain: Constitutional Renewal, (Cm 7342-1) in March 2008 followed the consultation. It is apparent from this process that the consultation was a genuine consultation where the Government and civil servants listened to the submissions relating to restrictions on protest and proposed action that was consistent with the consultation response. This in itself is a significant change in emphasis from the way in which much legislation on criminal justice has been passed from 1994 to the present.

The Analysis of Consultations document gave a clear impression of submissions on managing protest around Parliament. The Ministry of Justice press release was unequivocal that the Government had accepted the overwhelming sentiment expressed in the consultation exercise:

“The Home Secretary Jacqui Smith will remove the legal requirement to give notice of demonstrations around Parliament and obtain the authorisation of the Metropolitan Police Commissioner”. 25 March 2008.

This is a fundamental change in attitude from previous Government announcements on criminal justice measures which often seemed to pursue stated policy with little regard to consultation or evidence.42

Indeed it is evident that sensible and rational suggestions in the consultation paper to revise the law about conditions on processions and assemblies were overlooked because of the strength of feeling of respondents who supported repealing the restrictions and did not consider the detailed suggestions for amendments to the regulation in Part II Public Order Act 1986. Specifically the suggestion that the conditions that can be imposed on assemblies and marches should be harmonised (question 2), subject to appropriate modifications, it is submitted would give the police more flexibility in deciding the appropriate steps to take in a public order situation. Arguably the senior police officer should be given a greater degree of discretion to impose such conditions as are reasonable and proportionate in the circumstances while promoting the right of freedom of assembly and association and the right of freedom of expression. In relation to assemblies it is probably not helpful if the current list in the Public Order Act 1986 is seen as being an exhaustive one rather than examples. Although I am not aware of any caselaw regarding this others may know if this has caused difficulties for protesters or police in practice. Section 14 Public Order Act could simply be amended to make it clear that the conditions imposed can include but are not limited to those listed.

Section 12 states that the senior police officer “may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions”.

 Whereas s 14 states that the senior police officer “may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation”.

(The relevant parts of ss 12 and 14 are included at the end of this paper).

It might be clearer if the wording of s 14 was amended to give consistency with s 12. Amended the wording might be that the senior police officer “may give directions imposing on the persons organising or taking part in the assembly such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it”. I believe this would make clear that the list was not intended to be exhaustive but a statement that the conditions are including but not limited to those listed could be included if thought necessary by the draughtsman.

Arguably SOCPA gave the Commissioner no ability to add conditions on protesters that is not already covered by existing pre-2005 legal powers. However there was possible ambiguity about noise nuisance and further thought is needed about unreasonable use of noise to disrupt the business of those working in and around Westminster on a more than temporary basis. If time-limited noise nuisance generally were to be penalised this would surely remove politicians from the necessity of being always able to deal with hecklers, which surely is a part of the skill of the job. (The issue of noise is covered specifically in s 134(4)(f) and s 137 on use of loudspeakers in designated area). Section 3 of the consultation considered whether there should be a different position around Parliament than in other locations. The concerns about Members of Parliament not being obstructed and allowing the business of Parliament to proceed unhindered (paras 3.2 and 3.3) are both important. The same issues though apply to every local Council up and down the land and it would be a self-obsessed and out of touch local council that called in the police to resolve such matters. They would look out of touch and elitist and as if they did not care about the views of their residents. It is noticeable though that noise nuisance is not covered by breach of the peace or except by possible inference by Public Order Act powers and even the breathtakingly broad section 54 para 14 of the Metropolitan Police Act 1839 appears to omit protests from this offence (nor is there an equivalent provision for other areas in the eclectic s 28 Town Police Clauses Act 1847). Clearly while banning many other forms of nuisance and disturbance of the day, one might term it “anti-social behaviour”, the Victorians were not as concerned about noise nuisance in cities as people and politicians are today.

It is right that there should not be a criminal offence for a person to use a loudspeaker in the designated area (with repeal of the 2005 Act provisions). The Explanatory Notes to the Draft Constitutional Renewal Bill tell us that “the use of loudspeakers will continue to be governed by section 62 of the Control of Pollution Act 1974 and section 8 of the Noise and Statutory Nuisance Act 1993”.

Section 62 “Noise in streets” generally prohibits operation of a loudspeaker in a street between the hours of nine in the evening and eight in the following morning (and for commercial purposes not relevant here). SOCPA used the same wording relating to certain exceptions which include the proviso that the equipment “is so operated as not to give reasonable cause for annoyance to persons in the vicinity”. It is possible that this wording could be incorporated into a condition that police could impose on users of loudspeakers at processions and assemblies under the POA. However I would assert that any such provision (in this case condition) should be subject to a warning before any escalation—and that escalation thereafter be initially by means of a fixed penalty. Alternatively if it was felt that restriction was only needed near Parliament because of its unique status then amendment could be made by way of an amendment to the Metropolitan Police Act 1839. This might cover actual disruption rather than simply annoyance. How this might be done is considered below. Officers would also it is suggested need a power to confiscate equipment if reasonable and this is also noted.

The clearest explanation of the penalty notice system that I am aware of is that on the Home Office website: “Once a penalty notice has been issued the recipient must either pay the amount shown on the notice or request a court hearing. This must be done within the 21 days of the date of issue.

Payment of the penalty by the recipient discharges their liability to conviction of the offence for which the notice is issued. Payment involves no admission of guilt and removes both the liability to conviction and a record of criminal conviction.”

(http://police.homeoffice.gov.uk/operational-policing/crime-disorder/index.html/).

It is suggested that any provisions considered here be subject to the lower tier penalty.

Another specific concern raised was Parliament as an obvious terrorist target. It must be noted that police and Government interpretation of what is a security risk has been highly discriminatory, particularly in the Metropolitan Police area—peace campaigners and protesters have generally been held to be a security risk necessitating high levels of policing but sporting-related processions or large crowds related to film and pop stars or alleged “celebrities” have not. The distinction appears to be that legal powers are used where there is a political motive but not on large crowds without political background, ignoring the same or possibly greater...
security risks obvious in relation to groups that would not otherwise come to any particular attention of the police and may not (though they may) be organised by professional or experienced stewards. (The warnings about terrorist risk associated with the George Bush visit to London on 20 November 2003 can be contrasted with the much more low key policing of the England Rugby World Cup victory procession less than one month later, 8 December 2003.44 The argument of Parliament as a particular security risk could apply to Premiership football grounds, mainline railway stations and many other particularly symbolic locations in the life of Britain as well as strategic ones. (The Counter-Terrorism Bill 2008 highlights policing at gas facilities, clauses. 77–82). Security and vigilance by the authorities, employees and the public at all of these locations is vitally important but restricting protest is not the same as security and vigilance.

Parliament is of course not a local Council office and the consultation paper and occasionally Government ministers as well as opposing MPs and Lords have highlighted that it correctly is a focus for protest by a wide range of people wanting to exercise their freedom of expression. If there really is a specific issue in relation to obstruction this merits further consideration though existing police powers are probably adequate. In part the Sessional Orders should be revised so that they directly cover the area around Parliament and the language modernised so that it reflects the Human Rights Act era language rather than apparently the antiquated language of the pre-Victorian era. A specific and limited legal provision relating to access to Parliament could be included here if necessary however police powers relating to both obstruction of highways and obstruction of officers probably give them sufficient powers at present. A specific power to deal with this and related offence if required could be included in an amendment to the Metropolitan Police Act 1839. It is interesting to note that this may not have been a significant issue before the modernisation of public order law 20 years ago. Card suggested that in London informal agreements usually worked in the past prior to the Public Order Act 1986.45 It was certainly the case by contrast that on stop and search weak and informal controls did not work prior to the safeguards introduced in PACE at about the same time.

CONCLUSION.

Specific recommendations.

(1) Repeal the restrictions on protest around Parliament as included in the Bill.

(2) Keep the Sessional Orders but modernise the language—if thought necessary add a specific new clause to s 54 para 14 Metropolitan Police Act 1839 to cover obstruction of access to Parliament. This should initially include a requirement of a warning before an officer or CSO can take any further action. Escalation should then be by means of a fixed penalty with arrest only if necessary. Keeping the Sessional Orders is suggested because Parliament is of particular significance in the life of our democracy and that should be recognised.

(3) Regarding use of loudspeakers. The above clause could include a specific provision regarding use near Parliament. On complaint received if a police officer or CSO reasonably believes that noise from a loudhailer is excessive and hindering the work of any person in Parliament they may warn the user to reduce the volume. If the user does not do so within a reasonable time the officer must tell them that if they fail to do so they will be subject to a penalty notice and the equipment liable to confiscation. If the user still persists then the officer or CSO can give a penalty notice and/or confiscate the equipment. The notice should initially be a civil matter unless not paid and the equipment should be returned by the police in a reasonable time after application in writing by the user and payment of an administrative fee. Alternatively there could be a general amendment to the Public Order Act conditions.

(4) The Public Order Act 1986. As suggested in the original consultation paper the conditions that can be imposed if reasonable and proportionate should be standardised for conditions and assemblies. Rather than an exhaustive list it is suggested that the current lists be regarded as examples and the senior police officer given greater discretion, always subject to protection of the right to peaceful protest and freedom of assembly and association, the application of the Human Rights Act and the rule of law in general.

Public Order Act 1986 (extract).

12.—Imposing conditions on public processions.

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

14.—Imposing conditions on public assemblies.

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that—

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.

June 2008

This is based on a shorter extract from a detailed draft paper on protest and police powers in England and Wales in the last decade. I have amended and expanded the section on this topic with additional legal detail and some references added on the specific questions of interest to the Committee. (Most background references omitted dealing with points which the Committee will be familiar with).

Memorandum by Mark Ryan (Ev 36)

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University. My submission, however, is made in my own personal capacity and indicates my personal observations on the Draft Constitutional Renewal Bill. It in no way reflects the views of my employers (Coventry University).

2. At the outset, the Government should be commended on its inclusive approach to constitutional reform in relation to the Draft Constitutional Renewal Bill 2008 (hereafter the Bill). Indeed, producing the Bill in draft form will ensure that it is subject to effective pre-legislative scrutiny and provide those outside Government with an opportunity to shape its provisions. Unlike other countries which are required to adhere to specified procedures in order to modify their constitution, in the United Kingdom, our uncodified constitutional arrangements can be amended at will and with little fanfare. In this context therefore, it is imperative that any constitutional changes are secured in the most consensual and participatory way possible. After all, as has been said before, the British Constitution is not the preserve of any one political party, or indeed the Government of the day for that matter. My observations will be confined to selected aspects of the Draft Constitutional Renewal Bill.

3. In terms of the overarching questions, the Bill is consistent with the United Kingdom’s historical approach to reforming the constitution which is to amend it on an incremental basis (Q1). There is also no objection in principle to the Bill containing disparate elements and provisions (Q2). In fact, the Constitutional Reform Act 2005 simultaneously (and successfully) comprised provisions relating to the reform of the Lord Chancellor, the reform of judicial appointments and the creation of a Supreme Court. The Bill as a whole does re-balance the relationship between the executive and Parliament in favour of the latter; however this constitutional shift of power could have been made more pronounced (Q3).

4. In terms of the Civil Service (Part 5), by enshrining the core values which underpin the Civil Service, the Bill will enhance the accountability of civil servants. The Bill will, however, also (and arguably more importantly) provide the Civil Service with protection by preventing the above values from being undermined or diluted by any future Government (Q4). Placing the Civil Service Commission on a statutory basis should enhance the independence of the Commissioners (Q5) and the Bill should specify to whom Civil Service Commissioners should make recommendations (Q6). In terms of initiating investigations, the Civil Service Commission should be authorised to initiate investigations, thereby equipping it with a pro-active role (Q7).
5. Given the nature of the advice that Special Advisers provide (and the relatively short duration of their employment), it does not seem problematic for their appointment to be excluded from the principle of selection on merit based upon open and fair competition (Q8). The Bill should be amended so as to specify the number of Special Advisers, thereby creating a statutory cap on their numbers (Q9). The Bill should also specify their precise constitutional role and powers—in this way their responsibilities would be limited by stipulating exactly what they are expressly permitted to do. Although clause 39 of the Bill provides for the Minister for the Civil Service to lay an annual report before Parliament concerning Special Advisers, in effect, this provides Parliament with information (eg, the number and cost of Special Advisers), rather than any de facto control. On a related issue, the Bill should be amended so as to provide for the Special Advisers Code of Conduct (clause 33) to be subject to Parliamentary approval, and not simply laid before Parliament.

6. In terms of protests (Part 1), by repealing sections 132–138 of the Serious Organised Crime and Police Act 2005, the Bill will re-balance the constitutional equilibrium between the right to protest within the vicinity of Parliament and the rights of Parliamentarians to perform their constitutional responsibilities without interference (Q11). Notwithstanding this, Parliament remains a special case (not least because of its symbolic constitutional importance) and it may, therefore, be necessary to provide the police with residual powers, to be exercised on an ad hoc basis and only when strictly necessary, in order to regulate access to Parliament (for example, to take account of a specific and urgent security threat) (Qs12/13).

7. In terms of the Attorney General (Part 2), my preference is that from a constitutional perspective, the office of the Attorney General should be separated from that of a Government Minister and a member of one of the Houses of Parliament (Q14). As the Bill, however, does not adopt this approach, my observations will be predicated on the model advocated in the 2008 White Paper (paragraph 51) and adopted in the Bill viz., that the Attorney General will continue to be a Government Minister and a Parliamentarian.

8. The powers of the Attorney General are circumscribed and decreased to some extent by the current provisions of the Bill (Q15). In terms of the power of the Attorney General under clause 12 to intervene in order to safeguard national security, although it appears inevitable that such a residual power should exist, its use however must be tightly constrained and involve Parliament at some point in the process. At present, under clause 14 the Attorney General is required to lay a report before Parliament after a direction has been issued under clause 12. It is suggested that the Bill be amended so as to provide that any proposed use of the power under clause 12 is immediately brought to the attention of a specially appointed Select Committee. This committee could thereafter alert Parliament if concerned about the Attorney General’s proposed use of his/her power under clause 12. The committee would ideally be a joint one comprising very experienced politicians embracing all political parties as well as independent members. The use of judicial review in relation to the use of the Attorney General’s power under clause 12 would, however, not be appropriate as not only would the nature of matters concerning national security inevitably be regarded as non-justiciable, but it would also infringe the separation of powers. In doing so, it could threaten the independence of the judiciary.

9. The issuing of an annual report (clause 16) by the Attorney General appears to be a sensible provision (Q16), although the report provides Parliament with information only, rather than control. The Attorney General should attend Cabinet only where it is strictly necessary (ie, to clarify and advise on legal issues) (Q18). A provision to this effect should be inserted into the Bill. It should be possible for any likely issues requiring the input of the Attorney General to be clearly identified in the Cabinet agenda beforehand. The content of the Protocol appears appropriate, although Parliament should approve it formally (Q19). Any review of its provisions should, similarly, be subject to Parliamentary consent.

10. The Attorney General’s constitutional role to protect and advance the rule of law should be made a statutory requirement (Q20). This statement (Oath of Office) would be declaratory and reflect the importance and symbolic value of the rule of law in our uncodified constitutional arrangements. Given the varying interpretations of the rule of law, however, this statement should not be justiciable and so not enforceable before the courts. The power of the Attorney General to enter a nolle prosequi should be abolished (Q21) and the setting out of the tenure of office for the various Prosecutorial Directors is appropriate and should enhance their independence (Q22). The verbatim legal advice provided by the Attorney General should not be disclosed (Q23), however, a very general and broad outline of such advice should be provided in the event of Parliament formally requesting it.

11. In terms of judicial appointments (Part 3), it is never too early to revisit and reform judicial appointments if it is deemed necessary to do so (Q24). It is appropriate to remove the Prime Minister from the process of appointing Supreme Court Justices to the nascent Supreme Court, as such a role under the Constitutional Reform Act 2005 is superfluous (Q25). It is opined that reducing the role of the executive in the process of judicial appointments would not leave a gap in constitutional accountability. In fact, it would help to realign our constitutional arrangements in accord with a purer separation of powers (Q26). The Judicial Appointments Commission Panel should be established and is to be welcomed (Q29).
12. In terms of treaties (Part 4), the problem with this aspect of the Bill (Q31) is that it has been drafted in the context of a partially reformed House of Lords. Indeed, the process is still ongoing and very much a live constitutional issue. It is imperative that constitutional amendments—such as Part 4 of this Bill—are not viewed in isolation and purely in terms of their own individual merits, but also how they relate to (and impact upon) other aspects of the constitution. As a result of the debates and votes that took place in March 2007, the Government has made it clear that it is currently working towards reform of the House of Lords on a cross-party basis with a view to creating a largely or wholly elected second chamber. As currently drafted, clause 21 of the Bill ascribes more importance to a resolution of the House of Commons that a treaty should not be ratified, than to a similar resolution by the Lords. This state of affairs would appear to be constitutionally and politically acceptable in the context of the Parliament of June 2008, in which the Upper House is partially reformed. If, however, reform of the House of Lords takes place along the lines as envisaged by the Government (ie, a largely or fully elected second chamber is created), then in these changed circumstances, the Upper House should be conferred with an equal power to veto the ratification of a treaty. It is Parliamentary approval which is sought after all. As a result, a sunrise clause should be inserted into the Bill so as to provide both Houses with an equal veto in the event of a largely or fully elected second chamber being established. This provision would reflect the greater constitutional legitimacy associated with a largely or wholly elected second chamber.

13. There is going to be, inevitably, constitutional concern expressed about whether a Secretary of State should be able to repeatedly place a treaty before the House of Commons after it has already rejected it (Q31). This raises an issue of constitutionalism and whether the executive should just simply accept a decision of the democratically elected House of Commons that a treaty should not be ratified. It is submitted that the House of Commons Public Administration Select Committee made a valid point when it recommended in its recent report (May 2008—paragraph 89) that in the event of the House of Commons voting not to ratify a treaty, the Secretary of State should be prevented from re-introducing it during that particular Parliamentary session. The Bill should be amended so as to give effect to this sensible recommendation.

14. It is opined that there is also likely to be concern about clause 22 which in effect enables the Secretary of State to by-pass Parliament (and the requirements set out in clause 21) so that it does not have the opportunity to vote on a treaty. The exceptional circumstances which trigger the power in clause 22 should be specifically set out in the Bill. It is also suggested that any proposed use of the power under clause 22 should be subject to the scrutiny of a joint Parliamentary committee which could report to Parliament if it was not satisfied that the circumstances identified by the Secretary of State fell within the category of being exceptional (Q34).

15. In respect of the negative resolution procedure proposed by the Bill, this should be replaced with a positive resolution, thereby providing Parliament with more control over the process. This would help achieve the Government’s primary objective of redressing the executive/Parliamentary balance. In fact, during his Parliamentary Statement on the Bill, the Secretary of State for Justice and Lord Chancellor indicated that he would look at the issue of a positive resolution.

Mark Ryan BA, MA, PCGE
Barrister (non-practising)

9 June 2008

Memorandum by Emma Sangster, Parliament Square Peace Campaign (Ev 46)

Parliament Square Peace Campaign is a group of supporters of Brian Haw’s protest for peace and justice in Parliament Square. We also support the right to protest in the vicinity of Parliament without the restrictions imposed by sections 132–138 of the Serious Organised Crime and Police Act 2005 (SOCPA).

Should Parliament be treated any differently from any other part of the country in terms of managing protests?

The area around Parliament is at the heart of decision-making in the UK and there should be no more restrictions on protest in this area than the rest of the county. It is fundamental to democracy that individuals and groups should be able to protest without first getting authorisation from an authority about issues of significance to them. Otherwise, the way is left open for political interference—this has been evident in the policing of the area around Parliament since SOCPA was introduced. And it is fundamental to the effectiveness of protest that those making the law and our parliamentary representatives can actually see and hear the message of the protest.

 Freedoms which we all take for granted today have been won through protest and dissent, mostly with great opposition from the authorities. This is recognised in the right to freedom of expression and freedom of association now enshrined in the Human Rights Act. These freedoms should not be contingent on the place,
the theme of the protest or any other matter. We feel that SOCPA has introduced an assumption against protest in the vicinity of Parliament with the police even harassing protests that have been authorised, imposing unreasonable conditions and monitoring every public expression of political opinion, however trivial. This is on top of an increasing array of more general police powers over protesters in recent years. The only way to reverse this tendency is to legislate for a positive right to protest throughout the country under which protests and other public expressions of opinion are unrestricted unless there are very particular and arguable reasons why they may not go ahead.

Would the repeal of sections 132 to 138 of the Serious Organised Crime and Police Act give rise to a need for new powers for the police or other authorities?

There should be no new powers over protest given to the police or other authorities. The Public Order Act grants significant powers to the police and these been increasingly abused by the police eg in penning protesters into a confined area without regard for their rights or needs. Other recently introduced legislation also grant significant powers and the requirements of the City of Westminster and the GLA also restrict protest within Parliament Square.

(i) Powers to ensure free access to, from and around the Parliamentary Estate and to enable Parliamentarians to discharge their roles and responsibilities

Almost all protests around Parliament are small enough that they present no threat to free access to Parliamentarians. On rare occasion, a very large demonstration may threaten access in theory but, it is our opinion that a democracy should be mature enough to acknowledge that a demonstration such as this would be a valid expression of public opinion and is rare enough to not warrant extra powers that can then be used against protests of all sizes. With the redefinition of an assembly under the Anti-Social Behaviour Act from 20 to 2 people, it appears evident that the aim is to place the same restrictions on protests of all sizes, no matter how small.

(ii) Powers to restrict the use of loudspeakers

After SOCPA was introduced, Brian Haw was granted a license from the City of Westminster to use his megaphone at certain times, including during Prime Minister’s Question Time. This is because the Council’s exercise in measuring the noise Mr Haw’s megaphone emitted found that it was no louder than the traffic noise. It is an important dimension of a protest to be able to project the message. Not being allowed to use loudspeakers, even a megaphone, makes a demonstration far less effective and reduces the organisers’ ability to organise effectively. We believe this is an unnecessary restriction for which there is no adequate justification.

(iii) Powers to take account of the particular security risk

Aside from SOCPA there are other police powers that can be used to deal with security risks. More fundamentally however, we question the assumption that demonstrations pose more of a security risk around Parliament than other activities. The court case in January 2007 in which Brian Haw challenged the SOCPA conditions placed on his protest revealed that the police carried out few security checks on Mr Haw’s site in practice despite the issue of security being their main argument for reducing his protest.

It would seem very short-sighted if theoretical security risks, against which there is already significant forms of deterrence are utilised to undermine our hard-won rights.

(iv) Powers to protect Parliament Square as a world heritage site

We would ask if protest is incompatible with the concept of “heritage”. Many different kinds of activities take place in the area around Parliament—not all are compatible with each other, but each have a place. There is no defensible reason why protest, the tradition of which is one to be proud of, should be restricted because of preconceived and limited notions of our common heritage.

The plans to restructure Parliament Square pose concerns for freedom of assembly. Currently, it is not possible to use the grassed area without permission from the GLA. Similarly, permission must be sought to hold any sized protest in Trafalgar Square. If the GLA become responsible for a greater part of Parliament Square then this will have serious implications for the right to protest without prior authorisation and raise all the concerns that the SOCPA legislation raised.
(v) **Powers to prevent permanent demonstrations in Parliament Square**

Brian Haw’s display is recognised nationally and globally as a landmark and achievement which people respect enormously. It has been to the Government’s discredit that they attempted to silence his protest. The issues he raises still need to be addressed and are still important to the people of this country. Indeed it is unlikely that his protest would have been sustained were it not for significant public support. Such forms of expressions must not be ruled out in a democracy.

(vi) **Ensure equal access to the right to protest.**

The area around Parliament is large enough to accommodate various protests at the same time. We are not aware of any calls from protesting organisers to restrict one protest because it crowded out another. We feel that this justification for restrictions on protest was one conceived of inside Parliament as the SOCPA legislation was being debated and has not been called for by anyone else.

12 June 2008

**Memorandum by David H Smith (Ev 09)**

**Summary**

I believe that the government’s proposals fall far short of what is needed to achieve its stated objectives. Whether the proposals would achieve anything at all depends largely on how far Parliament is prepared to assert itself.

I make proposals for holding government to account effectively. I then discuss the government’s proposals in the areas of Treaties and War Powers, in each suggesting ways in which Parliament’s role can be strengthened somewhat.

**Notes**

1. Question numbers quoted below are the paragraph numbers in the Call for Evidence.

**Overarching Questions**

2. In the introduction to its White Paper the government sets out four key goals. I am concerned particularly with the third of these: “To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account”. I believe that the government’s proposals fall far short of what is needed to achieve this goal. The draft Bill does address (although inadequately) two important areas of foreign policy, Treaties and War Powers, by limiting the use of the Royal Prerogative. Very large areas of domestic policy are not addressed at all. How far taking an area outside the Prerogative improves accountability depends very much on how far Parliament is prepared to assert itself. I discuss the wider question of how the government could be held to account for all its actions in the next section. (*Questions 1 to 3*)

**Holding Government to Account**

3. The measures needed to hold government properly to account might well be beyond the scope of the committee. This section is nevertheless included in order to give a standard against which to judge the proposals.

4. Exchanges on the floor of the House of Commons do not in themselves provide an adequate mechanism for holding government to account. Good committee work is essential. Select committees of both Houses produce some good reports, but improvements could be made.

5. Select Committee work can be divided into two broad classes:
   
   (a) Examination of government performance after the event. This is necessary if government is to learn from its mistakes.
   
   (b) Examination of government policy, including scrutiny of draft legislation.
6. Much of the burden of examination of performance falls on the Public Accounts Committee, which considers around 50 National Audit Office (NAO) reports per annum and produces its own report in each case. It only has time to hear one day’s evidence per report. More of this burden could perhaps be transferred to the departmental select committees. Accounting Officers could be required to report to them as well.

7. National Audit Office reports are often criticised for being too neutral and cautious. I have heard criticism by former senior civil servants who described the NAO as being “tenacious over detail but inclined to miss the blindingly obvious”. If the burden on the Public Accounts Committee were eased it might be able to co-operate with the Public Accounts Commission in helping the NAO to overcome these deficiencies.

8. The House of Lords has a reputation for good committee work. If reform were completed it could do more. Although not the primary chamber it could ask the following questions of draft legislation:
   — Is it likely to achieve the stated objectives?
   — Will there be unidentified side effects?
   — Is it necessary, or could existing legislation be better applied?
   — Is it proportionate?

9. Under the Bill of Rights the House of Commons has the right to call for “people, papers and records”. It has extended this power to its committees through standing orders. However the government has made its own rules as to what evidence civil servants and ministers should give. Although the House of Commons has never formally accepted these rules, they are in practice accepted. Indeed as the Foreign Affairs Select Committee noted, in contrasting the information provided to the Butler and Hutton inquiries with the meagre information it was able to extract in its investigation into the circumstances leading up to the Iraq War, there is no mechanism by which it could have enforced its rights.

10. Despite all this, select committees can produce some highly critical reports. Few consequences follow however. One possible reason for this is that neither House votes on whether to accept the findings of its committees. If they did, it might just put pressure on the government to implement the findings. On the other hand, so long as both Houses for different reasons bend to the government’s will, the effect of adopting such a voting practice might be simply that future reports would be bowdlerised to the point of meaninglessness.

11. There is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. A start could be made by defining War Powers (see paragraph 20).

12. I personally doubt if the House of Commons in particular will ever assert itself to the extent necessary to produce any real improvement, unless radical reforms such as a proportional voting system for the House of Commons combined with a requirement for Parliament to approve ministerial appointments are made.

Civil Service

13. I have not examined the government’s proposals in this area in detail. However I believe that the breakdown of the doctrine of individual ministerial responsibility poses questions about the proper relationship between Parliament, ministers and civil servants that have yet to be addressed in the UK. At some point the UK should look at the workings of the New Zealand State Sector Act 1988. I do not believe that the government’s proposals address this issue at all.

Treaties

14. Treaties should not be ratified without an affirmative resolution of each House. However the House of Lords should not be able to withhold its consent for longer than a period consistent with the provisions in the Parliament Act for delaying ordinary legislation. I believe the requirement for parliamentary consent would give UK negotiators slightly more leverage. This answers Questions 31 and 33.

15. If the government requires parliament’s consent before ratification then it would be in its interest to arrange parliamentary scrutiny of draft treaties. Such scrutiny should consider what domestic legislation might be required in order for the UK to honour the treaty. It is already the practice not to ratify EU treaties without passing the relevant domestic legislation. This practice should be extended to extradition treaties. The handling of trade treaties is a different matter. Parliament is not currently well informed in advance about the possible implications for domestic legislation. It should be much more assertive in probing this. This answers Questions 32 and 36.
16. The government did not in its White Paper make its case for overriding parliament’s refusal to consent to ratification in exceptional circumstances in accordance with Section 22 of the draft Bill. If it really believes there might be treaties whose ratification is so urgent that parliament cannot be recalled, then it should give examples. This answers Question 34.

17. If the government wishes to enter into any written agreement with a foreign power or international organisation, but argues that it is not a treaty on the grounds that it will not be bound under international law, then it should be required to obtain an affirmative resolution of both Houses to treat the agreement as other than a treaty. The question of whether international law applies may not be clear. Even if it is clear it would not be bound in law, the other party may be in a position to apply effective sanctions. In particular I believe that trade agreements should be regarded as treaties. The WTO Disputes Settlement procedure is very different from the way that other branches of international law are enforced, and the government may therefore claim that trade agreements negotiated through the WTO do not bind the UK under international law. This partly answers Question 35.

18. A treaty does not normally take effect until both (or all) parties have delivered the appropriate instruments. This exchange of instruments is commonly referred to as ratification. If the government uses the definition in clause 24, subsection (3) of the draft Bill, then it may mislead parliament into believing ratification is complete, when in fact only the UK has signed. It may do this in order to push through the domestic legislation without opposition. An example is the Extradition Treaty with the USA of 2003 and the Extratiction Treaty of the same year. This completes my answer to Question 35.

19. None of the above would substantially improve parliament’s performance in holding government to account unless it shows a greater degree of independence than of late.

WAR POWERS

20. As stated in paragraph 11, there is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. Parliament’s view of the extent and nature of the powers it should grant government in relation to the deployment of the armed forces is bound to change over time. It is therefore desirable that these powers be time limited. The powers initially granted should lapse after 18 months, unless in the meantime parliament had voted to extend them. This vote should be held 12 months after the powers take effect, thus giving the government 6 months to bring forward new proposals in the event that existing powers were not renewed. The draft Bill only covers the deployment of the armed forces outside the UK. Taking this power outside the Prerogative would be a start and could provide a model for the future.

21. Some decisions as to the maintenance, equipment and development of our armed forces are also conducted under the prerogative. The government’s powers in these areas ought also to be defined in legislation, but this is probably beyond the scope of the Bill and therefore of this committee.

22. The resolution route to defining War Powers, worded as it is as, “an humble address”, is not consistent with the transfer of executive powers from the Prerogative to legislative definition. The provisions of the draft resolution should therefore be included in the Bill, prefaced by the wording:

“Her Majesty graciously surrenders, and Parliament accepts, her authority and responsibilities over the deployment of Her armed forces outside the UK, except that She reserves Her right to recall forces back to the UK in defence of the constitution. Parliament delegates the powers thus granted to it, to the Prime Minister in cabinet, subject to the following conditions . . . .” (Question 37)

23. I would make a general point on Question 38: There are several references in the draft to the Prime Minister’s powers. Whatever happened to collective cabinet responsibility? I am aware that it has been the practice to treat defence issues (such as the acquisition of nuclear weapons) in a highly secretive fashion, the cabinet being bypassed. Is this not an opportunity to challenge these practices?

24. In individual cases the Prime Minister or cabinet might have to decide the timing, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 38i)

25. In individual cases the Prime Minister or cabinet might have to decide what information to provide, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 38ii)
26. In individual cases the Prime Minister or cabinet might have to decide whether emergency or security conditions apply, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 38iii)

27. There should be a requirement to seek retrospective approval where exceptional circumstances have been deemed to apply. (Question 38iv). Where Parliament does not believe there is an issue approval could be given without debate.

28. There should be a regular re-approval process. Where Parliament does not believe there is an issue approval could be given without debate. (Question 38v)

29. In individual cases the Prime Minister or cabinet might have to decide to deploy special forces without prior approval, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 39)

26 May 2008

Memorandum by Gabriel John Spence, retired Civil Servant (Ev 08)

SUMMARY

1. Qualification in 1948 by open written examination under the Trevelyan-Northcote system has empowered me to take a long-term view. The inevitable high costs of the solutions proposed may have untoward effects without solving the underlying problems—an expensive steam-hammer to crack a peanut on the Westminster village floor?

PERSONAL QUALIFICATIONS

2. I am one of the last senior civil servants who qualified in 1948 for the Administrative Class under the original Trevelyan-Northcote principles of anonymous competitive written examination designed to circumvent the appointment of unqualified candidates. I retired a quarter of a century ago as Deputy Secretary of the University Grants Committee after having served in four separate Departments of State. I am persuaded that a long-term view may assist the Committee to come to a balanced view on this Part of the Bill.

EVIDENCE

3. The section of the of the draft Bill relating to the Civil Service takes us a long way down the road from the maxim of Sir Edward Coke (CJ) that “an Act of Parliament can do Any Thing” towards the currently-popular doctrine that “an Act of Parliament should do everything”, including perhaps answering the hopes of hard-pressed Ministers that they satisfactorily “addressed” their problems by laying another weight upon both the Statute Book and the pockets of taxpayers.

4. The provisions are elaborate and expensive, involving the laying before Parliament (with the inevitable complications involved ) of codes of conduct both for civil servants and special advisers, and including a whistle-blower’s charter (S.32 (6) (b)), probably not unnoticed by lawyers whose commercially-inspired briefs might be diminishing. Any Government hard-pressed to balance budgets will no doubt be well-advised to consider whether the ensuing expenses and demands on Parliamentary time will be justified in relation to the avoidance of problems, abuses, or malfunctions. The risk is that a minor Westminster-village spat could provoke a massive and expensive response which a vulnerable economy would find hard to afford.

5. The main practical effects, apart from cost, are likely to be twofold: the bringing into the public domain of the numbers and costs of paid special advisers, and the projection into the limelight of the hitherto private (though increasingly so, as the 10p. Tax affair showed) relationships between ministers and their professional advisers. The former might well be achieved with less cost, if less elegantly, by the probings of the tabloid press, and the latter might well affect the quality and character of potential senior advisers who might increasingly look elsewhere for shelter from exposure to political controversy. Advice to Ministers from officials would become less frank and much more hedged by risk of quasi-political or legal exposure.

6. The provisions of the Bill will not affect informal “special advice” of the kitchen cabinet, “in and out club” or St Stephen’s Dive character, except perhaps to make it even more conspiratorial. Nor will they ensure that junior Civil Servants receive better in-career training for their political interface, such as is attempted in France through the Ecole Nationale D’Administration.
7. What they will almost certainly achieve is a series of elaborate and expensive controversies conducted in public over the machinery and the way the Government is run. Matters formerly dealt with, if not to the satisfaction of everyone, in an afternoon’s heavy meeting behind closed doors, might well be dragged out in the manner of Public Enquiries with Senior Counsel leading the proceedings, and the public footing the bills.

8. The criticisms above do not relate to all of the provisions, and it might well be helpful to regularise and strengthen the position of the Civil Service Commission in the hope that stronger membership might enable it to tackle (or require Departments to tackle) the problem of in-career training for the senior civil service to help to recover and retain the understanding and confidence which must exist between Ministers and their staff. But the work of such a revivified body would be better conducted outside the glare of the political debate.

20 May 2008

Memorandum by Peter Steadman (Ev 06)

1. INTRODUCTION

The Joint Committee considering the draft Constitutional Renewal Bill has invited submissions from interested parties. This document concerns itself specifically with the proposed repeal of sections 132–138 of the Serious Organised Crime and Police Act.

It will be noted that I have provided my own Background and Discussion notes, which may prove informative.

2. SUMMARY OF RECOMMENDATIONS

That Parliament should enact laws to facilitate the following:

— Sufficient monitoring and police presence in Parliament Square and its environs so as to provide:
  — Security for all.
  — A facility for peaceful protest.
  — Unimpeded access for business in Parliament.
— Revisit the original recommendations of the Metropolitan Police Commissioner as submitted to the Privileges Committee in July 2003.
— Reinstate the right of the people to demonstrate spontaneously.
— Limit the amount of time that a protestor can be “in situ” in Parliament Square to (say) 18 hours in any one day.
— Not introduce any further control or hindrance in respect of the public’s right to freely assemble and demonstrate.
— Provide funding to groups and individuals so that perceived unconstitutional acts by government or its agents may be challenged in the courts.
— Recognise that keeping the arteries of freedom and democracy open is a costly and often untidy business.

3. BACKGROUND

People have been protesting in Parliament Square for centuries—by means of mass assembly, lone protest or by marching. Throughout the ages, the citizen viewed Parliament as the place where their collective or lone voice should be heard. It was, after all, the place where the legislators assembled to make laws that affected the people.

In recent years, the desire by the authorities to modify the public’s right to demonstrate in Parliament Square was motivated by the actions of a Mr Brian Haw. Mr Haw, a protestor opposed to the invasion of Iraq, had been camped on the green opposite the Houses of Parliament on a continuous basis and declared he would stay there until British troops were withdrawn from Iraq. He gathered about him many placards decrying the government’s actions and often, and repeatedly, regaled the people in Parliament by means of a loudhailer.
In response to these actions, the Procedures Committee (PC), whilst accepting that MPs were much divided on the issue, nevertheless recommended that:

“The Government should introduce appropriate legislation to prohibit long-term demonstrations and to ensure that the laws about access are adequate and enforceable”.

The Chairman of the committee stated that the evidence given by the Commissioner of Police (CMP) influenced this recommendation as did the evidence of the Sergeant at Arms who reported:

“Mr Speaker has for some time been concerned about the use of Parliament Square for unsightly and occasionally disruptive demonstrations; and many Members have expressed the view that more recent demonstrations against the war in Iraq have constituted an unacceptable intrusion into their working environment”.

It is clear from reading the minutes of the committee’s hearings plus the evidence of the police and their advisers and of The Speaker’s representatives, that the drive for new legislation was focused on protecting those who work in Parliament from sustained and voluble protest from Mr Haw, coupled with a desire that Parliament Square Green (PSG) should not become a home for permanent protestors and their seemingly endless, unsightly, accessories. Moreover, the police blamed lack of enforceable legislation as the reason they had been unable to keep clear all entrances to Parliament during some large protests.

Following the PC’s recommendations, the government developed its own, more comprehensive, proposals. There is marked divergence between what the CMP judged necessary, what the government initially proposed, and what was eventually enacted.

The sections, as finally drafted, had scant scrutiny in their passage through the Commons. MPs who opposed the legislation complained that, at committee stage, debate was curtailed and that the government often seemed to have no answers to many queries rose. On the day of the third reading of SOCPA, the government tabled new amendments. MPs were given 45 minutes to debate the clauses, before being asked to vote.

These sections were contested in the courts by civil liberty groups but were eventually upheld by the High Court.

4. THE LAW IN ACTION

After protracted legal battles, which initially favoured Mr Haw, the High Court ruled in favour of the government and as a result, Mr Haw’s site was much reduced under the direction of the new CMP. Haw was granted permission to stay but forbidden to use a loudhailer.

In the routine enforcement of these laws, the police have arrested, charged and imprisoned people for not having the Commissioners approval for the following actions:

— A lone figure-standing mute in Whitehall dressed as Charlie Chaplin, wearing a glove inscribed with the words “not aloud”.
— Two people standing near the Cenotaph, reading out the names of both The Fallen and the civilians killed in the Iraq war.
— A single demonstrator standing opposite Downing Street with a placard quoting George Orwell.
— Refusing not to display a placard with the four words “the right to protest”.

In addition, “the sections” were invoked by police when protesting pensioners were told to disperse, and numerous people have been threatened with arrest for variously sitting with a cake iced with the word “peace”; wearing “T” shirts with slogans; sporting lapel badges; holding picnics and wearing costumes.

Contrarily, anti-war protestors, who at Christmas, sang carols but carried banners on PSG green without permission, were not approached nor arrested by police. Similarly, a protestor symbolically burning “Magna Carta” in full view of police was not interfered with. Interestingly, in both these incidents reporters from the national media were present.

The media of many countries have carried the telling image of people carrying blank placards in Parliament Square.

A group, led by Mark Thomas the comedian, applies every month to Charing Cross police station for individual permissions for multiple demonstrations by lone individuals. This is a show of dissent and is designed to demonstrate the waste of police resources resulting from this legislation. In a bizarre twist, the government spokesman in the Lords used the high figure of applications resulting from this stratagem, as proof that people were accepting of the procedure (see appendix A).
Abroad, other, more repressive regimes, point to our new laws prohibiting protest without state police approval, when they are criticised for arresting dissidents who try to demonstrate.

5. Key Questions

In formulating this paper, I took into account the points and many of the questions contained in the Home Office pamphlet, but, in addition, I considered the following:

1. The credibility of the claim that the sections impede, deter, or prevent terrorists attacks.
2. The veracity of the statement that, hitherto the police did not have sufficient powers to ensure that people having business in the Houses of Parliament could go about their business unmolested.
3. The fairness, or otherwise, of one man (or one cause), monopolising the whole of the southern edge of Parliament Square Gardens (PSG) facing Parliament, with a display unlimited in size and for an indefinite duration.
4. The desirability that our representatives should be able to silence, or have removed, inconvenient and untidy citizens who wish to demonstrate.
5. Whether or not a citizen should need the approval of the state (or its agents) to protest about the state’s activities.
6. Why the government conceived of all the limitations contained in “the sections” when neither the police nor the PC had requested such sweeping laws.
7. How to cater for the “elf an’ saftty” issues that arise from spontaneous demonstrations.

6. Discussion

(1) Preamble

It is curious that nowhere in the paper “Managing Protest around Parliament” is there an explanation as to why the government introduced such stringent restrictions far in excess of those asked for by the MPC and the PC. The only acknowledgement is the statement that the governments “proposals were ‘partly’ based” on these recommendations. It would have been useful to know the governments thinking and motivation for such a major redrafting. Particularly when the minister had told the PC that there was nothing she wanted to add or resile from the MPC’s submission (see appendix B).

The other puzzle concerns the Home Office paper. In complete contrast to all the other thousands of words uttered and written on the subject of the sections, not once does the pamphlet ever refer to the root cause of the legislation, for nowhere is Mr Brian Haw or his permanent encampment ever referred to.

Yet the world knows that Parliament brought in these new laws to remove the nuisance of one man who had found loopholes in the existing legislation. In so doing, many believe they seriously besmirched our reputation for upholding free speech. Laws aimed at one individual or sect, tend to have dire, unintended, consequences, never imagined by the originators.

It may be that we live in the best democracy in the world, but like it or not, we now have a system where a political party not chosen by over 75 per cent of the electorate governs us all. The party in power can—and does—enact laws, which fundamentally change our constitution and our way of life.

It could be argued that, given their share of the vote, our current government has less legitimacy for their legislation than that achieved by the National Socialists in Germany who secured over 40% of the electoral role and had parliamentary majorities when introducing many of their heinous laws.

It is surely right, that people challenge the actions of the executive, because Parliament rarely does. Indeed, the very same MPs who were in favour of the sections will presumably now troop through the lobby having been told to change their minds—such is the power of the executive.

The foregoing, coupled with the low regard politicians are now held, would explain why the number of people seeking to demonstrate will, no doubt, increase. The government should facilitate this healthy outlet of peaceful demonstration in every way that it can; rather than stifle protest by imposing myriad rules and regulations.

To many, the right to unconditional protest is not in the state’s gift—they see it as a fundamental right and, learning from history, one that must be defended.
(2) Security
The insistence on obtaining prior permission to demonstrate in Parliament Square cannot be justified on security grounds. For a start, Parliament is not the only “very obvious target” in London—there are dozens—and the issuing of a piece of paper from a police constable at Charing Cross police station—doesn’t in any way guarantee that a protestor (lone or in a group) will not commit terrorist acts in the vicinity.

It is difficult to imagine that seeking permission six days in advance would impede plans for a terrorist attack. Indeed, it could be argued that a permit could provide a perfect cover for nefarious intentions—far better than just turning up with a bomb. In his evidence to the committee, the then CMP never once suggested this system. From the author’s personal experience, it is impossible for the police to search and question all PSG visitors and it is quite clear that C.X police do not know whether a permit seeker is genuine. It is therefore difficult to see how issuing of a permit thwarts terrorist activity.

(3) Going about their business
All those with business in parliament, should be able to go about unhindered and they should not be subject to a continuous loud cacophony that would distract them from their jobs.

There has been a stated legal opinion, not rebutted by the government, that even before the introduction of the sections, the police already had sufficient powers to deal with anyone impeding those with business in the House. Indeed, if it were not the case, then it is difficult to imagine how Hon Members have managed for these past centuries.

The police’s claim that the 1839 law was “toothless” is disputed. It has been suggested that this was but an excuse for the sub-standard policing on one or two occasions when the police, who were dealing with large demonstrations, barred access to Parliament on “ell an’ saftly” grounds.

Furthermore, the avalanche of new powers given to the police over the last decade should have silenced all claims as to the lack of legislative teeth. They now have powers to stop, search and question on a scale unseen since wartime.

The outright ban on loudhailers is far too draconian. It does no harm for our paid representatives to hear protestors. It is not for MPs to silence dissenters. After all, before standing for election, parliamentary candidates should have had the wit to know that loud protests take place outside Parliament, and have done for centuries. This ban should be eased to allow amplification devices to be used in a responsible manner and from time to time.

(4) “Permanent” Protest
It cannot be right that one protestor can monopolise the whole of the prime site of protest to the exclusion of other causes and do it on a permanent basis. Nor can it be desirable that the whole of PSG becomes a permanent campsite for a particular campaign. There should be no “permanent” sites in order that others have the opportunity to protest. It is not difficult to facilitate—I would recommend that protestors be limited to (say) 18hours per day. At the end of the allotted time, they would be required to leave the Square and not return for six hours taking all their belongings with them. They would be free to return as often as they wished.

In this way, others would have the opportunity of securing the “prime” sites for protest and, of necessity; the amount of display material will be self-regulated since it would need to be carried off on a daily basis.

By this device the right to on-going protest is maintained. Parliament is spared “permanent” and “unsightly” protests, and unwieldy bureaucratic systems are avoided.

(5) Prior Permission
In the main, the system that was in place prior to the introduction of the sections, worked well. Of course, some endeavoured to circumvent the regulations, others ignored them totally. And that situation pertains today, and will doubtless occur in the future. There will always be some who will seek to find loopholes, and there will always be loopholes—as the current protestors have proved.

Single or small groups of demonstrators should not be compelled to give advance notification of a demonstration in PSG. The concern expressed about possible multiplicity of single or small protests does not bear scrutiny. As the police will verify, this rarely happens and if it does, it is not necessarily a threat to health and safety. Surely the police have sufficient resources to hand that can deal with any situation in respect of this “very obvious” target?
Recent history has demonstrated that no amount of legislation is a substitute for adequate and effective policing. That no law will prevent determined people with a sense of injustice, from attempting to influence events—and that peaceful protest is probably the most benign form. This should be encouraged, not stifled by putting obstacles in the way. Prior notification is one such obstacle.

(6) *A Pretty Place*

It is of course desirable that PSG is kept as attractive as possible—but so should all of London.

Contrary to what the Home Office pamphlet states, Parliament Square is not a World Heritage Site (see Appendix E), but if it were, UNESCO would want the centuries old democratic traditions to continue because that is the true heritage. It should not be forgotten that the exercise of democracy and the expression of liberty can often be a costly and untidy business but it is a price we should be willing to pay.

As to enhancing the attractiveness of PSG, many around the world, regardless of their political stance, see something rather noble happening in PSG. It is the actions of one man, who for over five years has maintained his vigil/protest outside the mother of parliaments. No doubt, historians will contrast this with the fact that our government had originally intended to ban people and demonstrations from the square if they were judged to detract from its aesthetic setting. This proposal was eventually withdrawn, but only because it placed too great a burden on the discretion of the police to decide what constituted unsightly people or displays. Thus, was one of our ancient liberties so nearly set aside by the sartorial judgment of a junior functionary of the state.

(7) *“Break the law to make the law”*

It is all very well for the Home Office to baldly state that the Human Rights Act “prevents the imposition of excessively strict conditions on an assembly as they would be open to challenge through the courts”. Yet there is no indication as to where the funding for such a challenge would come from.

It could be argued that the only reason this matter is under review is the adverse global media coverage resulting from the enforcement of the sections on demonstrators who deliberately broke the law. It is regrettable that we still have a situation where, consistently, people find it necessary to commit a criminal act to bring perceived injustice to the legislator’s attention. Thus, we come full circle, because if the executive make it more difficult for people to air their grievances, as they do by limiting demonstrations, then it may well lead to more law breaking.

The government should consider establishing a commission to which people could apply for funds with a view to challenging legislation in the courts. This would obviate the need to seemingly break the law in order to test the validity of the legislation.

7. **Conclusion**

This administration is to be congratulated for having the courage to reappraise this law so recently enacted. It is to be hoped that if it learns nothing else from this consultation, the government will come to see that legislation rushed through Parliament without full debate and scrutiny, often leads to bad law.

These are fearful times. The public look to their legislators for calm and considered judgment. I hope we now see it.

19 May 2008

**Addendum**

Letter published in *The Sunday Times* 1 July 2007

Dear Sir,

*“Brown to allow Iraq protests”*—24 June

It struck me that the headline for your exclusive (“Brown to allow Iraq protests”) aptly describes the state we’re in. It just shows how far we have travelled—it is front-page news when the government allows people to protest!
Whilst I personally applaud the move, doesn’t this starkly illustrate the enfeeblement of Parliament that has occurred in recent times? Clearly, Mr Brown has no doubt that his MPs will do as they are told; change their minds; and repeal the legislation that their former Prime Minister instructed them to support less than three years ago.

Our method of government is beyond presidential. After all, a president’s actions are normally constrained by a constitution. Here, our Prime Minister can do anything he likes if his party slavishly allows—and the evidence of the last 10 years is that they generally do.

On the very day of your story, Gordon Brown announced in his acceptance speech that he wants the government to “give more power to Parliament”—note that he sees it within his gift. It would be richly ironic if a man with no mandate (succeeding a Prime Minister backed by less than a quarter of the electorate) undertakes constitutional reform to protect our rights. If he does nothing else, Mr Brown’s place in history would be assured if he really does deliver us from a democratic system so fatally flawed that it allows our liberties to be curtailed at the behest of the largest party of the day.

As your article makes clear, he certainly has the power.

19 May 2008

APPENDIX A

Contrary to the fear expressed by many noble Lords that demonstrations would not take place or that in some way democracy was imperilled because of the authorisation requirement, one should note that the opposite appears to have happened: more demonstrations are taking place than before.

Lord Davison of Glen Coa 23 Nov

APPENDIX B

Mr Burnett: Just very quickly, we have discussed with the Commissioner the business of balance, which you have referred to, and the creation of an eyesore in Parliament Square and the annoyance caused to members and staff by the use of loudhailers. Is there, in general terms, anything you would like to add to or resile from in what the Commissioner said in evidence to us?

NO . . . Hazel Blears July 2003

APPENDIX C

Memorandum by Metropolitan Police

PROPOSALS FOR STATUTORY CHANGE IN CONNECTION WITH SESSIONAL ORDERS

PAPER FOR THE CONSIDERATION OF THE HOUSE OF COMMONS PROCEDURE COMMITTEE

This paper is intended as a brief summary of the views of the Metropolitan Police Service as outlined to the Committee in evidence by Sir John Stevens on 8 July 2003.

1. RECENT DEVELOPMENTS

1.1 A number of recent events have exposed limitations on the current arrangement to protect the business of Parliament and access to the Palace of Westminster.

Problems can be set out under three heads:

1.1.1 Concerns have been raised by Members that on a number of occasions they have been unable to gain access to Parliament due to demonstrations in Parliament Square.

1.1.2 The use of voice amplification devices has disrupted Parliamentary debates.

1.1.3 Some of the protests in Parliament Square have become permanent in nature, in particular that of Mr Brian Haw, exacerbating problems with obstruction and noise nuisance.

1.2 Further the police are concerned with an increased terrorist threat in the area, which has led to the creation of a Government Security Zone intended to reduce the risk to the public in a defined area, which includes the Palace of Westminster.

1.3 These problems have highlighted limitations not only with the use of Sessional Orders but also limitations in the substantive statutory powers available to the police.
ISSUES IDENTIFIED WITH CURRENT POSITION

The method employed to comply with the Sessional Orders (to keep passage through the streets leading the Houses of Parliament free and open and to allow no obstruction to hinder the passage of Members and Lords) is the issue of directions under section 52 of the Metropolitan Police Act 1839. There are a number of problems with the use of Commissioner’s directions:

2.1.1 The Act is antiquated and not designed for modern day protests and issues. The age of the provision also means that it was not drafted to take account of the rights to peaceful assembly and freedom of expression.

2.1.2 Isobedience to a direction is not an arrestable offence and section 54 does not create a statutory power of arrest.

2.1.3 Section 52 should only be used “from time to time, and as occasion shall require” and therefore the issue of identical directions at the beginning of every session arguably ultra vires.

2.1.4 As a result of 2.1.1–2.1.4 above, no prosecutions have been brought for many years. The provision therefore lacks teeth.

2.2 Other substantive police powers do not cover the situations that have arisen over recent months. For example, section 14 of the Public Order Act 1986 enables conditions to be imposed on public assemblies. However a public assembly is defined by section 16 as comprising 20 or more persons and the conditions that can be imposed relate only to the place where the assembly takes place, the maximum numbers attending or the maximum duration.

2.3 On a number of recent occasions groups of just under 20 persons have deliberately exploited the number requirement in section 14 to evade its operation. Section 14 also only operates where such assembly may result in intimidation, serious public order, serious property damage or serious disruption to the life of the community. It does not therefore begin to address the main aim of the Sessional Order, which is to ensure good access to the Houses of Parliament ie to prevent obstruction. It also does not address issues around the use of loudhailers at assemblies.

2.4 Sections 33–36 of the Terrorism Act 2000 provide police powers to designate and demarcate a specified area as a cordoned area for the purposes of a terrorist investigation but do not allow for the imposition of such cordons as a preventative measure ie when intelligence is received of an imminent attack on a target in or around the Palace of Westminster, or indeed elsewhere.

3. PROPOSED STATUTORY CHANGES

3.1 Whether any statutory amendment or enactment is to be recommended and how such recommendation would be implemented is of course a matter for the Committee and Parliament. The MPS would wish to be involved in any consultative process.

3.2 The following suggestions are made however to address the issues arising:

3.2.1 On the uppermost level, in the event of intelligence of an imminent terrorist threat, an amendment to the Terrorism Act 2000 to enable preventative cordons to prohibit pedestrian and vehicular access in order to ensure public safety;

3.2.2 An amendment to section 14 of the Public Order Act to:

— extend police powers to protests involving less than 20 persons, where such protests raise the same consideration as to the intimidation or the risk of serious public disorder, serious damage to property or serious disruption to the life of the community;

— enable the imposition of such conditions as are necessary, to bring it into line with section 11 (relating to processions)—this would enable steps to be taken in relation to the use of loudhailers.

3.2.3 An amendment to the Metropolitan Police Act 1839, or a replacement provision, to update police powers to enable access to the Palace of Westminster to be kept clear of obstruction and to prohibit the deliberate or wilful disruption of the business of government by noise amplification devices. It needs to be borne in mind that sections 52 and 54 are not limited to the Palace of Westminster and the MPS is keen not to lose the wider ability to make directions for other events in the Notting Hill Carnival. However, the wider use needs to be on an ad hoc basis only whereas it appears that the provision in relation to the Palace of Westminster should be a standing power, available whenever the House is sitting. In respect of all uses, there is a need for a specific statutory power of arrest to be created so that the provision is effective.
4. **PERMANENT PROTESTS**

4.1 None of the above addresses the issue of permanent protests in Parliament Square. In relation to Mr Haw, the MPS is keeping the position, and in particular the application of section 137 of the Highways Act 1980, under review.

4.2 One of the matters that has been looked at is the applicability of the Trafalgar Square and Parliament Square Garden Byelaws and it may be of interest to the Committee that our reading of section 2 of those byelaws is that the area covered by the Byelaws, as defined by reference to the Parliament Square (Improvement) Act 1949, does not include the relevant sections of the east and south pavements. The amendment of the Byelaw (or more probably the Act) would extend the ability of the police, the GLA and the Mayor to protect the central garden in Parliament Square from this type of long-term invasion.

**APPENDIX D**

Jack Straw (Lord Chancellor, Ministry of Justice) Link to this *Hansard* source

I understand and am grateful for the hon Gentleman’s comments, which my right hon Friend the Home Secretary, whose happy task it is to conduct this review, will certainly bear in mind. Having been Home Secretary when we had the Stop the City protests, which were very violent and disruptive—on one occasion people dug up the whole of Parliament square—I discovered that the legal ownership of that piece of land is a nightmare, as different bits of it belong to different owners with different rights in respect of it. If I might make my own suggestion to my right hon. Friend the Home Secretary, one of the things that we have to ensure is that any new legal framework in respect of demonstrations there takes proper account of those legal ownership issues.

**APPENDIX E**

Dear Mr Steadman,

Please find enclosed the map of the World Heritage property clearly indicating the boundaries of the Westminster Palace, Westminster Abbey and St Margaret’s Church inscribed in the World Heritage List since 1987.

Memorandum by The Corner House (Ev 10)

The Corner House is a non-governmental organisation focusing on environment, development and human rights. It has a track record of detailed policy research and analysis on overseas corruption, including UK laws on corruption and enforcement.

The Corner House will restrict its comments on the Draft Constitutional Renewal Bill to Part 2 (The Attorney General and Prosecutions) of the Bill.

**GENERAL COMMENTS**

The Corner House believes that actual and perceived independence of the prosecuting bodies is essential to a functioning constitutional democracy. As the Director of Public Prosecutions’ 2004 Statement of Independence puts it: “our independence is of fundamental constitutional importance. It is a force for human rights and justice in society”. As former Attorney General, Lord Goldsmith, also put it, “you simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this”. The Corner House believes that the Draft Constitutional Renewal Bill must protect and enshrine that independence.

**NEED FOR STATUTORY OATH FOR THE ATTORNEY GENERAL**

The Corner House welcomes the fact that the oath of the Attorney General is to be modernised. However, if, as the government proposes, the Attorney General is to both remain a government minister and keep superintendence function over the prosecuting authorities, it is essential that the Attorney General’s oath of office is a statutory one, like that of the Lord Chancellor. This statutory oath should require the Attorney General both to uphold the rule of law and to act independently of government in exercising her or his prosecution functions. Anything less would simply not address the credibility gap that will remain if a member of the executive has responsibility for and superintendence of independent prosecuting bodies.

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CLAUSE 2: BAN ON INDIVIDUAL DIRECTIONS

The Corner House welcomes section 2 of the Bill banning directions from the Attorney General on individual cases and believes that this is an important principle enshrining the independence of prosecutors. The Corner House believes that there should be no exemptions from this principle and therefore opposes the powers permitted in section 12 as explained in detail below.

CLAUSE 3: PROTOCOL FOR RUNNING OF PROSECUTION SERVICES

The Corner House believes that the protocol between the Attorney General and the three Directors of the prosecuting authorities, its implementation and effectiveness should be subject to Parliamentary debate and that it should be regularly monitored by a Parliamentary Select Committee, who should take evidence from both the Attorney and the Directors of the prosecuting services.

The Corner House believes that with respect to circumstances in which the Attorney General is to be consulted or provided information (section 3, clause 2 c) of the draft Bill), both in relation to prosecutions by any of the bodies supervised and in relation to investigations by the Serious Fraud Office, these should be exceptionally limited. In relation to overseas corruption cases, the fact that the Attorney General has been constantly informed of the progress of investigations has severely undermined the perception of the independence of prosecutors, and created the impression that this is a route for political interference in such investigations.

The Corner House also believes that the protocol should address the circumstances under which the Attorney General should consult independent counsel in undertaking her or his supervisory role. In one recent overseas corruption case the Attorney General’s office employed separate counsel to that employed already by the Serious Fraud Office. The Attorney is entitled to take independent legal advice on whether to provide consent for prosecution of certain offences and it is appropriate that she or he should do so. In practice, however, it appears that the Attorney has been taking parallel legal advice on the nature of the evidence and the merits of cases under investigation by the Serious Fraud Office before consent stage. This practice undermines the prosecutors at the Serious Fraud Office and the independence of the Bar and is unnecessarily costly on the public purse. The protocol should establish clearly when it is appropriate for the Attorney’s office to seek such separate advice and ensure that when it does so with full visibility to the prosecuting office. Given that the draft Bill proposes to remove many of the Attorney’s consent functions or transfer them to the various Directors, such independent advice should be needed only in wholly exceptional cases, and there should be transparency about how and when the Attorney decides to take such advice.

CLAUSES 4–6: PROVISIONS FOR TENURE OF OFFICE OF DIRECTORS

It is inappropriate for the Directors of the various prosecuting authorities to be appointed by the Attorney General as long as the Attorney General remains a member of the executive. The appointment process should be independent to remove any perception of appointees being chosen by the executive. This would significantly assist the independence of the prosecuting bodies.

The Council of Europe’s Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, (section 5), stipulates that:

“States should take measures to ensure that:

(a) the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures . . .

(c) disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review”.

The Corner House is not convinced that the current provisions for tenure of office of the Directors contained in the draft Bill fully meet these criteria and believes that such measures should be specifically provided for by statute to enhance the independence of prosecutors. The selection criteria and process should be fully transparent. There should be a mechanism for parliamentary scrutiny of the appointment process. Any decision to remove a Director from office should be subject to an independent and impartial review, and not undertaken by the Attorney General alone.
Clauses 7–10: Attenuation of Attorney’s Prosecution Consent Functions

The Corner House welcomes the removal of Attorney’s consent for prosecution and transfer of consent to the various Directors of the prosecuting authorities. The Corner House notes, however, that the government has not clarified precisely the offences for which Attorney General’s consent will be kept (Official Secrets Act offences and war crimes are the only ones mentioned in the White Paper). The Corner House believes that there should be a proper public and parliamentary debate about which offences would continue to require the Attorney’s consent for and that guidelines should be drawn up for the circumstances in which the Attorney should give consent.

Clause 11: Abolition of Nolle Prosequi

The Corner House welcomes the abolition of nolle prosequi.

Clauses 12–15: Safeguarding National Security

The Corner House has very grave concerns about Clauses 12–15 of the draft Bill, and believes that these clauses may be unconstitutional and breach international standards on public prosecution as well as rights to access to justice under the European Convention on Human Rights.

The Corner House believes that the way in which legitimate national security concerns are involved in halting a prosecution or investigation may need clarification, and that the Draft Constitutional Renewal Bill may be the place for this clarification. Any such clarification by statute however needs to be based on domestic and international law principles and needs to contain strong checks and balances to avoid the arbitrary abuse of national security arguments by the executive or by any decision-maker.

Creation of a new statutory power of direction

By means of Clauses 12–15 of the draft Bill, the government proposes to create a new statutory power for the Attorney General to halt an investigation by the Serious Fraud Office (SFO) or a prosecution by any prosecutor. The government has stated that it has created this new power on the basis that a small majority of people responding to its consultation on the Attorney General favoured some role for the Attorney in relation to cases which involve a national security or public interest element.47 The government also noted that the new power was in keeping with the Law Commission’s 1998 report on Consents to Prosecution which recommended (again on the basis of a very small majority of respondents to its consultation) keeping consent for a very limited number of offences which involved a national security or international element (such as War Crimes, Taking of Hostages, Biological Weapons, Prevention of Terrorism and the Official Secrets Act).

The Corner House considers that there are some significant differences between the new power to halt an investigation by the SFO and any prosecution on national security grounds and the existing arrangements. The new power is a statutory power. Under existing arrangements, the Attorney General would theoretically be able to halt an investigation by the SFO in his superintendence role but she or he does not have the statutory power to do so. He or she would also be able to refuse permission for a prosecution to continue for offences where consent was required, using the public interest or national security as a reason to do so. This is limited however to those offences where consent is required.

Furthermore, the consent regime and the Attorney’s supervisory role, by convention and in practice, involves discussion and consensus reaching between Attorney and prosecutor. As Lord Goldsmith told the Constitutional Affairs Committee in 2006, “I take the view, which I believe was the conclusion which Sir Ian Glidewell reached when he looked at the CPS, that if ultimately, after discussion, there is a difference of view between an Attorney General and a Director then the Attorney General’s view should prevail. I have never had to test it. I think it would be quite a big thing if it had to be tested. I do not direct” (emphasis added).48 The power to override a Director of the prosecuting agency has never apparently been used. Various commentators have pointed out the ambiguity over the Attorney General’s right to override a Director of the prosecuting agencies.49

47 The government’s analysis of its consultation on this aspect of the Attorney General’s role is however contradictory. The analysis refers to at least six respondents who wished for no Attorney General consent whatsoever (regardless of national security concerns). It goes on to say that 14 out of 16 who replied on this specific issue (out of a total of 52 respondents) favoured keeping some role for the Attorney.


By contrast, the draft Bill proposes a new statutory right for the Attorney to direct. It allows the Attorney to take the decision to halt an investigation and prosecution without any input from or discussion with the prosecutor. Indeed (Clause 13 (4) of the draft Bill) propose that if a prosecutor fails to comply with the Attorney’s direction, a court can make an order to bring the proceedings to an end. The new power would also allow the Attorney to require information from a Director that is relevant to determining whether to give such a direction (Clause 15); failure to provide such information would become a criminal offence (Clause 15 (4)). This would set up a new and potentially confrontational dynamic between the Attorney and the Directors where such decisions are concerned.

The new power also, by giving power to the Attorney General to make a decision to halt a prosecution or SFO investigation on national security grounds, makes the executive the sole arbiter of national security considerations. This raises significant domestic constitutional issues. It is not a right, the Corner House believes, that can be granted without a proper assessment of its constitutional impact. No such power should be given, the Corner House believes, without clear mechanisms for accountability, including judicial oversight. Nor should it be given without a requirement on the Attorney or whoever takes the decision (which we will argue should be an independent prosecutor) to conduct a thorough and documented balancing exercise between national security issues and the rule of law. Without strong checks and balances, the new power will seriously erode public confidence in important national security decisions rather than enhance it and undermining the constitution.

**Lack of checks and balances**

The draft Bill proposes to create a new power for the Attorney General to halt SFO investigations and any prosecution with no meaningful oversight by either Parliament or the Courts.

Clause 13 of the draft Bill contains a provision for establishing a conclusive certificate where any question arises in relation to whether the new power of direction is or was necessary. As section 5(a) puts it: “a certificate signed by a Minister of the Crown certifying that the direction is or was necessary for that purpose is conclusive evidence of that fact”. The effect of this provision is to prevent any judicial enquiry into whether the decision was rational, based on real evidence, was applied according to domestic and international law principles, and whether irrelevant or improper considerations were taken into consideration. As this submission will argue below on domestic law issues, it is doubtful whether a power that precludes judicial scrutiny and denies access to due process of law for individuals can be constitutional or compatible with the Human Rights Act.

Clause 14 of the Bill requires the Attorney to prepare and lay before Parliament a report on the giving or withdrawal of a direction. While at first sight, this provision allows for Parliamentary scrutiny, section 3 of the Clause makes clear that the Attorney need not include any information in that report which is legally privileged, would prejudice national security or “seriously prejudice international relations”, or would prejudice an investigation or proceedings before any court. In practice this is likely to mean that the Attorney will provide extremely limited information about his or her decision.

As constitutional expert Professor Bradley told the House of Lords Select Committee on the Constitution, however: “it should not be possible for the Attorney to avoid accounting for decisions taken in the public interest without indicating the facts that had been taken into account”. 50 Parliamentary accountability can be meaningful only when the Attorney General is required to put forward a full account of a decision and the facts and reasoning behind the decision. The draft law does not require the Attorney to provide any factual evidence for his or her decision, or to lay out the basis on which his or her decision was made. Nor does the draft law provide for any scrutiny mechanisms within Parliament for the intelligence assessments on which a national security decision is made. Given several recent controversies over executive manipulation of intelligence for political purposes, this is a grave oversight that will do nothing to enhance the accountability of the executive’s decision-making with regard to national security or increase public confidence in such decision-making.

These clauses taken together essentially mean that there will be no meaningful checks and balances on the executive, and the executive will be the sole judge of when and how to apply national security grounds in relation to halting an SFO investigation or prosecution. The lack of meaningful parliamentary accountability and exclusion of judicial scrutiny has the real potential to allow for abuse of national security arguments. Without having to account for the reasons for its decision the executive could use national security arguments as a shield for other reasons to which it actually gives as much if not more weight, such as damage to

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international relations and to commercial contracts which it may be prohibited from taking into account by international law obligations, or for reasons which are synonymous with its interests as the ruling party rather than with the national interest.

**Breach of international guidelines on public prosecution**

The Corner House believes that the new statutory power as currently formulated would breach international guidelines on public prosecution.

The Council of Europe’s Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, section 5() is clear that:

> “instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and subjected not only to requirements indicated in paragraphs d and e above but also to an appropriate specific control with a view in particular to guaranteeing transparency” (emphasis added)

The requirements in paragraphs d and e are that any such instruction, which must be in writing and published in an adequate way, must carry

“d. adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

— to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

— duly to explain its written instructions, especially when they deviate from the public prosecutor’s advice and to transmit them through the hierarchical channels . . .;

— e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received”.

The Council of Europe’s Recommendation makes no exception for national security cases.

The International Association of Prosecutors statement of standards of professional conduct for all prosecutors and of their essential duties and rights states (section 2) that where non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, “such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence”. Again, no exception for national security cases is envisaged.

If there is to be a statutory power to halt a prosecution or an SFO investigation on grounds of national security, these international guidelines outline strong checks and balances that need to be in place. These should include that:

— A decision to halt a prosecution must be in writing and made public.

— If it is made by a non-prosecutorial authority, the authority must first seek written advice from the public prosecutor.

— The decision must be explained and it must be shown how it is consistent with the law.

— The decision must not preclude a public prosecutor submitting any legal arguments of their choice to a court.

— There should be established guidelines for how such a decision is taken.

— There must be an appropriate control to guarantee transparency in relation to the decision.

The new statutory power proposed for the Attorney General does not contain these safeguards.

**Domestic law issues**

As Professor Bradley told the House of Lords Select Committee on the Constitution: “decisions not to prosecute . . . appear to bar access to due process of law” and need to take into account European Convention rights incorporated into UK law under the Human Rights Act. The same must hold true for decisions to halt prosecutions and criminal investigations. Certainly, the “conclusive certificate” provision of the Bill (Clause 13(5)) which effectively prevents any judicial review of the decision would appear to be in breach of Article 6 of the European Convention on Human Rights. Article 6 states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

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The rights of both the person whose trial has been halted who may want a fair hearing to clear his/her name, and the person who believes that the decision to halt the prosecution is irrational and contrary to the public interest and wishes to bring a judicial review are infringed by the conclusive certificate.

Furthermore, the decision to halt a prosecution or investigation involves the criminal justice system and the administration of public justice and necessarily involves questions about the rule of law. There is a real question as to whether it is constitutional for the executive to take such a decision without any reference to or oversight from the courts, who have responsibility for protecting the integrity of the criminal justice system and for upholding the rule of law. As Lord Hope put it in a recent judgment: “the rule of law enforced by the courts is the ultimate controlling factor on which our Constitution is based”. If the rule of law is to be suspended on grounds of national security, the courts must have scrutiny over whether that suspension was lawful.

The UK’s domestic law already and clearly allows for a defence of duress and a justification of necessity in cases where due process of law is to be suspended. It is worth noting Halsbury’s Laws of England, in the volume that deals with Constitutional Law and Human Rights on this issue, which states (paragraph 6) that:

“common law does recognise that in cases of extreme urgency, when the ordinary machinery of state cannot function, there is a justification for the doing of acts needed to restore the regular functioning of the machinery of government”.

But Halsbury also states that:

“the argument of state necessity is not sufficient to establish the existence of a power or duty which would entitle a public body to act in a way that interferes with the rights or liberties of individuals”. In other words, national security or state necessity is not a sufficient reason to create a new statutory power that interferes with the rights of individuals; national security or state necessity may however be cited in extreme circumstances as a legitimate reason to take appropriate action.

The courts themselves are in the process of establishing what legal principles should be deployed for assessing when a criminal investigation or prosecution may be halted in response to a threat, and what role the courts should have in assessing whether such a decision meets those principles. The Corner House believes that it would be wise for Parliament to delay consideration of the creation of such a new power, and indeed of how national security decisions should be taken, until the full and final view of the courts can be taken into account.

It is highly desirable that any statute clarifying how national security decisions in relation to halting prosecutions and SFO investigations can be taken contains reference to the specific domestic law criteria by which such decisions can be taken. In particular, the statute should specify the conditions under which national security may be invoked under domestic law, that is to say where there is duress, necessity (defined in detail below through customary international law), or extreme urgency, and define these terms in an appropriately restrictive way.

The Corner House believes that any statutory clarification of how national security decisions are taken in relation to halting prosecutions and SFO investigations should also include an appropriately restrictive definition of national security, which confines it to a definite and immediate threat.

International law issues

Decisions to halt a prosecution on national security grounds are likely to raise international law issues especially where that decision involves the breach of an international obligation. The Corner House notes that under general international law, where a state wishes to invoke national security as a reason for breaching an international obligation, the state must show that the act that breaches that obligation was as a result of self-defence, force majeure, distress (that there was no other reasonable way to save lives) or necessity. According to the International Law Commission, “the plea of necessity . . . will only rarely be available to excuse non-performance of an obligation and . . . it is subject to strict limitations to safeguard against possible abuse”. The plea of necessity is subject to certain conditions that include:

— A State may invoke necessity only to safeguard an essential interest from grave and imminent peril and the course of action taken must be the “only way” to safeguard the essential interest of the State (article 25.1(a)).

53 Articles 21, 23, 24 and 25 of the International Law Commission’s Draft Articles on State Responsibility.
55 See International Law Commission Commentaries on Draft Articles on State Responsibility and commentaries.
— The course of action taken to safeguard the essential interest of the State must not impair the essential interest of other States or the international community as a whole (article 25.1(b)).
— Necessity may not be pleaded where the State has contributed to the situation of necessity or the international obligation excluded the possibility of invoking necessity (article 25.2).

The International Court of Justice confirmed that these conditions “reflect customary international law”. 56 The UK is therefore bound by them.

Furthermore, international judgments have added other limitations to the circumstances in which States can invoke necessity, such as:
— a requirement that as soon as the situation of necessity has ended, and stability resumed the State must resume its international law obligations immediately57; and
— the State invoking the situation of necessity “is not the sole judge” of whether the conditions which would enable it to do so have been met, rather objective criteria must be satisfied.58

Where international treaties do expressly allow for national security to be invoked, there are usually careful restrictions on and principles for how it may be invoked. For instance, in relation to the Status of Refugees, 1951, the UNHCR consider that, where the national security exception in article 33(2) of that Convention is used to remove refugees from a host country:
— The threat must be interpreted restrictively and according to the principle of proportionality.
— The danger posed must be very serious.
— The finding of dangerousness must be based on reasonable grounds and supported by credible and reliable evidence.
— There must be a rational connection between the removal and the elimination of the danger.
— The removal must be the last possible resort.
— The danger to national security must outweigh the risk to the refugee.59

In a different context, the OECD has developed similar principles in relation to the circumstances in which member states can invoke national security in order to intervene with Sovereign Wealth Funds.60 Key principles on which governments should be able to design and implement measures intended to address national security concerns in the context of foreign investment and Sovereign Wealth funds include:
— Transparency and predictability (including prior notification of interested parties; consultation with interested parties; and full disclosure).
— Proportionality (ensuring that the measure taken should be avoided where other measures are adequate and would address the concern; that any such measure is based on rigorous risk assessment techniques and designed with appropriate expertise; that any such measure should be restricted to the specific risk identified; and that any such measure should only be taken as a last resort).
— Accountability (ensuring there are procedures for parliamentary oversight, judicial review and monitoring).

Given that according to the International Court of Justice, States cannot be the sole arbiters of whether the objective conditions are present to invoke necessity, it is undesirable that a member of the executive should make a decision about halting a prosecution or SFO investigation on grounds of necessity. It is undoubtedly against international law if they do so without any scrutiny from the courts or parliament. If there is to be a statute expressly allowing either the attorney or any decision-maker to use national security grounds as a basis for halting a prosecution or SFO investigation, it must make specific reference to the principles outlined in international law. In particular, such principles that should be specifically included are that:
— halting the prosecution is a proportionate response to the national security threat;
— halting the prosecution must be the only way to respond to that threat;
— the threat must be “grave and imminent” and there must be credible, reliable and objective evidence that the threat is such;

56 International Court of Justice, Gabcikovo-Magymaros Case
58 International Court of Justice, Gabcikovo-Nagymaros Case, 25/9/07; see also the IJC’s Oil Platforms Case, where the court held that whether a measure is “necessary” is “not purely a question for the subjective judgment of the party” (2003 ICJ Reports, p. 183, para 43).
59 See UNHCR Advisory Opinion on the scope of the national security exception under Article 33(2) of the 1951 Convention, 2/1/06, http://www.unhcr.se/Pdf/Position_countryinfo_papers_06/Advisory_opinion_national_security_USA.pdf
The case for an independent prosecutor to make the decision to halt a prosecution on grounds of national security

As long as the decision to halt a prosecution on national security grounds remains exclusively with a member of the executive with no meaningful checks and balances on that decision, there will always be a perception that the decision may have been based on political rather than objective grounds and that any intelligence assessments on which such a decision is based may have been politically manipulated. For the sake of the integrity of both the judicial system and the security and intelligence system in the UK, a decision to halt a prosecution or investigation on grounds of national security should be taken by an independent prosecutor who has responsibility for upholding the rule of law, and is able to assess whether or not the threat to national security is so exceptional as to justify setting aside the duty to prosecute or investigate.

It is worth noting that the former Attorney General, Lord Goldsmith stated: “robust independence in the prosecuting function is the only way to ensure that potentially controversial prosecution decisions command respect”. A decision taken by an independent prosecutor with appropriate input from the government, made according to the principles of transparency, legality and appropriate control, is likely to command more respect than one taken by a member of the executive with no checks and balances.

As law professor Jeffrey Jowell put it in evidence to the House of Lords Select Committee on the Constitution: “it is not necessary to have a ‘political’ Attorney in order to identify or assess [matters of national security or public interest]. In countries such as Ireland, an independent DPP has proved perfectly capable of making these decisions. He consults in sensitive cases with the Government (in a similar way to our Attorney’s consultation with ministers under the “Shawcross Convention”) but the decision is his alone, untainted by the perception of unacceptably partisan bias”.

It is worth noting that at present in the UK decisions to halt prosecutions on grounds of national security primarily in relation to terrorism cases where the identity of an intelligence agent might be made known by a prosecution are routinely taken by the Director of Public Prosecutions after consulting with the Government.

The Corner House believes that there are mechanisms for ensuring that an independent Director can be accountable to Parliament for any such decision. The Director can and indeed must be called before a Parliamentary Select Committee to account for his or her decision and be required to provide full information to Parliament about his or her decision and the grounds on which it was made.

If any role for the Attorney is to be kept, the Corner House believes that it must be dependent upon there being a statutory oath of independence and of upholding the rule of law for the Attorney and that the role must be limited to an advisory role rather than a power of direction. The Attorney must be required to reach a consensus with the independent Director in taking the decision to halt the prosecution, and will seek written representations from the Director and/or the prosecutor involved as to his or her views.

The Corner House also believes that whoever takes the decision, whether the Attorney or a Director must make a full public and written account of the grounds on which the decision was taken, documenting clearly the exercise that was undertaken to assess whether the national security considerations were so exceptional as to justify setting aside domestic legal principles and the government’s international law obligations.

Government input and advice on national security issues

Whoever takes the decision, there must be clear guidelines for how the government can make legitimate representations about information and considerations which may affect the decision to be made, and transparency about how these representations are made. A Shawcross exercise, or a similar consultation exercise that views the government Ministers on the public interest aspects of an investigation or prosecution if it is an independent prosecutor, should meet the following criteria:

- The representations of each government department should be put before Parliament and made public. Clearly some information may need to be omitted to protect the lives of intelligence agents, but damage to international relations is not a legitimate reason to withhold information. This is

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particularly the case where the decision to halt a prosecution is in breach of an international obligation, such as the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, which expressly prohibits damage to international relations being used as a reason to halt a prosecution.

— Government ministers may not in their representations raise considerations that are forbidden by domestic law or international conventions. This creates confusion as to the real basis for their advice, and whether unlawful reasons may have affected their advice.

— Government ministers will not express an opinion on whether the Attorney or independent Director should halt or proceed with the prosecution, but only lay out the information and considerations which they believe should be taken into account.

— The Government must show, in its advice, that it has requested full, rigorous, objectively verifiable intelligence assessments from the security services about the national security threats, and that it has sought to verify these with security experts. The Government should provide the assessments in full to the Attorney General or the Director taking the decision, and should provide, at the very least, the conclusions reached by these assessments, to Parliament.

Mechanisms for judicial scrutiny

The Corner House believes that any decision to halt a prosecution on grounds of national security must be open to proper scrutiny through the courts as to its lawfulness, both under domestic and international law, and that there must therefore be proper judicial scrutiny of any such decision.

The Corner House believes that the removal of the conclusive certificate in Clause 13 is absolutely essential to ensure that decisions to halt a prosecution on national security grounds can be subject to judicial review.

An additional procedural mechanism would be to specify in the legislation that where one of the Directors wishes to invoke national security as a grounds for halting a prosecution (or if the Attorney General’s role is kept, if the Attorney wishes to do so), he or she should apply to the courts to get the prosecution halted. Professor Bradley, for instance, suggested a similar mechanism in his evidence to the House of Lords Select Committee on the Constitution, when he proposed that any decision to prevent a prosecution by the Attorney General could be subject to a requirement that the decision “be approved by (for instance) the Queen’s Bench Divisional Court” on the grounds that it may be considered that it is not sufficient “to rely on conventional safeguards against abuse of this power”. Careful consideration would need to be given as to whether such a mechanism would preclude judicial review thus preventing access to justice required by Article 6 of the ECHR.

Conclusion

The Corner House believes that the new statutory power for the Attorney General at Clauses 12–15 of the draft Bill is a break from the previous consent role envisaged for the Attorney and has considerable constitutional implications. The new power has not been drafted with any meaningful checks and balances that are essential for a functioning democracy.

The Corner House believes that clarification of how decisions on halting prosecutions on national security grounds is needed and that the draft Bill may be the place to do this. However, the Corner House believes that any mechanism for invoking national security exemptions in relation to halting prosecutions must be based on clear, objective criteria and a transparent and accountable process which meets international guidelines on public prosecution as well as domestic and international law principles.

The Corner House believes that for the sake of credibility, it is desirable that any decision to halt a prosecution or SFO investigation on national security grounds be taken by an independent Director, following a process of consultation with government that is based on clear guidelines and that is transparent. The decision must be put in writing and made public. It must document the evidential basis and the grounds on which it was taken, and the exercise that was undertaken assessing that national security considerations were exceptional enough to justify setting aside domestic legal principles and the government’s international law obligations. The decision must be subject to judicial scrutiny. There must also be a full accounting to Parliament of how the decision was reached.

Finally, the Corner House believes that any statute clarifying how decisions to halt prosecutions on national security are taken must specify the domestic (and international) law principles upon which such a decision may be taken.

*May 2008*

**Supplementary memorandum by The Corner House (Ev 38)**

1. The Corner House would like to bring to the attention of the Joint Committee additional evidence relating to the contradictions between the proposed new powers for the Attorney General at Clauses 12–18 of the Draft Constitutional Renewal Bill and the Government’s own national security strategy, published in March 2008.

2. As The Corner House has already stated to the Joint Committee, any clarification of how legitimate national security concerns are used to halt a Serious Fraud Office investigation or any prosecution need to be accompanied by strong checks and balances.

3. The Cabinet Office’s March 2008 national security strategy document stresses the importance of checks and balances. Several provisions in the Bill, however, create the possibility for the executive or any decision-maker to abuse national security arguments.

4. To prevent such abuse, The Corner House believes that:

   (i) national security must be defined narrowly as “national security creating a situation of necessity”.

   (ii) the provision invoking “prejudice to international relations” should be removed.

(i) **National security must be defined narrowly as “national security creating a situation of necessity”**

5. The Corner House would like to draw the Committee’s attention to the Cabinet Office’s March 2008 document, *The national security strategy of the United Kingdom*.[64] This stresses repeatedly the importance of the rule of law and accountable government in maintaining national security. For example:

   “Our approach to national security is clearly grounded in a set of core values. They include human rights, the rule of law, legitimate and accountable government, justice, freedom, tolerance, and opportunity for all”. (page 6, emphasis added)

   “At home, our belief in liberty means that new laws to deal with the changing terrorist threat will be balanced with the protection of civil liberties and strong parliamentary and judicial oversight”. (page 6, emphasis added)

   “The single biggest positive driver of security within and between states is the presence of legitimate, accountable and capable government operating by the rule of law”. (page 19, emphasis added)

   “[Tackling global instability, conflict, and failed and fragile states] means advocating and helping deliver the ingredients of long-term healthy societies, from the rule of law, civil society and legitimate, accountable and effective government”. (page 34, emphasis added)

6. As pointed out in our first submission, The Corner House believes that Clause 13, in particular the issuing of a certificate by a Minister as being held to be conclusive evidence that a direction to stop any prosecution or a Serious Fraud Office investigation was necessary, removes judicial oversight of such directions, while the exclusions in Clause 14 (3) in reports to Parliament weaken parliamentary oversight.

7. The Cabinet Office’s national security strategy document also identifies “challenges to the rules-based international system” as one of the main drivers of insecurity:

   “Overseas, our belief in the rule of law means we will support a rules-based approach to international affairs, under which issues are resolved wherever possible through discussion and due process, with the use of force as a last resort”. (page 6, emphasis added)

   “We believe that a multilateral approach in particular a rules-based approach led by international institutions brings not only greater effectiveness but also, crucially, greater legitimacy”. (page 7, emphasis added)

   “... how well it [the international system] succeeds in... dealing with states that violate international laws and norms, will be one of the most significant factors in both global security and the United Kingdom’s national security over the coming decades”. (page 17).

8. Yet Clauses 12–18 will have the effect of enabling the UK Government to override the UK’s obligations under at least one multilateral, rules-based approach to international affairs, that of the OECD Anti-Bribery Convention.

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9. This would seem to conflict with the government’s own stated analysis of the importance of tackling corruption to maintain national security. Indeed, the Cabinet Office’s national security strategy highlights the problems corruption can cause and stresses the government’s commitment to tackling it:

“Over the long term, we can expect that . . . democracy will continue to spread, and governance to improve, with resulting benefits for global security as well as for well-being and prosperity. But it will be a long and uneven path, and dictatorship, corruption, weak or absent government, and civil war will remain a feature of the landscape over the coming decades”. (page 20, emphasis added)

“We will continue to play a leading role in wider international efforts to fight corruption . . . (page 53)

10. Part 2 of the draft Constitutional Renewal Bill, therefore, despite being titled “Safeguarding of national security”, significantly contradicts and undermines the government’s own national security strategy.

11. As stressed in its earlier submission, The Corner House believes that any statutory clarification of how national security decisions are taken in relation to directions to halt prosecutions and SFO investigations should include an appropriately restrictive definition of national security, which confines it to a definite and immediate threat. We therefore suggest replacing “national security” with “national security creating a situation of necessity”.

12. This is especially important given ongoing policy proposals by the Government and others to broaden the understanding of national security to encompass a wide range of threats and risks beyond those made by another state to the UK’s territory. Such threats and risks would include transnational organised crime; infectious diseases (particularly influenza), extreme weather and coastal flooding; man-made emergencies; climate change; competition for energy; poverty, inequality, and poor governance; and migration and demographic changes.65

13. While these threats and risks undermine many people’s individual and collective security and their rights to life and livelihood, and have the potential to undermine those of many more, the extent to which they should be considered as national security threats is still a matter of debate.

14. Given that understandings of national security are currently in flux, it is especially important that powers pertaining to national security are restricted and subject to checks and balances.

(ii) The exception invoking “prejudice to international relations” should be removed

15. Given the importance of parliamentary oversight, highlighted by the Cabinet Office’s own national security strategy, it is important that full explanations be given to Parliament on any direction to stop a prosecution or SFO investigation on the grounds of national security.

16. The draft Bill’s inclusion of “prejudice to international relations” as a reason not to provide full information to Parliament needs, The Corner House believes, to be removed, both at Clause 14 (3) (b)66 and Clause 17 (3).67

17. The definition of international relations at Clause 17 (3) is so broad as to allow the Government (or any decision-maker) effectively to exclude information that may be highly relevant to Parliament’s ability to hold the Executive (or any decision-maker) to account. If this exception for “prejudice to international relations is maintained, it will become extremely difficult, if not impossible, for Parliament to disentangle whether a decision to halt a Serious Fraud Office investigation or any prosecution is based on national security grounds alone or has, in fact, been mingled not only with concerns about international relations but also with commercial and partisan interests.

18. As the Joint Committee will be aware, consideration of damage to international relations is expressly forbidden as a ground for discontinuing a prosecution or investigation under Article 5 of the OECD Anti-Bribery Convention. The inclusion of this exception will therefore create the suspicion that the Government is not committed to upholding Article 5 of the OECD Convention despite its assurances to the contrary to the OECD. Such suspicion will undermine still further public trust and belief in the Government’s decisions and actions invoking national security.

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66 14(3) “Nothing in subsection (2) requires information to be included in a report [to Parliament] if the Attorney General is satisfied that—. . . (b) the inclusion of the information would prejudice national security or would seriously prejudice international relations.
67 17(3) . . . international relations are prejudiced if any of the following are prejudiced—relations between the United Kingdom and another other State; relations between the United Kingdom and any international organisation or international court; the interests of the United Kingdom abroad; the promotion or protection by the United Kingdom of its interests abroad.
Memorandum by the Rt Hon Don Touhig MP (Ev 44)

SUMMARY

— One of the key aims of the Draft Bill is to increase the accountability of the Civil Service.

— The Committee on the Grant of Honours, Decorations and Medals (HD Committee) currently epitomizes Civil Service remoteness and unaccountability, and its arbitrary decisions have caused great offence to veterans of the Armed Services.

— I propose that a clause be added to the Draft Bill requiring an annual report to Parliament on the activities of the Committee by the Foreign Secretary, under whose jurisdiction the committee falls, or by another senior minister.

— By this step, Civil Service accountability would be strengthened in an area where its very unaccountability has been the cause of hurt and offence to people to whom our country owes respect and gratitude.

SUBMISSION

1. I propose that a clause be added to the Draft Bill requiring an annual report on the activities of the Committee on the Grant of Honours, Decorations and Medals (HD Committee) to be made to Parliament by the Foreign Secretary, Minister for the Cabinet Office or another minister whose responsibilities touch on the area of honours.

2. As I pointed out in a 10-minute Rule Bill Speech on Wednesday 21 May, the HD Committee has come to be regarded by many, especially veterans of our country’s Armed Forces, as a byword for Civil Service unaccountability. Its apparently arbitrary decisions, which its members do not have to justify to elected representatives, have caused grave offence to service personnel, veterans, and, in the past two years, the Malaysian government as well. Its members transact business by secret correspondence, and are not subject to Parliamentary scrutiny or any transparent oversight by ministers.

3. The measure which I propose would bring accountability to an arcane and remote body through the means of a report to Parliament, on which there should be a debate in the House of Commons and a vote on a motion to approve the report. Through this vote, the House could express its view on the Committee’s actions during that year.

4. The classic example of the Committee’s bizarre behaviour came in January 2006 when it set aside rules governing the acceptance and wearing of foreign medals—the five-year rule and the double-medalling rule—to allow veterans of the Malaysia Campaign (1957–66) to accept the Pingat Jasa Malaysia medal, but then imposed exactly the same rules to stop them wearing the medal on public occasions.

5. The Malaysian authorities who wished to award the medal were baffled and British service personnel were very offended by the inconsistent and slap-dash approach of the Committee towards veterans of the Malaysia Campaign.

6. Requiring an annual report to Parliament on the Committee’s work by the Foreign Secretary or another senior minister would prevent such a fiasco from taking place again and would be an important step in strengthening accountability in the Civil Service. Bringing to account such an arcane body would have huge symbolic importance in the work of making the executive more accountable to the people it serves.

I enclose a copy of my remarks [submitted but not printed] on this matter in the House on 21 May 2008.

12 June 2008

Memorandum by the UK Parliamentary Ombudsman (Ev 32)

1. In a letter to the Prime Minister dated 19 December 2007 (copy and enclosure attached) [Submitted but not printed] I set out my views on the constitutional role of the UK Parliamentary Ombudsman and drew attention to two specific issues: citizens’ access to the Ombudsman; and the status of the Ombudsman’s findings and recommendations. This note is intended as an addendum to the short paper enclosed with that letter and should be read in conjunction with it.

2. Since I wrote that letter the February 2008 Court of Appeal judgment in the litigation arising from my report on occupational pensions (Trusting in the pensions promise: government bodies and the security of final salary occupational pensions, 15 March 2006) has clarified the status of my findings and recommendations.
3. In effect, that judgment requires Government to have due regard to such findings and to give a reasoned account of any decision on its part not to comply with them. In my view, this provides an adequate framework for the future effective discharge of my functions and I am content to let the matter rest there.

4. I would, however, like to take the opportunity of drawing to the Committee’s attention the wider significance of the work of the UK Parliamentary Ombudsman for the overarching questions that you have identified. In particular, I wish to comment on the aim of giving Parliament more ability to hold the Government to account.

5. As the Committee will no doubt be aware, the Office of Parliamentary Ombudsman was established by the Parliamentary Commissioner Act 1967 to provide an innovative means of investigating and exposing any misuse of Government power in its dealings with the citizen. The broader purpose (in the words of the preceding 1965 White Paper) was “to humanise the whole administration of the state”.

6. In practice, the work of the Office, which now also includes the role of Health Service Ombudsman for England, has at its centre the investigation of complaints of maladministration brought by individual citizens against central government departments and other national bodies. The core business of the Office is this investigative activity. A key feature of the role of Ombudsman, and one that makes it different from the courts and tribunals, is the ability to detect patterns of administrative failure and to propose systemic remedy. Beyond that, there is the ability to comment upon the way in which policy has been implemented and its impact on the citizen. I am mindful, for example, of my recent reports into the tax credit system, which proposed practical remedies for individual aggrieved citizens, pointed towards systemic failings in the operation of the system, but also asked searching questions about the ability of the policy design ever to deliver the intended results. The objective is therefore to deliver on the dual function of providing both individual and public benefit.

7. A distinguishing feature of the Office is that this investigative and remedial activity, this dual function, is exercised on behalf of Parliament. The Ombudsman has Officer of the House status and reports directly to Parliament, with specific oversight by the Public Administration Select Committee. Complaints must be referred to the Ombudsman through an MP. This so-called MP filter, although it complicates access to the services of the Ombudsman, does symbolise the close relationship between the work of the Ombudsman and the ability of MPs to hold the executive to account. The very fact that my findings are not binding upon Government further reflects the intention that those findings should contribute to the ongoing process of Parliamentary deliberation about the issues raised and so form part of the material available to Parliamentary debate.

8. This is an aspect of the Office’s activity that has perhaps been given less prominence in the past than it might have been. The reasons for this are no doubt various. They include, I suspect, the fact that administrative justice and judicial review in particular have developed rapidly since 1967 and so have drawn particular attention to the role of the Ombudsman as an alternative form of dispute resolution. In fact, that dispute resolution function complements the larger role to which I am now drawing attention and is an essential ingredient of it. It should not, however, be taken to define the entire purpose of the Office.

9. The particular salience of these observations to the matters under consideration by the Committee relates to the overarching ambition of reinvigorating democracy and holding the Government of the day to account. In my experience, the encounters between citizen and state that generate the caseload of the Office are precisely the space where most people get their first, and often only, real taste of the democratic process. It is in these encounters that citizens get a sense of whether they count as individuals or are merely cogs in a bureaucratic machine. It is, for example, in the decision-making process about welfare benefits, tax liability, and healthcare delivery that citizens experience first-hand the way the state tackles the issues of most pressing concern to them and their families. To the extent that those encounters are marred by maladministration, the democratic process itself is damaged, with attendant loss of confidence and commitment on the part of the citizens who should be most engaged with it.

10. In short, I believe that Parliament in general and MPs in particular should be encouraged as part of the scrutiny of the Constitutional Renewal Bill to reflect carefully upon the resource made available to them by the Office of Parliamentary Ombudsman. When we talk about democratic deficit and the desirability of deliberative democracy, I suggest we should keep in mind the apparatus that Parliament itself, with more than a little foresight, put in place in 1967 to contribute precisely to the process of humanising the administration of the state that remains as urgent as ever and is a critical constituent of the reinvigorated democracy that The Governance of Britain wishes to promote.

11. I would of course be very pleased to expand on these observations either in person or by further correspondence with the Committee.

11 June 2008
Memorandum by Sir Michael Wood, KCMG (Ev 18)

SUMMARY

1. The present arrangements whereby the Attorney General gives legal advice to the Government are preferable to any of the alternatives that have been canvassed. It is axiomatic that legal advice, if it is to be frank, should not be disclosed.

2. The draft clauses on “Ratification of Treaties” are satisfactory, though it would be preferable for Clause 23 to contain a power to add new descriptions of treaties to which Clause 21 does not apply.

3. If there is to be any change as regards war powers, the better route would be by way of parliamentary resolution, as proposed in the White Paper. The legislative option has grave disadvantages.

INTRODUCTION

1. I was the Legal Adviser to the Foreign and Commonwealth Office from 1999 to 2006. I am now a barrister in private practice, specialising in the areas of foreign relations law and international law. My evidence is concerned chiefly with the foreign relations aspects of the proposals in the White Paper (Cm 7342).

I. ATTORNEY GENERAL: LEGAL ADVICE

2. I welcome the approach in the White Paper, and agree, for the reasons there given, that the Attorney General should remain the Government’s chief legal adviser, and that he or she should remain a Minister, a member of one of the Houses of Parliament, and continue to attend Cabinet whenever necessary (paras. 51–54 and 61–65).

3. My particular concern is with the Attorney General’s role in furnishing the Government with advice on questions involving public international law. Given the nature of international law, and the critical nature of many of the matters with which it deals, it is important that legal advice within Government should be advanced firmly and convincingly in high-level policy discussions. The existing arrangements comprise, in addition to the Attorney General, the Legal Advisers at the Foreign and Commonwealth Office and the lawyers in the Attorney General’s Office. These arrangements are effective in melding together expertise in international law with the extra weight of the Attorney General’s broader experience, and his or her standing as a Member of the Government. They ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. The Attorney General’s status as a Minister gives him or her a greater possibility than would be secured by any other arrangement of ensuring that legal considerations are not misunderstood (or ignored) in high-level decision-making on foreign affairs.

The current arrangements also ensure that there is a degree of Parliamentary accountability in respect of the legal positions which the Government adopts.

4. I agree with the approach in the White Paper to the disclosure of the Attorney General’s advice (paras. 66–69).

5. Suggestions that the legal advice tendered to the Government should be published are misconceived. This is so with regard to the often delicate and uncertain questions of international law as with other areas of the law. The normal rule of confidentiality (the Law Officers convention, enshrined in section 35 of the Freedom of Information Act 2000) needs to be maintained. International situations, and especially crisis situations, are rarely static, but develop, often at great speed. When this happens, and legal questions are involved, seeking legal advice is an iterative process. The advice sought may go to tactics as well as substance. To reveal the legal advice (including whether legal advice has been sought on a particular question) could seriously damage the Government’s hand in fast-moving international diplomacy.

II. TREATIES

6. Clauses 21 to 24 of the draft Bill (Ratification of Treaties) are technically satisfactory, subject to one point.

7. Clause 23 should contain a power to add further descriptions to the list of descriptions of treaties to which Clause 21 does not apply, as was proposed in the Green Paper. Such flexibility would have at least two advantages. First, it would enable account to be taken of experience under the legislation, which might show that the procedure set forth in the Act was not necessary or appropriate in certain cases. And it would enable categories of treaties that have been overlooked or that may emerge in future international practice to be brought within Clause 23. Parliament should have the final say on whether this is appropriate, so it would be
right for the power to be exercisable by a procedure requiring the assent of Parliament, such as a statutory instrument requiring an affirmative resolution of each House.

8. My (brief) responses to the specific questions listed in the Call for Evidence are as follows:

Question 31
Yes, on all counts.

Question 32
Parliamentary scrutiny of draft treaties (which I take to be a reference to scrutiny while negotiations are ongoing) is not a matter to be dealt with in an Act of Parliament.

In many cases, such scrutiny will not be practical. Treaty negotiations are often conducted behind closed doors. Sometimes the very fact that negotiations are taking place at all is a matter of considerable sensitivity, to one side or the other (or both). In addition, it may well not be possible for the Government to reveal its negotiating hand or its tactics, without damaging consequences.

There are exceptions, particularly in the case of multilateral treaties negotiated within an international organization or at an international conference, where negotiations do take place to some degree in public. I believe that Parliament did, for example, discuss the draft Statute of the International Criminal Court while it was under negotiation.

Question 33
Current arrangements, reflected in the draft Bill, have proved to be satisfactory in practice, and seem to strike the right balance between Parliament and the Executive in this matter.

Question 34
Clause 22 as drafted seems right. It should be for Government to decide whether exceptional circumstances (which are likely to be very rare) exist. Only they will have the necessary information (including possibly sensitive information) to take such a decision, and be in a position to balance all relevant considerations, foreign policy and other.

Question 35
Yes.

Question 36
This is a matter for Parliament, and I express no view.

III. WAR POWERS

9. It would have been a serious error to have placed new arrangements in respect of war powers on a statutory footing. To have done so would inevitably have involved the judges in the application of the powers. This applies also to the hybrid solution. In addition, detailed legislation would have introduces an inappropriate degree of rigidity into new and untried procedures that relate to the most difficult and crucial of governmental decisions.

10. There is much to be said for leaving matters as they stand at present, with a developing constitutional practice that the House of Commons will, wherever possible be consulted in advance of any major use of force. If, however, that is considered undesirable, proceeding by way of a detailed parliamentary resolution, as proposed in the White Paper, would be the right way to go. This will be effective in formalizing Parliament’s role, which seems to be the purpose of the exercise, without opening up matters of war and peace to the risk of inappropriate judicial scrutiny.

11. Unless the aim is to reduce the ability of the United Kingdom’s armed forces to participate in overseas operations to the level of, say, those of Germany or Japan, great care should be taken not to judicialise the decision-making process. If matters of war and peace were to become justiciable in the courts of the United
Kingdom, this would risk putting serious obstacles in the way of United Kingdom participation in United Nations, NATO, EU peace-keeping and other operations overseas, with the consequent diminution of our standing in the world. And it would risk involving the judiciary in highly political questions. Judges could find themselves having to second-guess the Government, not only as regards the original decision to use armed force, but also as regards decisions to continue to use armed force, to use armed force in a certain way, and so on. Among the difficult issues that might come before the courts would be the interpretation of the scope of a conflict decision and its application to an ongoing conflict. Ministers and military commanders would continually need to have regard to the judge over their shoulder. The distraction of court proceedings (which might well take place in the lead up to or during a conflict), both political and for the individuals implicated, would be considerable, at a time when all concerned are fully stretched by the day-to-day conduct of the conflict. And there would be the prospect of legal proceedings dragging on for years thereafter.

12. To illustrate the kind of issues that could well arise, if the courts were asked to decide whether war powers legislation had or had not been complied with, I draw attention to a very recent Judgment of the German Constitutional Court (BVerfG, 2 GvE 1/03 of 7 May 2008). The Constitutional Court held, in May 2008 (that is, five years after the event) that the Federal Government had violated the rights of the Federal Parliament by not seeking its approval for the participation of German soldiers in NATO aerial surveillance measures (AWACS) over Turkey between 26 February and 17 April 2003. In reaching this conclusion, the judges of the Constitutional Court had to decide whether the participation of German soldiers in the unarmed AWACS fights over Turkey, at a time when Turkey was not itself involved in an armed conflict, amounted to the involvement of German soldiers in armed undertakings. This required a detailed examination of the nature of NATO’s Operation Display Deterrence. The judges examined the particular role of the AWACS planes in the NATO Operation, and their communications links to Patriot anti-missile launchers and NATO fighter planes stationed in Turkey for the defence of that country in the event of an attack by Iraq. The judges also had to consider the effect of decisions of NATO’s Defence Planning Committee, and the applicable NATO Rules of Engagement (which the NATO authorities changed in the course of the short operation, making them significantly more robust).

13. Among other things, this case illustrates the real difficulty (even in the German system where there already is a substantial case-law on the subject) of drawing a clear line between those deployments that require Parliamentary approval and those that do not. If this were a matter for the British courts, I could foresee a host of interesting and difficult cases.

14. The possibility was raised (in the Legislative Option set out in the October 2007 Green Paper (Cm 7239)) of including a subsection in an Act of Parliament to the effect that “A conflict decision is not unlawful because it is not approved as required by this Part”. Quite apart from the nonsense involved in saying that something done in violation of an Act of Parliament is not unlawful, any such provision would be unlikely to oust the jurisdiction of the courts. The courts traditionally (and rightly) have usually found ways to avoid “ouster” clauses.

15. The detailed draft resolution in the White Paper gives Parliament an appropriate degree of control over conflict decisions. Certain matters must inevitably be left to Government, and the draft properly reflects that.

16. It is right that approval should not be required for a conflict decision involving Special Forces. It would be incompatible with the effectiveness of the operations of Special Forces to require Parliamentary approval.

17. Whether the term “conflict decision” has been adequately defined depends on how widely (or narrowly) Parliament wishes the procedure to apply. Whatever definition is used there are bound to be difficult borderline cases (as, for example, in the German case referred to at paragraph 12 above). Experience may well suggest a need for changes in the scope of the new procedure. Proceeding by way of a resolution will allow for improvements to be made in this and other respects much more easily than if the details were enshrined in an Act of Parliament.

6 June 2008

I am a Senior Fellow of the Lauterpacht Centre of International Law, University of Cambridge, and a barrister at 20 Essex Street Chambers. From 1999 until 2006, I was the Legal Adviser to the Foreign and Commonwealth Office.

This evidence is submitted on an individual basis.
Memorandum from Derek Wyatt MP (Ev 62)

Protests in Parliament Square
I do not object to single one-day protests—this has been the traditional form which citizens have employed in recent times. I do object to the Square being used as an encampment and by protesters endlessly using microphones.

Attorney General
MPs should have their own Attorney General, separate from the government.

War Powers
The government is right to adopt a resolution as to whether to send a send forces into conflict.

Civil Service
The Civil Service is inadequately trained, especially the personnel in the Foreign Office, for today’s more complex world. It is not their accountability that is the issue.

Apologies for being slightly late with this response.

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