HOUSE OF LORDS

Select Committee on the Constitution

14th Report of Session 2009–10

Bribery Bill & Constitutional Reform and Governance Bill: Government Responses to the Committee's 7th and 11th Reports of Session 2009–10

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Government Responses to the Committee's Reports on the Bribery Bill and Constitutional Reform and Governance Bill

1. On 4 December 2009 and 2 February 2010 we published reports on the Bribery Bill.[1] The Government response to the second of these reports was received with a covering letter dated 22 March from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice to the Chairman of the Committee. The response and the covering letter are reproduced here, for the information of the House, as Appendix 1.

2. On 18 March we published a report on the Constitutional Reform and Governance Bill.[2] The Government response was received in the form of a letter dated 23 March from the Rt Hon Michael Wills MP, Minister of State for Justice to the Chairman of the Committee. The response is reproduced here, for the information of the House, as Appendix 2.

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1 1st Report (2009–10): *Clause 12 of the Bribery Bill* (HL Paper 10) and 7th Report (2009–10): *Clause 12 of the Bribery Bill: Further Report* (HL Paper 49).

2 11th Report (2009–10): Constitutional Reform and Governance Bill (HL Paper 98).

APPENDIX 1: GOVERNMENT RESPONSE TO THE 7TH REPORT

Letter from Lord Bach, 22 March 2010

I am pleased to attach the Government's response to the Constitution Committee's second report on what was clause 12 (now clause 13) of the Bribery Bill published on 2 February.

Claire Ward and I were grateful for the opportunity to meet with you, Lord Lyell and Lord Pannick on 10 March to discuss the Government's alternative proposals for providing a measure of ministerial oversight of the conduct of the intelligence services and armed forces in circumstances where the clause 13 defence would apply. These are detailed in the attached response, paragraph 13 of which provides examples of the matters that might be covered in the arrangements that the heads of the intelligence services and Defence Council will be required to put in place in order to ensure that conduct amounting to a relevant bribery offence only takes place where the defence would apply.

As you may be aware, the Public Bill Committee in the Commons has now agreed the Government amendments removing subsections (6) to (14) of clause 10 and inserting alternative oversight arrangements in clause 13.

At our meeting Lord Pannick also asked about the link between the arrangements referred to above and the Intelligence Services Commissioner. The Commissioner has a statutory duty to scrutinise the intelligence services' activities under the Intelligence Services Act 1994 and activities conducted under Parts II and Ill of the Regulation of Investigatory Powers Act 2000. There is no direct correlation between those duties and the provisions now in clause 13 of the Bribery Bill.

Government Response

The breadth of the defences

1. **We are pleased that the Government have now tabled an amendment to omit clause 12(1)(a) from the Bill. (Paragraph 5)**

2. The Government welcomes the Committee's support for the Government amendments at Lords Report stage to narrow the ambit of the defence so that it only covers the intelligence services and armed forces.

3. **The Government have now explained why they consider this [that is, the application of the defence to the intelligence services' functions in respect of safeguarding the economic wellbeing of the United Kingdom] to be necessary. (Paragraph 6)**

4. The Government welcomes the fact that the Committee has recognised that the Government has made the case for the defence applying to conduct that was necessary for the proper exercise of any of the functions of the intelligence services, including the function of safeguarding the economic wellbeing of the United Kingdom.

A system of prior authorisation

5. **From a constitutional point of view the advantage of a system of prior ministerial authorisation is that it provides a measure of oversight by a Minister who is accountable to Parliament. (Paragraph 8)**

6. **We reiterate our recommendation that the defences in respect of both the intelligence services and the armed forces should be accompanied by a system of prior ministerial authorisation. (Paragraph 11)**

7. The Bill was amended at Third Reading in the Lords to include provision in clause 10 for a discretionary prior ministerial authorisation scheme in respect of conduct by the intelligence services and armed forces. In line with the Committee's recommendation, this scheme was designed to augment, rather than replace, the defence in what is now clause 13 of the Bill. The Government opposed the amendment to clause 10 of the Bill.

8. The Government recognises the concern that there should be appropriate oversight by a Minister who is accountable to Parliament, but we remain of the view that there would be significant drawbacks with the authorisation scheme provided for in the Lords' amendment. The amendment makes provision for conduct to be 'specifically authorised' in advance by the Secretary of State. The Government considers that this amounts to a case-specific authorisation scheme and, as such, would present significant practical difficulties such as to make it unworkable. Such a scheme could place heavy demands on the Secretary of State because of the number of separate authorisations that would be needed. Moreover, such a scheme fails to recognise the dynamics of what can be complex and fast moving operations.

9. The Government has other concerns about the particular model approved by the Lords at Third Reading. In providing for a discretionary, rather than a mandatory, authorisation scheme, the Government considers that the Lords amendment to clause 10 creates uncertainty about the scheme's legal and practical effect. A key purpose of clause 13 is to provide members of the intelligence services and armed forces with legal certainty that they would be protected in the event they were required to engage in conduct that would constitute a relevant bribery offence under the Bill in pursuit of one or more of the functions of the intelligence services or armed forces whilst engaged on active service. A discretionary authorisation scheme casts doubt on the position of a person to whom the defence applies but who engaged in conduct which was not covered by a prior authorisation.

10. It is also the case that the Lords amendment would allow the Secretary of State to authorise conduct that would constitute an offence under clause 6 of the Bill, namely bribery of a foreign public official for a business purpose. We have taken particular care in drafting clause 13 to ensure that it is compatible with our international obligations and accordingly the definition of a relevant bribery offence purposely excludes a clause 6 offence.

11. For these reasons, and those set out in paragraph 19 of the Government's response to the Committee's earlier report, the Government remains of the view that the defence in clause 13 is to be preferred as compared with either a discretionary or mandatory authorisation scheme. Moreover, the defence needs to be considered against the existing governance arrangements for the intelligence services and armed forces which provide the measure of ministerial (and parliamentary and judicial) oversight the Committee is seeking.

12. That said, the Government has reflected carefully on the Committee's further report and on the debate at Lords Third Reading. In the light of this, the Government tabled amendments for Commons Committee stage of the Bill. Those amendments omit subsections (6) to (14) of clause 10 of the Bill, but in their place further strengthen the accountability arrangements in respect of

conduct by the intelligence services and armed forces that would fall within the ambit of clause 13. The amendments to clause 13 would place a statutory duty on the heads of the intelligence services and, in the case of the armed forces, on the Defence Council to ensure that they have in place arrangements to ensure that any conduct amounting to a relevant bribery offence only takes place where the defence would apply. The arrangements must be ones which the relevant Secretary of State considers to be satisfactory.

13. It will be the responsibility of the head of each of the intelligence services and the Defence Council to design arrangements which will work most effectively for their staff and operational activities. However, by way of illustration, such arrangements might include internal guidance on the offences in the Bill and the clause 13 defence, and on the taking of internal legal advice in specified circumstances.

14. We consider that this provision strikes an appropriate balance between the need for effective ministerial oversight of the work of the intelligence services and armed forces and maintaining their operational effectiveness. The Public Bill Committee in the Commons agreed the amendments on 16 and 18 March 2010.

Process Issues

15. **It is a matter of regret that the Government failed to produce a properly rounded set of proposals in the Draft Bill, so denying pre-legislative scrutiny on a matter where the need was considerable. (Paragraph 12)**

16. We recognise the value of pre-legislative scrutiny of legislative proposals and we are grateful to the Joint Committee for its thorough and considered report on the draft Bribery Bill (HL115, HC430). We accept that it would have been preferable if the proposals for a defence (as contained in clause 12 of the Bill as introduced in the House of Lords) had been finalised in time to allow the Joint Committee the opportunity to consider them. Unfortunately, for the reasons set out in paragraph 3 of the Government's response to the Committee's first report on clause 12, this was not possible but the Joint Committee's comments on the proposal in the draft Bill for an authorisation scheme in relation to the intelligence services helped to inform our proposals for a defence in the Bill as introduced. The Government welcomes the Committee's recognition that Government proposals at the pre-legislative stage may not always be fully formed and that legislative proposals may need to be revised in the light of pre-legislative scrutiny.

17. **We underline the importance, as a matter of good legislative practice, of the Explanatory Notes accounting for major departures from a draft Bill. (Paragraph 13)**

18. The Government accepts the importance of explaining major departures from a draft Bill. However, we do not accept that the Explanatory Notes to the Bill as introduced are the appropriate vehicle for this. The Explanatory Notes which accompany a Bill are primarily concerned with what the Bill does and how it does it. It would be inappropriate to provide a narrative on the policy developments which resulted in changes to the Bill prior to introduction. The Government responded in full to the Joint Committee's report on the draft Bribery Bill (Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill, Cm 7748), including an explanation of why the Bill as introduced provided for a defence for law enforcement agencies, the intelligence services and the armed forces in place of the authorisation scheme

originally proposed. The Government response to the Joint Committee was published alongside the Bill, and the Background section of the Explanatory Notes makes reference to the response to the Joint Committee.

19. **Given the importance of ensuring proper parliamentary scrutiny, including by this Committee, it is a matter of regret that the Government's response was so delayed. (Paragraph 14)**

20. The Government response of 27 January to the Select Committee's report of 4 December complied with the recognised convention of responding to such reports within two months of publication. We appreciate the Committee's preference for an earlier response, but as Lord Bach indicated in his letter of 15 January 2010 to Lord Goodlad, we were concerned to reflect fully on the debate in Grand Committee before responding to the Committee. Following that debate, the Government came forward with amendments for Lords Report stage responding to the Committee's concerns by significantly narrowing the scope of clause 12 to exclude law enforcement agencies.

APPENDIX 2: GOVERNMENT RESPONSE TO THE 11TH REPORT

Letter from the Rt Hon Michael Wills MP, 23 March 2010

The Government is grateful to the Committee for their report on the Constitutional Reform and Governance Bill (CRaG Bill) of 18 March. I have given consideration to the points you raise, and have responded promptly so that the Government's reply can inform the second reading debate on the Bill on 24 March.

A number of the points throughout your report relate to the time made available for the scrutiny of the CRaG Bill. I propose to address those together in conclusion. Before that, I will address points raised in relation to specific policies.

The Governance of Britain

In paragraph 7 of your report you mention a number of policy proposals made as part of the Governance of Britain programme—on war powers, flag flying, reform of the Intelligence and Security Committee, a wider review of the royal prerogative, the granting of passports, senior public appointments, and Church of England appointments—and note that the CRaG Bill does not contain provisions pertaining to these matters.

Although the Committee makes no substantive comment on most of these, save to suggest that in some cases this may mean reform does not require legislation, while in other cases it may mean that the Government no longer intends to introduce further reform, it is important to note that these proposals have not been left unresolved. To illustrate, I would like to draw the Committee's attention to the fact that the Government has issued a consultation on flag flying and changed the instructions so that the Union flag is flown from Government buildings at all times; changed the arrangements for the ISC including enhancing the involvement of Parliament in the appointment of the committee; conducted a review and issued a report on the review of the royal prerogative; introduced arrangements for select committees to hold hearings into the nominations for a variety of public appointments. We have also changed the rules on Church appointments so that the appointment of Bishops and Deans is now managed by the Church, and the PM receives only one name to forward to the Queen for the appointment of Diocesan Bishops, instead of two as previously.

In paragraph 8, however, you do comment on the war powers proposals, calling on the Government to publish a draft resolution as soon as possible. As the Justice Secretary told your Committee on 24 February, the draft resolution has been through a number of iterations. It is important to ensure that the resolution strikes the right balance between democratic accountability and operational effectiveness and that UK armed forces are not put at unnecessary risk. It has also been necessary to ensure that the resolution is properly framed in terms of the procedures of the Commons and, in particular, takes into account the views of the House authorities expressed to the Joint Committee on the Draft Constitutional Renewal Bill (which appears as Ev 65 in Volume II of the Joint Committee's report). I can reassure the Committee that the Government intends to publish the resolution as soon as possible.

The civil service

Moving on to matters in the Bill, the Government welcomes the Committee's comments on the importance of the provisions placing the civil service on a statutory footing, and the Committee's own welcome in broad terms for the provisions.

As the Committee's report says, the provisions concerning the civil service were subjected to detailed pre-legislative scrutiny by the Joint Committee on the Draft Constitutional Renewal Bill and by the House of Commons Public Administration Select Committee (PASC). The Government responded in July 2009 to the detailed recommendations of both the Joint Committee and PASC, some of which are reproduced in the House of Lords Select Committee on the Constitution's own report, and continues to listen to, and carefully consider, the issues raised as the Bill progresses. In relation to the civil service provisions, the Committee's report notes that the Bill now contains provision for certain restrictions on special advisers' functions to be included in the code of conduct for special advisers. This was an issue which was widely raised at earlier stages of the Bill, and incorporated following a Government amendment at Report Stage in the House of Commons.

The ratification of treaties

On the ratification of treaties, paragraph 16 raises points of interest in relation to the scrutiny of treaties, but which are largely a matter for either House. Although many treaties deal with topics which are of only passing interest to the House, the Government of course remains willing to work with Parliament to improve its mechanisms for scrutiny.

The Government fully respects the convention that the laying of a treaty should be accompanied by the publication of an Explanatory Memorandum (EM), and has laid an EM at the same time as laying a copy of every treaty under the Ponsonby Rule since January 1997. We fully intend to continue with this practice, and indeed it is all the more important that we do so in the event that the consequences of a vote will have legal effect. It is of course in the Government's own interest to set out the case for ratification clearly and effectively. Nevertheless, the Government sees no reason to set out the requirement in legislation.

In relation to scrutiny by select committees, again the Government stands ready to work with Parliament and with whatever select and joint committees it wishes to establish.

National Audit

Paragraph 24 raises questions about the relationship between the National Audit Office and the Comptroller and Auditor General, and consequently about the Comptroller's accountability to Parliament under the arrangements proposed in the CRaG Bill.

The relationship between the National Audit Office chair and the Comptroller and Auditor General is clearly set out in the Bill; they will jointly have to submit the National Audit Offices strategy and estimate to the Public Accounts Commission for approval. If there were a disagreement between the two, it would be for the Commission to arbitrate. The Comptroller, however, retains complete discretion in carrying out his statutory responsibilities. That discretion cannot be overridden by either the Chair or the Commission.

I note an unintended factual error in the report: the Comptroller and Auditor General's accountability to Parliament is through the Public Accounts Commission, not the Public Accounts Committee. The provisions in the Bill do not alter the relationship between the Comptroller and the Commission, but strengthen it through the various approval processes and requirements.

Referendums

Your report notes that the Electoral Commission has identified five improvements that it believes should be made to the Political Parties, Elections and Referendums

Act 2000 (PPERA). The Report notes that the CRAG Bill fully addresses two of these; addresses a further two for the purposes of the proposed referendum on the Alternative Vote system only; and does not address one.

PPERA sets out the general framework under which statutory referendums in the UK must be conducted. However, further enabling legislation must be agreed by Parliament before any referendum on a particular issue can be held. As well as dealing with important matters of substance (such as specifying the referendum question or the means by which it should be set), it may be appropriate for this further legislation to specify, on a case-by-case basis, what further provisions will apply to any particular referendum, having regard to the particular circumstances or issues involved. The sorts of provisions that such legislation may seek to make could relate to the way that the referendum campaign is to be regulated or the way the referendum itself is to be conducted.

In addition, any amendment to the generic PPERA framework would apply to all future referendums held under PPERA. Before making such an amendment, the Government must therefore be satisfied that it is appropriate for all future referendums to be conducted in such a manner, and that there is no reason why flexibility to make provision on a case-by-case basis should be retained.

The Government is satisfied that the Commission's proposal for aggregation of spending incurred by permitted participants with a common purpose should apply both to the proposed referendum on voting systems and to any future referendums, since that is consistent with the approach taken to regulation of spending by third parties in the Political Parties, Elections and Referendums Act 2000. Clause 89 of the CRaG Bill therefore amends the generic PPERA legislation.

Your report suggests that clause 37 of the Bill ("Conduct etc of referendum") satisfies the Commission's recommendation that a generic conduct order for future referendums should be prepared. This is not the case. Clause 37 provides a specific enabling power that may be used to make such provision as is necessary or expedient in relation to the conduct of the referendum and other related matters. The power applies only to the proposed referendum on voting systems and not to any other future referendums. The Government has no current plans to introduce a generic conduct order for future referendums. The Government believes that orders dealing with the conduct of referendums should be made on a case-by-case basis, in order to retain a degree of flexibility which will enable the specific circumstances of any given referendum to be taken into account. That also reflects the position for statutory elections, where a conduct order is made in advance of that particular poll in order to take account as necessary of any change in the electoral law framework in the intervening period.

Your report notes that the clauses in the CRaG Bill providing for Regional Counting Officers and a conferral of powers on the Electoral Commission to promote public awareness apply in relation to the proposed referendum on voting systems only, and not to all future referendums. The Government will examine the position further with the Electoral Commission before a change to the overarching PPERA framework is made.

Your report notes that no amendment is proposed in relation to the 28 day restricted period on publication of Government promotional material, as set out in section 125. The Government does not accept the Commission's recommendation that the restriction should apply throughout the whole of the referendum period. In relation to the proposed referendum on voting systems, this referendum period could last for up to six months. For other future referendums, this could

potentially be longer. The Government does not believe it would be appropriate to restrict the publication of Government material for such a potentially lengthy period of time in each and every case. Depending upon the subject of the referendum, such a restriction could cause significant difficulties to the operation of normal Government business. The Government believes that whether or not the proposed 28 day closed period should be extended should be considered on a case-by-case basis, taking into account the particular circumstances and subject matter of each referendum. The Government notes that, for the 2004 North East referendum, the then Office of the Deputy Prime Minister agreed to a self-imposed restriction on the publication of material from the point 28 days before the issue of postal ballot packs. The Government would consider closer to the time whether any extension of the restriction set out in section 125 of PPERA would be appropriate in relation to the proposed referendum on voting systems.

Your Report notes that the clauses in the CRaG Bill provide that the question for the proposed referendum on voting systems will be specified by the Secretary of State in secondary legislation, following consultation with the Commission on the intelligibility of that question. The role of the Commission in this respect is entirely consistent with that provided for it by the provisions of PPERA. Your report prefigures a recommendation to be made in the forthcoming Report from your Committee, Referendums in the United Kingdom, that statutory responsibility for formulating the question should be passed to the Electoral Commission, which would then present the question to Parliament for approval.

The Government awaits your Committee's final report on referendums before commenting fully. However, in its evidence to your Committee's recent enquiry, the Government stated its firm view that the final decision on the wording of the question should be a matter for the Government to propose and for Parliament to agree. Giving evidence to the Committee, I stated that:

> "It is right that the ultimate authority should lie with Parliament, with the Government of the day framing the question [in] secondary legislation, but, of course, it is crucial that the Electoral Commission has the role that it does in deciding on the intelligibility of the question, which is fundamental to it being perceived as a fair process."

(http://www.publications.parliament.uk/pa/ld/lduncorr/uccnstl00210ev6.pdf)

The Government notes that that the Electoral Commission, in its briefing on amendments for Commons report stage of the CRaG Bill commented:

> "We have made clear previously that we are content with the approach currently set out in PPERA which would apply to other referendums held under that framework, whereby the Government proposes the referendum question and Parliament approves it, with the Electoral Commission's views on the intelligibility of the question being made available to Parliament for its consideration. We believe that the existing approach strikes the right balance between Government responsibility for proposing the question, Commission responsibility for providing an independent assessment of it, and overall Parliamentary accountability in approving the question."

(http://www.electoralcommission.org.uk/data/assets/pdf_file/0010/87139/Report-Commons-Briefing-01.03.2010.FINAL.pdf)

Parliamentary standards

The Committee also comments on the provisions which give effect to the report of the Committee on Standards in Public Life on MPs' expenses and allowances, and

wonders whether the changes being made to the Parliamentary Standards Act 2009 are an indicator that the legislative process for that Bill was flawed.

The Government rejects the Committee's suggestion that the legislative process of the Bill that became the Parliamentary Standards Act 2009 was flawed. There was a clear need to respond to the public's legitimate concerns about the abuses of the MPs' expenses scheme. Passing the Act last July has meant that the Independent Parliamentary Standards Authority (IPSA) is now established and will be in a position to have the new expenses regime in place for the start of the new Parliament. The Parliamentary Standards Act provided the firm foundations on which IPSA and the Government could quickly implement the recommendations of the Committee on Standards in Public Life.

The Kelly report noted that:

> "We applaud the creation of an independent regulator. We think it is very important that it should be in operation from the beginning of the next Parliament. Nothing in this report need or should be allowed to get in the way of that happening."

The response to the Kelly report shows us that there is now a clear consensus that the report's recommendation should be implemented and Part 4 of the Bill gives effect to those recommendations requiring urgent primary legislation.

Process issues

Chapter 4 of the Committee's report is entitled "Process Issues", although concerns are raised at a number of points through the report in a similar vein. I have grouped my responses together.

In paragraph 4, the report draws attention to the fact that the Bill grew during its passage through the Commons, with the addition of provisions on a referendum on the voting system, on parliamentary standards, on the tax status of MPs and Members of your Lordships' House, and public records and freedom of information. Your Lordships' concern seems to be that these amendments were made late in the legislative process.

In response, I would like to stress that most of these provisions are largely matters of cross-party agreement, a fact which is highlighted by the speed with which those on parliamentary standards, tax status and freedom of information passed through the Commons and the very small number of amendments which were tabled to them. Moreover, a number of these new parts responded either to independent reviews which the Government had already said it would implement or to matters of widespread public concern. In the circumstances I feel it is only right that the Government should take a timely opportunity to legislate on these matters.

The Committee also comments on the Government's handling of the Bill, notably at paragraphs 5, 39, and 40, suggesting that this has led to a lack of scrutiny of the Bill, and insufficient opportunity to consider amendments of constitutional significance.

In response, I must say that the Bill was before the Commons for 7 months. There was ample opportunity for Select Committees in that House to consider it if they wished to do so, in addition to the consideration that a number of Select Committees gave to the Draft Constitutional Renewal Bill and to individual policies before that point. It also had 6 days in Committee on the Floor of the Commons. Most of the Bill was fully discussed; indeed, on one day the business in Committee finished early. I accept that amendments to add completely new

material to the Bill were not always reached, but the Bill itself was given more than adequate scrutiny.

I also note your comments in paragraphs 26 and 37 that you were unable to raise a number of issues with the Government in correspondence due to the lack of time made available for scrutiny. I am somewhat surprised by this, since the Bill completed its Commons passage on 2 March. There will therefore have been 3 weeks, rather than the standard 2, between the end of Commons consideration and the Lords Second Reading.

Moreover, the provisions outlined in paragraphs 17 to 25 of your report—on the membership of the House of Lords, demonstrations in the vicinity of Parliament, convention rights, courts and tribunals, audit, and transparency of Government's financial reporting—have been part of the Bill since its initial introduction in the fourth session, on 20 July 2009, and have not been subject to significant amendments.

I regret that you feel you have not had time to sufficiently scrutinise these provisions—or those outlined in paragraphs 33 to 36 of your report, which were all the subject of cross-party support—but where you have raised particular points on these parts in this report, I have endeavoured to respond fully.

Finally, the Committee goes on to suggest, in paragraphs 45 to 47, that the Government's handling of the time available may lead the House to the conclusion that parliamentary consideration has been substantially curtailed on matters that remain contested, and that agreement on such matters in the wash-up before the general election would be "extraordinary".

I disagree with the assessment of the Committee that many of the provisions on which the Commons spent its time seem to be contested. This is a common misconception of a Bill which, while dealing with areas of interest to many members of both Houses, and therefore inviting much comment, is largely founded in broad consensus.

As the Committee has pointed out, this Bill has had six days in Committee on the floor of the House, has been the subject of 18 consultations and publications, draft Bills, and several Select Committee reports. In addition, many Members have contributed diligently and tirelessly to improving the Bill during its passage.

Since the beginning of its gestation more than two years ago, Parliament and politics have faced new challenges, and the Bill has grown to meet them. As I have said, we have tried to proceed on the basis of consensus as far as possible, and I believe that the third reading debate in the Commons was very encouraging. It is highly significant that third reading was agreed to, as was second reading before it, without a division.

This Bill has come a long way; I believe the differences between the major parties are relatively small, and I hope they can be overcome. I therefore reject the Committee's assertion that proceeding with the Bill during the wash-up would be inappropriate.

In order to assist Members in their continuing consideration of this Bill, I will make arrangements for copies of this letter to be placed in the library of your Lordships' House.