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Select Committee on the Constitution

2nd Report of Session 2012–13

Crime and Courts Bill [HL]

Report

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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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Crime and Courts Bill [HL]

1. The Constitution Committee is appointed "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.

2. This report draws to the attention of the House three aspects of the Crime and Courts Bill.

The National Crime Agency and counter-terrorism policing

3. Part 1 of the Bill establishes a major new non-ministerial department, the National Crime Agency (NCA), in place of the Serious Organised Crime Agency and the National Policing Improvement Agency. Intended "to lead the fight against serious and organised crime and strengthen border security",[1] the agency will have two principal functions. The first is the "crime-reduction function" of "securing that efficient and effective activities to combat organised crime and serious crime are carried out (whether by the NCA, other law enforcement agencies, or other persons)" (clause 1(4)). The agency will thus be an operational agency, directly engaged in the prevention, detection and investigation (but not prosecution) of criminal activity, as well as a networking body with duties of cooperation and coordination. Secondly, the NCA will have the "criminal intelligence function" of gathering, storing, processing, analysing and disseminating information relevant to activities to combat, in particular, organised crime and serious crime (clause 1(5)). The new agency will be headed by a Director General, appointed by the Secretary of State. It will initially be comprised of four commands ("Organised Crime", "Border Policing", "Economic Crime" and "Child Exploitation and Online Protection") and will also house the National Cyber Crime Unit.[2]

4. Clause 2 ("Modification of NCA functions") concerns the possible future extension of the agency's remit into counter-terrorism. Currently, the counter-terrorism command of the Metropolitan Police has the lead national role in counter-terrorism policing. Although not intending to conduct a whole-scale review of existing structures in the immediate future,[3] the Home Office would like to have the option of assigning or transferring relevant functions to the new agency.[4] Clause 2 would thus give the Secretary of State an enabling power to "make provision conferring, removing, or otherwise modifying" NCA counter-terrorism functions. In turn, provision could be made conferring or otherwise modifying the counter-terrorism functions "of any person".[5]

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1 Explanatory Notes, paragraph 10.

2 Home Office, *The National Crime Agency: A plan for the creation of a national crime-fighting capability*, Cm 8097, 2011.

3 *Ibid.*, para 4.2.

4 See also Home Affairs Committee, 14th Report (2010–12): *New Landscape of Policing* (HC 939), paras 86–90.

5 NCA counter-terrorism activities in Northern Ireland would require the agreement of the Chief Constable of the Police Service of Northern Ireland: clause 2(2).

5. The enabling power in clause 2 is an order-making power of the "Henry VIII" type, so empowering the minister to "amend or otherwise modify this Act or any other enactment". It is proposed that a clause 2 order be subject to a form of "super-affirmative" procedure[6] (clause 28 and Schedule 16).[7] The fact remains that the ordinary legislative processes of amendment and debate, and with it much of the substance of the role of the House of Lords as a revising chamber, would be circumvented. Clause 2 raises the fundamental constitutional issue of the proper relationship between parliamentary and executive lawmaking.

6. As shown by our report last session on the Public Bodies Bill,[8] the Committee is concerned about excessive demands for enabling powers in the name of "flexibility". Our approach to Henry VIII clauses is based on the constitutional principle that it is for Parliament to amend or repeal primary legislation. The use of powers allowing amendment or repeal of primary legislation by ministerial order is therefore to be avoided, except in narrowly-defined circumstances. A departure from the constitutional principle should be contemplated only where a full and clear explanation and justification is provided. For assessing a proposal in a bill that new Henry VIII powers be conferred, the Committee has adopted a two-fold test—

> "Whether Ministers should have the power to change the statute book for the specific purposes provided for in the Bill, and, if so, whether there are adequate procedural safeguards."[9]

7. We are not persuaded that clause 2 passes the first test.[10] **The subject-matter of the proposed order-making powers—the allocation of functions and attendant responsibilities and accountabilities of counter-terrorism policing—is of great importance and public interest. The House will wish to consider whether the constitutionally appropriate vehicle is primary legislation.**

The size of the UK Supreme Court

8. The Constitutional Reform Act 2005 reflected and reinforced the increasing importance of the principle of separation of powers in the UK constitution. In particular, Part 3 of the Act replaced the appellate jurisdiction of the House of Lords with the new UK Supreme Court. At the same time, the statute underwrote Parliament's chief role in determining the size of the Supreme Court, which clearly is a significant constitutional matter. Section 23 of the 2005 Act thus specifies that "the Court consists of 12 judges appointed by Her Majesty"; the number may be increased, but only through an Order in Council following approval of a draft by resolution in both

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6 This procedure requires Ministers to take into account any representations, any resolution of either House and any recommendations of a parliamentary committee, in respect of a draft order (a draft order being laid for a period of 60 days).

7 As for precedents, the Government chiefly rely on section 5 of the Public Bodies Act 2011 (modification and transfer of functions of bodies such as the British Waterways Board): Home Office and Ministry of Justice, *Crime and Courts Bill: Delegated Powers—Memorandum*, para 12. The super-affirmative procedure applies.

8 Constitution Committee, 6th Report (2010–12): *Public Bodies Bill [HL]* (HL Paper 51).

9 *Ibid.*, para 5. As originally drafted, key provisions of the Public Bodies Bill did not adopt the super-affirmative procedure.

10 The Delegated Powers and Regulatory Reform Committee have reported on clause 2: 2nd Report (2012–13): *Crime and Courts Bill [HL]* (HL Paper 12).

Houses. The 2005 Act makes no provision for a permanent decrease in the number of Supreme Court judges.

9. In dealing with "judicial appointments", clause 18 of and Schedule 12 to the current Bill are largely concerned with promoting the Government's aim of a more diverse judiciary (further comment on this is made below). In order to extend the principle of salaried part-time working to the Supreme Court, it is proposed to amend the maximum number of judges, so that it is specified in terms of full-time equivalents. In the words of paragraph 2(2)(b) of Schedule 12, "no appointment may cause the full-time equivalent number of judges of the Court at any time to be more than 12". The maximum of 12 full-time equivalents may be increased, but once again only with the approval of both Houses to an Order in Council.

10. These provisions are apt to obscure a shift in the constitutional balance proposed in paragraphs 2 and 3 of Schedule 12. This involves two legislative steps. First, for the "12 judges appointed" in section 23 of the 2005 Act (above), paragraph 2(2)(a) would substitute "the persons appointed as its judges". Secondly, paragraph 3(3) would require the Lord Chancellor to convene a selection commission if the full-time equivalent number of judges is or soon will be less than the maximum, but only if the Lord Chancellor or the President of the Court "considers it desirable that a recommendation be made for an appointment".[11] A letter to our chairman from the Lord Chancellor makes plain the Government's thinking—

> "Removing the requirement that there must always be twelve Justices of the UK Supreme Court … will give greater flexibility for the Court to operate below the mandatory current level of twelve Justices if this is agreed by the President of the Court."[12]

11. Parliament however would be side-lined. There is also a risk with the proposed approach of future consideration of the size of the Supreme Court being clouded by considerations relating to potential applicants. **In our view, if provision for a possible reduction in the size of the Supreme Court is to be made, Parliament should for constitutional reasons of transparency and check retain a role. We consider that the established mechanism of Order in Council following approval of a draft by resolution in both Houses should apply to any changes in the size of the Supreme Court.**

Judicial appointments

12. Schedule 12 to the Bill contains a number of other changes to the process by which members of the judiciary are appointed. These include proposals aimed at improving the diversity of the judiciary.

13. The Committee published a report on the judicial appointments process towards the end of the last session,[13] to which the Government responses

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[11] The qualification does not apply in respect of vacancies in the offices of President and Deputy President of the Court: Schedule 12, paragraph 3(2).

[12] Letter to the chairman from the Lord Chancellor, Rt Hon. Kenneth Clarke QC MP, 14 May 2012. See also the Explanatory Notes, paragraphs 276–77. It is not proposed to alter the principle that between them the Supreme Court judges have knowledge of, and experience of practice in, the law in each part of the UK (Constitutional Reform Act 2005, section 27(8)).

[13] 25th Report, session 2010–12, HL Paper 272.

were published in May 2012.[14] We are pleased that a number of our recommendations are reflected in the provisions of Schedule 12. However, we remain concerned about four matters: the role of the Lord Chancellor in relation to the appointment of the Lord Chief Justice and the President of the Supreme Court; the absence of an express diversity duty on the Lord Chancellor and the Lord Chief Justice; the absence of proposals to increase the retirement age for certain senior judges; and the absence of proposals about government lawyers becoming judges.

14. Following the introduction of the Bill, the Lord Chancellor, Rt Hon. Kenneth Clarke QC MP, and the Minister of State at the Ministry of Justice, Lord McNally, attended an informal meeting with the Committee to discuss the above four matters. We found this discussion helpful, and are grateful to the ministers for their constructive approach.[15] However, we believe that more progress is needed. In order to assist the House, we reiterate below the relevant recommendations contained in our report on judicial appointments.

The role of the Lord Chancellor

15. On the role of the Lord Chancellor in relation to judicial appointments in general we recommended that: "the Lord Chancellor should continue to have a limited role in the appointment of individual members of the judiciary: an increased role would risk politicising the process. However, we consider that the Lord Chancellor must retain responsibility and be accountable to Parliament for the overall appointments process."[16]

16. We also commented on the Lord Chancellor's involvement in the appointments process for the offices of Lord Chief Justice and President of the Supreme Court. Our report stated—

> "The Lord Chancellor should be properly consulted before an appointment is made to either of these positions, and there may be a need to strengthen the current consultation process. It is also important that he retain the right to reject a candidate whom he considers does not possess the necessary leadership and administrative skills. But the very fact of the close working relationship between the Lord Chancellor and these two senior judges creates an increased risk that the Lord Chancellor, if he were to sit on the selection panels, might exercise a political (with a small "p") rather than a wholly impartial judgment."[17]

We recommended that: "The Lord Chancellor should not sit on selection panels for the appointment of either the Lord Chief Justice or the President of the Supreme Court. He should be properly consulted before the start of each selection process and retain his right of veto. Any closer involvement risks politicising the process and would undermine the independence of the

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14 The Government's response to their public consultation on judicial appointments and diversity addressed a number of the Committee's recommendations: *Appointments and Diversity "A Judiciary for the 21st Century—Response to public consultation*, Ministry of Justice, 11 May 2012. Those recommendations not covered in that response were addressed in the Government's response to the Committee: Cm 8358, May 2012.

15 During the last session, the Committee adopted a similar approach when scrutinising the Health and Social Care Bill: see 22nd Report, session 2010–12, HL Paper 240.

16 25th Report, session 2010–12, HL Paper 272, para 26.

17 *Ibid.*, para 138.

judiciary."[18] We were concerned, therefore, to note that paragraphs 4 and 54 of Schedule 12 would allow the Lord Chancellor to sit as a member (though not the chair) of the selection panels for the offices of President of the Supreme Court and Lord Chief Justice (respectively). **The House may wish to consider whether it is appropriate for the Lord Chancellor to sit as a member of the selection panels for these offices.**

A duty to have regard to the need to encourage diversity

17. Under section 64 of the Constitutional Reform Act 2005, the Judicial Appointments Commission (JAC) must have regard to the need to encourage diversity in the range of persons available for selection for appointments. In our report on judicial appointments we noted that improvements in diversity will not come about without decisive and persistent leadership—

> "Leadership must come from both the Lord Chancellor who is responsible to Parliament for the appointments process and the Lord Chief Justice as head of the judiciary. Both individuals, along with the JAC, can make it clear to all those involved in the appointments process, whether as applicants or selectors, that improving diversity is taken seriously as an aim within government and the judiciary. The message that all those who meet the merit criterion are capable of becoming judges is one which should not be left to the JAC alone to make. Although a statutory duty is not necessary for this leadership to be given, it will help to ensure that all Lord Chancellors and Lord Chief Justices properly recognise and fulfil their roles in this regard."[19]

We went on to recommend that the duty contained in section 64 should be extended to the Lord Chancellor and the Lord Chief Justice.[20]

18. We were disappointed, therefore, that the Government have not used the Bill as an opportunity to extend the section 64 duty as we recommended. Whilst we do not doubt the commitment of the current Lord Chancellor and Lord Chief Justice to the encouragement of diversity, the creation of a statutory duty would help to ensure the recognition and fulfilment of this role by future holders of these offices. **We draw the attention of the House to the omission from the Bill of the proposal to extend the section 64 duty to the Lord Chancellor and Lord Chief Justice.**

Judicial retirement

19. At present judicial office holders first appointed to the judiciary after 31 March 1995 must retire at the age of 70. Our report on judicial appointments included the following recommendation—

> "We do not agree that there should be a uniform retirement age across the whole of the judiciary. There should be differential retirement ages: of 75 for Court of Appeal judges and Supreme Court Justices and 70 for all other judges. This will ensure the retention to age 75 of judges at the highest level, where proven judicial quality and experience are at a premium in the development of the law. This will also ensure that posts

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18 *Ibid.*, para 139.

19 *Ibid.*, para 110.

20 *Ibid.*, para 111.

> become available at the lower levels whilst leaving time for talented individuals who have not followed a traditional career path to reach the highest levels. Differential retirement ages will thus help to promote diversity and to maintain public confidence in the judiciary as being of the highest quality."[21]

20. The Government in their response to our report did not accept our recommendation, and stated their intention to retain the uniform judicial retirement age.[22] **We invite the House to consider the conclusion we reached in our report about judicial retirement ages, and believe it applies with particular potency with regard to judges of the Supreme Court.**

Government lawyers

21. Lawyers employed by the Government (both in the Government Legal Service and the Crown Prosecution Service) are, as a class, more diverse than many other branches of the legal profession.[23] On the ability of government lawyers to attain judicial appointment, we recommended that—

> "Those who work for the Government Legal Service and Crown Prosecution Service must not be prevented from becoming judges because of their status as government lawyers. The Government and the JAC must act to overcome any undue impediments to their appointment as both fee-paid and full-time judges. This is important both from the perspective of ensuring equal access to judicial appointment and because it would promote the diversity of the judiciary. Furthermore, it is in the public interest that high quality candidates are not discouraged from applying to join the GLS or CPS because of a potential lack of career progression to the judiciary."[24]

22. We draw attention to the importance of these principles, both in terms of improving the diversity of the judiciary and of ensuring that high calibre lawyers are not discouraged from entering Government service. **The House may wish to consider whether to address this issue during the passage of the Bill.**

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21 *Ibid.*, para 197.

22 *Op. cit.*, paras 33 to 36.

23 *Op. cit.*, para 126.

24 *Op. cit.*, para 132.