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Renewal Bill

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Draft Constitutional Renewal Bill

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Joint Committee on the Draft Constitutional Renewal Bill

The Joint Committee was appointed to consider and report on the Draft Constitutional Renewal Bill published by the Ministry of Justice on 25 March 2008 (Cm 7342-II). The Committee was appointed by the House of Commons on 30 April 2008 and the House of Lords on 6 May 2008.

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The Members of the Committee were:

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Lord Campbell of Alloway	Christopher Chope MP
Lord Fraser of Carmyllie	Michael Jabez Foster MP (Chairman)
Baroness Gibson of Market Rasen	Mark Lazarowicz MP
Lord Hart of Chilton	Martin Linton MP
Lord Maclennan of Rogart	Ian Lucas MP
Lord Morgan	Fiona Mactaggart MP
Lord Norton of Louth	Mr Virendra Sharma MP
Lord Plant of Highfield	Emily Thornberry MP
Lord Tyler	Mr Andrew Tyrie MP
Lord Williamson of Horton	Sir George Young MP

Full lists of Members' interests are recorded in the Commons Register of Members' Interests <http://www.publications.parliament.uk/pa/cm/cmregmem/memi02.htm> and the Lords Register of Interests <http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Abstract		7
Chapter 1: Introduction	1	9
The Joint Committee	1	9
Setting the context	2	9
The Draft Bill	3	9
Our approach to scrutiny of the Draft Bill	4	10
Timing	7	10
Evidence and other views received	8	11
Acknowledgements	9	11
Chapter 2: Protests	10	12
Background	10	12
Serious Organised Crime and Police Act 2005	12	12
The review of SOCPA	14	13
General considerations	18	14
Access	28	16
Noise	38	18
Non-SOCPA noise powers	41	19
Possible legal frameworks	45	19
Permanent protests	49	20
General considerations	50	21
Visual impact	55	21
Impact on other demonstrations	57	22
Security risk from permanent protests	59	22
The power to impose conditions on grounds of security risk	61	23
Imposing conditions on grounds of public safety	64	23
Prior authorisation	66	24
Enforcement	73	25
Chapter 3: Attorney General and Prosecutions	77	27
Background	77	27
The Government's proposals overall	80	28
The Attorney General's role as legal adviser and as a Government Minister	82	29
Disclosure of the Attorney General's legal advice	85	30
Parliamentary accountability and transparency	89	30
The Attorney General's attendance at Cabinet	89	30
The Attorney General as a Member of either House of Parliament	92	31
Parliamentary scrutiny of the work of the Attorney and the Attorney's office	97	32
Annual Report	97	32
Improved Parliamentary accountability mechanisms	100	33
The Attorney General's role in the formulation of criminal justice policy	102	33
The Attorney General's role in prosecutions	105	34

Removing the Attorney's power to direct prosecutions in individual cases	105	34
Exception to the ban in cases affecting national security	108	35
Transfer or abolition of most of the requirements for the Attorney's consent to individual prosecutions	115	37
Abolition of the power to halt a trial on indictment (by entering a plea of nolle prosequi)	119	38
The Attorney General's superintendence function	122	38
Retention of the Attorney General's superintendence function	122	38
The protocol	125	39
Qualifications and tenure of office of the Directors	128	40
Oath of office	131	41
Chapter 4: Courts and Tribunals	134	42
Background	134	42
The Role of the Executive	143	44
The Prime Minister	143	44
The Lord Chancellor	146	44
Accountability	154	46
Power to set targets or issue directions	155	46
A new role for Parliament?	160	47
Key Principles	166	48
Judicial Appointments Commission Panel	169	49
Non-Statutory Eligibility Criteria	172	49
Improving the process: reducing bureaucracy and delay	176	50
Medical checks	177	50
Vacancy Notices and Forecasting	179	51
Exclusion of appointments from the Schedule 14 list	181	51
Deployments, authorisations and nominations	185	52
Size, composition and re-appointment of the JAC	188	53
Disclosure of information	191	53
Diversity	193	54
Statutory salary protection	198	55
Other changes	200	55
Conclusion	201	55
Chapter 5: Ratification of Treaties	202	56
Background	202	56
Putting the Ponsonby Rule on a statutory footing	205	57
The detail of the resolution	209	58
The 21 day sitting period for laying treaties before Parliament	209	58
Parliamentary control: the effect of negative votes in the Commons and Lords	213	59
Government's ability to re-present a treaty	218	60
Exceptions and exceptional circumstances	221	61
Alternative procedures in exceptional circumstances	221	61
Statutory exceptions to the Ponsonby Rule	227	62
Definitions	229	63
Parliamentary scrutiny	233	64
Chapter 6: The Civil Service	239	67
Background	239	67

Table 1: Chronology of relevant reports and events		67
Definitions (clauses 25 and 41)	241	68
General approach to defining the civil service	242	68
Exclusion of GCHQ	245	69
The Civil Service Commission (clause 26 and Schedule 4)	250	70
Financial and operational independence of the Commission	251	70
Appointment of the First Commissioner and other Commissioners	255	71
Functions of the Civil Service Commission (clauses 32, 37 and 40)	259	72
Ministerial power to manage the civil service (clause 27)	264	73
Other obligations on the Minister	268	74
The Ministerial Code	270	75
Transfer of prerogative power	271	75
Civil service codes (clauses 30 to 32)	272	75
Parliamentary scrutiny of the codes	272	75
Minimum provision of the codes	275	76
Wider accountability of the civil service to Parliament	279	77
Exceptions from appointment on merit (clause 34)	282	78
Appointments made directly by Her Majesty	283	78
Diplomatic appointments	284	78
Appointments excepted under the recruitment principles	287	79
Special advisers	289	79
A cap on the number of special advisers?	290	80
Special advisers financed by an extension of “Short money”?	291	80
Defining the functions of special advisers	293	80
Special advisers speaking in public on behalf of Ministers	297	82
Parliamentary approval of the Code of Conduct for Special Advisers	300	82
Parliamentary scrutiny of machinery of government changes	301	82
Business appointment rules for former civil servants	304	83
Chapter 7: War Powers	306	85
Background	306	85
The Government’s proposals	308	85
A resolution, legislation or the status quo?	310	86
The status quo	310	86
A Resolution	311	87
A statutory solution	313	87
The issue of legal risk	314	88
Definition of “a conflict decision”	319	89
Areas of executive discretion	322	89
Introduction	322	89
Discretionary powers: general arguments	323	90
The provision of information to Parliament	325	91
The Attorney General’s legal advice	327	91
Timing of a Parliamentary vote	328	91
Exceptional circumstances and the case for retrospective approval	329	92
Exceptions to the requirement for approval: special forces	333	93
Parliamentary oversight	336	93

Recall of Parliament	336	93
A re-approval process?	339	94
Role of the House of Lords	342	95
How should Parliament undertake scrutiny?	345	96
Chapter 8: Constitutional Renewal?	348	97
Introduction	348	97
Governance of Britain—objectives	349	97
Reform of prerogative powers	350	97
Justiciability	355	98
Parliamentary scrutiny of the executive	358	99
Clause 43	361	100
Genuine reform?	364	100
Civil service	365	101
War powers and treaties	366	101
Courts and tribunals	367	101
Constitutional renewal: rhetoric versus delivery	368	101
The Draft Bill	370	102
A coherent Draft Bill?	372	102
Long title	382	104
Short title: constitutional renewal?	386	105
Chapter 9: Summary of Recommendations	390	106
Chapter 1: Introduction	390	106
Chapter 2: Protests	391	106
Chapter 3: Attorney General and prosecutions	404	108
Chapter 4: Courts and tribunals	418	110
Chapter 5: Ratification of treaties	438	112
Chapter 6: The civil service	446	113
Chapter 7: War powers	470	116
Chapter 8: Constitutional renewal?	479	117
Appendix 1: Joint Committee on the Draft Constitutional Renewal Bill		119
Appendix 2: List of Witnesses		121
Appendix 3: Call for Evidence		124
Appendix 4: Map of Parliamentary Estate		129
Appendix 5: Formal Minutes		130

NOTE: References in the text of the report are as follows:

(Q) refers to a question in oral evidence

(Ev) refers to an evidence submission

The Report of the Committee is published in Volume I, HC 551-I, HL 166-I.

The Evidence of the Committee is published in Volume II, HC 551-II, HL 166-II (published 12 August 2008).

ABSTRACT

The Government's *Governance of Britain* Green Paper was launched in July 2007 with an aim to "begin the journey towards a new constitutional settlement—a settlement that entrusts Parliament and the people with more power". The Government would "seek to surrender or limit" those powers which it considered "should not, in a modern democracy, be exercised exclusively by the executive". Building on the Green Paper, the Draft Constitutional Renewal Bill and White Paper, published on 25 March 2008, set out proposals "to reform various aspects of our constitutional settlement". The Joint Committee was set up on 6 May to undertake pre-legislative scrutiny of the Draft Bill, and our report follows reports from the House of Commons Public Administration and Justice Select Committees on aspects of the Draft Bill.

We recognise that the Draft Bill is a first step in a wider programme of reforms to the constitution recommended in the Green Paper and we commend the Government for taking these first steps towards its stated objective of making Government more accountable to Parliament. However, we have found it difficult to discern the principles underpinning the Draft Bill and we ask the Government to reflect further on whether "Constitutional Renewal" is an appropriate title. It is clear to us that further work is required before the Bill will be ready for introduction in the next session of Parliament. Our inquiry covered six policy areas in the Draft Bill and White Paper:

Protests around Parliament: We endorse the Government's general presumption that protest must not be subject to unnecessary restrictions, particularly given the significance of Parliament Square as a place to express political views. At the same time, the right to protest must be balanced against ensuring that the police and other authorities have adequate powers to safeguard the proper functioning of Parliament and to protect the enduring amenity value of Parliament Square as a cultural site of international significance. We support the proposal to repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCPA), and in particular, the removal of the legal requirement to obtain prior authorisation to protest in vicinity of Parliament. Before these sections are repealed, further work needs to be done to create a framework to ensure the police have adequate powers.

The Attorney General and prosecutions: On balance, we are not persuaded of the case put forward by the Justice Committee and others to separate the Attorney General's legal and political functions and we support the Government's proposals that the Attorney should retain these two roles. Unlike the Government, however, we believe that the Attorney should retain the "nuclear option" to give a direction in relation to any individual case, including cases relating to national security. Given our conclusions in Chapter 3, we question whether there is a need for legislation in respect of the Attorney.

Courts and tribunals: We conclude that it is far too soon to propose significant reforms only two years after the Constitutional Reform Act 2005 introduced a carefully calibrated balance between the roles of the Executive, judiciary and the newly-created Judicial Appointments Commission (JAC). Although we acknowledge the short period of time in which the JAC has been operating, we are disappointed with the lack of measurable progress towards increasing diversity at all levels of the judiciary; and the JAC and others need to continue exploring the best ways of addressing this important issue.

Treaties: We agree that putting the Ponsonby Rule on a statutory footing, together with giving the House of Commons an effective veto on the ratification of a treaty, is a positive and beneficial reform. We recommend a new Joint Committee on Treaties which would sift treaties presented to Parliament; support existing select committees in the scrutiny of treaties; enhance the scrutiny of treaty-like documents not covered by the proposed legislation; and have a role in extending the 21 sitting days allowed for scrutiny where exceptional circumstances make this necessary.

Civil service: We welcome the Government's intention to put the civil service and the Civil Service Commission on a statutory footing and set out the historic principle of appointment on merit on the basis of fair and open competition, 154 years after Northcote and Trevelyan called for a Civil Service Act. Ideally, we would like to see this as a separate Civil Service Act rather than part of wider constitutional legislation.

War powers: We agree with the Government's case for strengthening Parliamentary involvement in armed conflict decisions, and that a detailed resolution approach is a well balanced and effective way of proceeding. But we are concerned about the definition of "conflict decision" in the White Paper and we recommend that the Government take steps to ensure that ongoing deployments are subject to effective Parliamentary scrutiny.

Overall: We encourage the Government to use this opportunity to make progress beyond these first steps. It would be regrettable if the passing of this Bill prevented further progress in other fundamental areas of reform. Many of the ideas set out in the Green Paper have not yet been brought forward into the Draft Bill and we recommend that the Government think again about the long title to enable Parliament to consider wider issues of constitutional reform during the passage of the Bill.

Draft Constitutional Renewal Bill

CHAPTER 1: INTRODUCTION

The Joint Committee

1. The Draft Constitutional Renewal Bill was published by the Ministry of Justice and laid before Parliament on 25 March 2008. The Joint Committee on the Draft Bill was appointed by a motion of the House of Commons on 30 April and a motion of the House of Lords on 6 May with terms of reference to “consider and report on” the Draft Bill by 18 July 2008. We sought, and were granted, an extension of this reporting deadline to 22 July.¹

Setting the context

2. The Governance of Britain agenda was launched in July 2007 with the publication of the Green Paper setting out the Government’s aim to “forge a new relationship between government and citizen, and begin the journey towards a new constitutional settlement—a settlement that entrusts Parliament and the people with more power”.² The Green Paper set out proposals in four broad areas: limiting the powers of the executive; making the executive more accountable; re-invigorating our democracy; and Britain’s future: the citizen and the state. There followed a number of consultation papers on individual policy areas, some still ongoing. Parliament has also been active in this area for some years, particularly the Commons Public Administration Select Committee’s (PASC) work on a civil service bill and prerogative powers.

The Draft Bill

3. Building on Green Paper consultation responses, the Draft Bill and White Paper set out legislative proposals “to reform various aspects of our constitutional settlement.”³ They cover those areas of the Green Paper which the Government said it would “seek to surrender or limit powers which [the Government] considers should not, in a modern democracy, be exercised exclusively by the executive”. The Draft Bill covers five areas:

- Demonstrations in the vicinity of Parliament
- The Attorney General and prosecutions
- Courts and tribunals
- Ratification of treaties
- The civil service.

Additionally, the White Paper deals with war powers, flying the Union flag and other issues.

¹ Votes and Proceedings of the House of Commons, Wednesday 30 April 2008 and Wednesday 4 June 2008, House of Lords Minutes of Proceedings, Tuesday 6 May 2008 and Monday 2 June 2008.

² *The Governance of Britain*, July 2007, Cm 7170, foreword

³ *The Governance of Britain—Constitutional Renewal*, March 2008, Cm 7342-I and II, executive summary

Our approach to scrutiny of the Draft Bill

4. As noted above, our brief was to “consider and report on” the Draft Bill. Additionally, the White Paper sought our views on a number of issues related to the provisions in the Draft Bill, and raised a number of issues, most significantly the power of the executive to deploy armed forces into conflict. Given the limited amount of time available to us, we agreed at our first meeting on 6 May to limit our inquiry to the five policy areas in the Draft Bill and the issue of war powers. However, in our Call for Evidence, we also asked for views about how the Draft Bill fits into the wider context of constitutional reform.
5. Two other Parliamentary committees have undertaken scrutiny and published reports on aspects of the Draft Bill. The Commons Public Administration Select Committee (PASC) published its report on 22 May⁴ covering the civil service provisions, war powers and treaties, as well as the wider review of the prerogative. The Commons Justice Committee published its report⁵ on the Attorney General provisions on 24 June. We are grateful to both committees for the effort they took to complete their scrutiny exercises in order that we could draw on their conclusions and recommendations in considering our report.
6. Chapters 2 to 7 of this report examine in detail each of the six policy areas of our inquiry. We note where we agree with the Government’s approach, and in other areas we offer recommendations on how the Draft Bill should be amended or strengthened. In Chapter 8 we give our views on the Draft Bill as a whole and the wider arena of constitutional change. Chapters 2 to 7 should therefore be read in the context of our conclusions in Chapter 8.

Timing

7. We welcome the decision to present this Draft Bill for pre-legislative scrutiny. This is the right thing to do for a bill of this nature. The Cabinet Office’s *Guide to Legislative Procedures* accepts that “a committee will normally require at least 3–4 months to carry out its work” (para 18.1). We were, however, given just 10 sitting weeks to conduct our inquiry. The House of Lords Constitution Committee were “disappointed” with the amount of time allowed for pre-legislative scrutiny. (Ev71, para 4) Despite the limited time available, we have approached our task vigorously and have done our best to consider the evidence before us. **Pre-legislative scrutiny is not intended to be merely a general examination of policy proposals, but should examine the detail of the Draft Bill, its merits, and whether it will work as intended. While we acknowledge the Government has undertaken extensive consultation on its proposals, this is no substitute for allowing sufficient time for Parliamentary scrutiny. It is in the interests of both the Executive and Parliament that the approach to constitutional reform is right. There is a risk that such a constricted timetable may not have allowed us, or for that matter the Government, to realise the full potential of the pre-legislative scrutiny process.**

⁴ *Constitutional Renewal: Draft Bill and White Paper*, Tenth Report 2007–08, HC 499

⁵ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, Fourth Report 2007–08, HC 698

Evidence and other views received

8. We have sought a wide range of evidence to inform our report. We heard oral evidence from 56 witnesses, and received 80 submissions of written evidence. As well as the reports mentioned in paragraph 5 above, we have benefited from input from the House of Lords Constitution and Delegated Powers and Regulatory Reform Committees, the Commons Foreign Affairs Committee, and the Joint Committee on Human Rights. We are grateful to all those who have assisted us in our inquiry.

Acknowledgements

9. We would like to record our thanks to our Specialist Adviser, Professor Rodney Brazier, Professor of Constitutional Law at the University of Manchester, for his valuable input. We should also like to thank our Clerks and all the other staff of the two Houses for the unstinting and admirable support they have given us in enabling us to complete our inquiry and report in the limited time available to us.

CHAPTER 2: PROTESTS

Background

10. Parliament Square has a special significance as a place to express political views near the seat of our democratic system, as well as its UNESCO World Heritage setting. The task of balancing public protest against maintaining the proper functioning of Parliament has historically been addressed by Sessional Orders in the House of Commons, with equivalent Stoppages Orders in the House of Lords. They instruct the Metropolitan Police Commissioner to make sure that passageways to and from Parliament are kept free from obstruction and disorder on all sitting days. Although the Orders do not give the police additional powers, there has been a statutory framework aimed at regulating protests as far back as the Tumultuous Petitioning Act 1661. In more recent times, the Public Order Act 1986 has set out the main provisions regulating marches and assemblies across Great Britain.
11. In 2003, the House of Commons Procedure Committee carried out an inquiry into the adequacy of Sessional Orders and the police powers available to manage protests around Parliament. The Committee took into account the permanent protest of Mr Brian Haw directly opposite Parliament since 2001. It also heard evidence from the Metropolitan Police Commissioner, the Parliamentary Authorities and Members of Parliament. The Committee recommended the discontinuance of Sessional Orders and the introduction of new legislation to prohibit long-term demonstrations and to ensure access. It also recommended controlling disruption from loudspeakers either through existing regulation or, failing that, through the introduction of new legislative powers.⁶ Following a consultation on police powers the Government concluded: “existing legislation has not provided the police with all the powers they need to control protests and demonstrations”, including in relation to the security threat to Parliament.⁷

Serious Organised Crime and Police Act 2005

12. The Government’s conclusion led to the introduction of sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCPA). The provisions require the organisers of any demonstration to obtain prior authorisation from the Metropolitan Police Commissioner, who can impose a range of conditions where necessary to meet objectives such as maintaining access and preventing a security risk. A protestor who knowingly fails either to obtain authorisation or to comply with a condition is guilty of a criminal offence. The Act also makes it a criminal offence to use a loudspeaker within the designated area, subject (in broad terms) to permission being granted by Westminster City Council. The House of Commons no longer passes Sessional Orders, following the introduction of these provisions, although the House of Lords has continued to pass its equivalent Stoppages Orders.
13. The SOCPA provisions have been strongly opposed for failing to achieve an appropriate balance between the right to protest and the proper functioning of Parliament. For instance, a series of mass lone demonstrations highlighted

⁶ Procedure Committee, 3rd Report (2002–03), *Sessional Orders and Resolutions* (HC 855)

⁷ HC Deb, 7 February 2005, Col 1287 (Caroline Flint MP, Parliamentary Under-Secretary of State, Home Office)

concerns about the law applying to lone protestors, together with the restriction on spontaneous protest resulting from the prior authorisation requirement. The need for prior authorisation has also led to widely publicised incidents such as the arrest of Miss Maya Evans and Mr Milan Rai outside Downing Street for reading out the names of civilians killed in Iraq. The level of police discretion in the interpretation of what constitutes a “demonstration” has also provoked concern. However Liberty’s Legal Director, Mr James Welch, has stated that the single greatest “chilling effect” resulted from the introduction of a “criminal sanction as a penalty for getting it wrong” within a framework that was neither “understood” nor viewed as “justified”.⁸ Nor has SOCPA succeeded in its objective of banning long-term demonstrations. Baroness Miller of Chilthorne Domer introduced a Lords private member’s bill in the 2006–07 session of Parliament to repeal the SOCPA provisions.

The review of SOCPA

14. In July 2007, *The Governance of Britain* Green Paper set out the Government’s intention to review the current law “with a view to ensuring that people’s right to protest is not subject to unnecessary restrictions”.⁹ The Government’s subsequent consultation, *Managing Protest around Parliament*, produced 512 responses, of which a significant majority called for the SOCPA provisions to be repealed without any replacement provisions being introduced.
15. Clause 1 of the Draft Bill repeals sections 132 to 138 of SOCPA, with the effect that static demonstrations around Parliament will return to being governed by the Public Order Act 1986. The White Paper invites Parliament to consider whether additional provisions might be needed to ensure free and open access or to prevent, for example, excessive noise disrupting the workings of Parliament. This is subject to the presumption expressed by the Home Office Minister, Tony McNulty MP, that “there should be as free and unfettered right to protest and demonstrate in the Square as possible.” (Q 502) The Metropolitan Police Service has also led calls for Parliament to articulate clearly the level of access that is required and the types of behaviour that are unacceptable in order to establish a framework that creates certainty for protestors, the police and Parliamentarians alike.¹⁰
16. The evidence that we have received consistently supported the repeal of the SOCPA provisions. For instance, Baroness Mallalieu QC, President of the Countryside Alliance, described them as “too restrictive” while also being “ill-defined and hard to implement on a practical level”. (Ev13) JUSTICE stated that they had “proved contentious, disproportionate and all too susceptible to ridicule”. (Ev45 para 3) Mr McNulty maintained that many of the criticisms were based on a misunderstanding of SOCPA, but he concluded that “time has moved on and it is both right and appropriate that

⁸ Joint Committee on Human Rights, *Policing and Protest*, HC 826-i, 24 June 2008 uncorrected transcript of evidence, Q 35, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/uc826-i/uc82601.htm>

⁹ Paragraph 166

¹⁰ Metropolitan Police Service Response to Government Consultation on Managing Protest around Parliament, available at http://www.met.police.uk/foi/pdfs/other_information/corporate/mps_response_on_managing_protest_around_parliament.pdf

we reflect on both the legislation and other circumstances, including the security provision now around [Parliament]”. (Q 489)

17. The evidence to us has been much less consistent in relation to whether replacement provisions of any kind are necessary. The Metropolitan Police Service has called for a number of the key components of SOCPA to be carried forward into new legislation, failing which it argued that the police would be unable to manage protests effectively.¹¹ Others such as Liberty and Bindmans solicitors, who have previously represented Brian Haw, stated that existing non-SOCPA legislation gives the police and other authorities all the powers that are necessary. (QQ 225, 235, 250, 254)

General considerations

18. Mr Andrew Dismore MP, Chairman of the Joint Committee on Human Rights, highlighted the importance of taking into account fundamental human rights, particularly the freedom of peaceful assembly under Article 11 of the European Convention on Human Rights. He referred us to a recent judgment of the European Court of Human Rights, stating that: “[i]n 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.”¹² As Mr Dismore explains, “this is a high threshold and does not permit restrictions which are merely convenient or helpful”. (Ev78)
19. Democratic Audit has warned that any special provisions applying to the area around Parliament would send a message that “the convenience of Parliament [takes] priority over basic human rights of speech and protest.” (Ev04, para 69) In contrast, other witnesses such as Mark Ryan, a constitutional law lecturer, highlighted the special constitutional significance of Parliament as sufficient reason to introduce special measures where necessary. (Ev36, para 6) The Clerk of the House of Commons also made us aware of other jurisdictions where legislation had been introduced to protect the functioning of their Parliaments, including Canada, Australia and Germany. (Q 455, Ev2A, para 1)
20. Responsibility for managing the area around Parliament Square is divided. The Metropolitan Police Service has the broadest role, with overall responsibility for the policing of protests and the security of Parliament. The central part of the square is formally Crown property, but is managed by the Greater London Authority (GLA) under a byelaw that prohibits unauthorised protest, camping and the use of loudspeakers.¹³ Westminster City Council (WCC) has the role of authorising the use of loudspeakers under the current arrangements. It is also responsible for the pavement to the south and east of the central part of the square, which is where the current permanent protest is taking place.
21. Plans have been announced to redevelop Parliament Square as part of the World Squares For All initiative which would impose new traffic

¹¹ Metropolitan Police Service Response to Government Consultation on Managing Protest around Parliament, available at http://www.met.police.uk/foi/pdfs/other_information/corporate/mps_response_on_managing_protest_around_parliament.pdf

¹² *Makhmadov v Russia* App. No. 35082/04, 26 July 2004, para 64.

¹³ Trafalgar Square and Parliament Square Garden (Amendment No 1) Byelaws 2002

management measures to pedestrianise the Square. However, there have been recent reports that these plans are being reviewed.¹⁴ The GLA stated that the plans must be taken into account as part of the review of SOCPA, particularly given the estimated 34 million pedestrians per year who would visit the Square were the new traffic management measures in place. (Ev14, para 10) The GLA also raised the possibility of the byelaw being reviewed as part of the redevelopment exercise. (Ev14, para 15; Ev14a, para 6) The Campaign Against Criminalising Communities, amongst others, drew a link between the scope of the byelaw and the meaningful review of SOCPA: “If the police can rely on the local authority to impose the same type of restrictions, the repeal of SOCPA powers ... will have little effect”. (Ev37)

22. Finally, during our inquiry we also took into account the enduring amenity value of Parliament Square as a cultural and tourist attraction of international significance. We agree with the GLA that Parliament Square “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”. (Ev14, para 1)
23. **The restrictions on protest around Parliament that were introduced by sections 132 to 138 of the Serious Organised Crime and Police Act 2005 have met widespread opposition. We agree that these provisions should be repealed. The Government has sought the views of Parliament about whether replacement provisions of any kind are necessary.**
24. **We strongly endorse the general presumption that protest must not be subject to unnecessary restrictions, particularly given the significance of Parliament Square as a place to express political views. At the same time, the right to protest must be balanced against ensuring that the police and other authorities have adequate powers to safeguard the proper functioning of Parliament and to protect the enduring amenity value of Parliament Square as a cultural site of international significance.**
25. **We acknowledge the need for Parliament to be clear about the level of access that is required, as well as the extent to which other considerations must be taken into account, including disruption from noise, and security.**
26. **If the redevelopment of Parliament Square proceeds, it could result in a major increase in the use of the site by the public and a possible extension of the Greater London Authority’s byelaw that governs its use. We support improved pedestrian access to Parliament Square. However, we are concerned that the Government is viewing the potential redevelopment and the possible extension of the byelaw as an issue for the future rather than as a part of the current review. This is problematic since they both affect the right to protest in Parliament Square and they should be looked at together.**
27. The following sections of this Chapter consider what, if any, additional provisions are viewed as necessary upon the repeal of sections 132 to 138 of SOCPA.

¹⁴ Evening Standard, 11 July 2008; see also HL Deb, 14 July 2008, Cols 1049–1059

Access

28. Section 134 of SOCPA gives the police a power to impose conditions on demonstrators in order to prevent “hindrance to any person wishing to enter or leave the Palace of Westminster”. If this provision is repealed the police will continue to have a number of powers, including:
- to arrest individuals who wilfully obstruct the highway;¹⁵
 - to impose conditions on the place or duration of an assembly that risks causing a serious disruption to the life of the community;¹⁶ and
 - to issue directions to protestors either to disperse or to stop causing an obstruction.¹⁷
29. Liberty and Bindmans, amongst others, maintained that these powers were adequate to ensure access, with particular emphasis being placed on the offence of obstruction. (QQ 225, 231, 236, 238, 239) Baroness Mallalieu highlighted the range of entrances to Parliament that could be used during the “very rare occasions” on which access was disrupted, while Milan Rai added that in practical terms there was no type of power that could address situations where “a section of a demonstration has formed the state of mind to create an incident”. (Ev13, Q 243)
30. However, the Metropolitan Police Service stated that its powers were “very limited”, based on its view that conditions could only be imposed in “extreme circumstances” and a general concern that the power to issue directions, drawn from an Act of 1839, was potentially open to challenge as being incompatible with human rights legislation. (Ev61, QQ 334, 339) The offence of wilful obstruction was also considered to be ineffective:
- “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 ... 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.” (Ev61)
31. The Clerk of the House of Commons favoured the introduction of new powers to ensure “pavements and roadways adjacent to Carriage Gates, St. Stephen’s Entrance, Peers Entrance and Black Rod’s Garden Entrance” were kept clear of demonstrators. (Ev02, para 18) The Serjeant at Arms and Black Rod proposed an outright ban on protest along the strip of pavement and roadway running along the front of the Houses of Parliament and Portcullis House, as identified in Appendix 4. (Q 475) This followed a cautionary warning from Deputy Assistant Commissioner Chris Allison that “If Parliament does not decide that, the reality is there will be occasions when there will be protests there because there will not be reasons for me or my colleagues to be able to say no to that particular protest”. (Q 309)

¹⁵ Highways Act 1980, section 137.

¹⁶ Public Order Act 1986, section 14.

¹⁷ Metropolitan Police Act 1839, section 52.

32. The proposal was opposed by Tony McNulty as being inconsistent with the general presumption in favour of free protest around Parliament. (Q 496) He stated that access could be ensured by “a simple power for police to impose conditions on demonstrations to prevent obstruction”.(Ev79) Professor David Feldman, Rouse Ball Professor of English Law at Cambridge University, was also cautious about a blanket ban, but considered that it might be compatible with human rights legislation provided the entrances were carefully selected to address real problems with access and that there were sufficient remaining areas in which to protest. (Ev66, paras 12–16) Dr Eric Metcalfe, Director of Human Rights Policy at JUSTICE, favoured the police being given a power “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” with at least “one viable route” of access at all times.¹⁸
33. A majority of witnesses accepted that Sessional Orders and Stoppages Orders should be abandoned as a way of ensuring access and regulating protests. While a minority considered that it might be possible to update the language of the Sessional Orders, the Clerk of the House of Commons told us that, if the police had adequate powers, the Orders were “otiose”, but if the police did not, they were “misleading”. (Ev2a, para 7) Professor Feldman doubted whether the Orders provide a “sufficiently solid legal basis” to regulate protests in a way that was compatible with the European Convention on Human Rights. (Ev66, para 4) The Home Office also argued that they had “no effect beyond the walls of Parliament”. (Ev57, para 12)
34. There was also opposition to days when Parliament was sitting being treated in a different way to non-sitting days, given the continuous use of Parliament and the need to create a consistent framework that was clear for all concerned. For instance, Mr McNulty stated: “there are [individuals] who will want to access the House during periods of recess, either to visit, or in many cases to carry on with their work”. (Q 498)
35. **As a general rule there should be unrestricted access to the Houses of Parliament for Members, staff and the public, but there must also be a willingness to accept some disruption during large scale protests. As a minimum, there should be one point of entry at each end of the Houses of Parliament open to both pedestrians and vehicles, particularly to enable disabled users to gain access. Our provisional view is that Black Rod’s Garden entrance and the main entrance to Portcullis House are best suited to accommodate pedestrian access, while Carriage Gates and Peers Entrance are the most appropriate for vehicles.**
36. **In light of the conflicting evidence that we have received during our inquiry, we are concerned that the police may not have adequate powers upon the repeal of SOCPA to maintain the level of access that we call for above. We urge the Home Office to work with the police and other interested parties to resolve this issue. However, we are not persuaded that it requires an outright ban on protest along the strip of pavement and roadway outside all the main entrances of Parliament.**

¹⁸ Transcript of evidence heard by the Joint Committee on Human Rights, Policing and Protest, HC 826-i, 24 June 2008, available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>

37. **The legal framework regulating access should apply to sitting days and non-sitting days equally, given the continuous use of Parliament and the need to create certainty for all concerned. At the same time we recognise that protests are less likely to cause disruption to the proper functioning of Parliament at weekends or during recesses, and this should be taken into account in the practical application of any resulting legislation. The Sessional Orders do nothing to enhance police powers and we recommend that the House of Lords Stoppages Orders should be discontinued and that the House of Commons Sessional Orders should not be reintroduced.**

Noise

38. Section 137 of SOCPA prohibits demonstrators from using loudspeakers, subject to prior authorisation from Westminster City Council. Section 134 gives the police an additional power to impose conditions on the maximum level of noise to prevent “hindrance to the proper operation of Parliament”. If these provisions are repealed there will be no prohibition on the use of loudspeakers, other than the general restriction that applies nationally between the hours of 9pm and 8am under the Control of Pollution Act 1974. Nor does the general framework that, in most circumstances, would be used to address “statutory nuisances”, apply in relation to noise from political demonstrations.¹⁹
39. The majority of responses to the Government’s consultation, *Managing Protest around Parliament*, stated that the current limits on loudspeaker use were too restrictive and undermined the ability of protestors to co-ordinate themselves.²⁰ Baroness Mallalieu also highlighted the value of being able to use loudspeakers as part of orderly demonstrations, while Professor Feldman stated that their use is part of the right to free speech. (Q 246, Ev66, para 23)
40. In contrast, strong concerns have been expressed within Parliament about the level of disruption caused by loudspeakers, particularly for Members of Parliament and staff with offices facing onto Parliament Square. For instance, the Serjeant at Arms told us that there were “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”. (Q 462) In addition, Dr Julian Lewis MP submitted a response to the Government’s consultation attaching complaints from 52 other Members of Parliament and staff:

“it cannot be justifiable for [rights] of democratically-elected Parliamentarians and their staff to be overridden by the determination of groups who disagree with them, no matter how passionately, to promote their cause by creating incessant din and disturbance”.²¹

¹⁹ Environmental Protection Act 1990, s.79

²⁰ The Governance of Britain, Analysis of Consultation Responses, Cm 7342-III, at paragraph 39; see also comments made by Baroness Mallalieu, Ev13.

²¹ Not printed (but available in the House of Lords Record Office)

Non-SOCPA noise powers

41. We have been made aware of a variety of legal provisions that might apply in the event that the noise control powers under SOCPA are repealed:
- the power to impose conditions on the place or duration of an assembly that risks causing a serious disruption to the life of the community;²²
 - the offence of causing “harassment, alarm or distress” together with other similar offences under trade union legislation;²³ and
 - the power to issue directions to protestors who are using “noisy instruments”.²⁴
42. Liberty, Bindmans and the Countryside Alliance stated that these powers were adequate, particularly given their view that police should only have the power to intervene where the level of disruption was “serious” or otherwise constituted “harassment”. (Ev13, QQ 250, 251, 254)
43. Other witnesses were not persuaded that the non-SOCPA provisions were adequate. Professor Feldman stated that the power to impose conditions under the Public Order Act 1986 would not provide “a reliable or comprehensive” means of controlling noise. (Ev66, paras 16–20) The Home Office told us that where there was an assembly with a minority of individuals causing noise, “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”. (Ev57, para 54) We are also aware that conditions cannot be imposed to regulate loudspeakers used by a collection of individuals protesting separately, since the power is limited to assemblies of two or more people. (Q 278) In addition the police and, to a lesser extent, the Home Office have highlighted the legal and practical challenges of relying upon harassment provisions. (Q 353; Ev57, paras 29–31) The police also expressed concern that the power in the Metropolitan Police Act 1839 to issue directions was open to challenge on human rights grounds. (QQ 334, 339)
44. Mr McNulty described the non-SOCPA powers as “not terribly strong” but sufficient, given his view that noise was an “irritant but no more than that”. (QQ 502, 504) He explained that the University of Oxford has taken out injunctions relating to the use of loudspeakers and that they have “worked well”. (Ev79, Ev80) He also acknowledged the depth of concern about disruption from noise and expressed his commitment to work with the Parliamentary Authorities in relation to this issue. (QQ 493, 496, 504)

Possible legal frameworks

45. We heard a number of suggestions for a new legal framework to control noise around Parliament. Westminster City Council supported an outright ban on loudspeaker use, although Professor Feldman stated that this would “face problems in relation to the proportionality of a necessity for the interference with freedom of expression”. (Ev66, para 23) As an alternative, Westminster City Council and others have suggested that the police be given a power to

²² Public Order Act 1986, section 14.

²³ Public Order Act 1986, section 5; Trade Union and Labour Relations (Consolidation) Act 1992.

²⁴ Metropolitan Police Act 1839, section 54.

limit maximum noise levels, accompanied by a power to confiscate sound equipment. Professor Feldman told us that an upper noise limit would present “no serious difficulty” from a human rights perspective, but he acknowledged “the practical difficulties involved both in selecting an appropriate level and in policing it”. (Ev66, para 24) Those practical difficulties were also highlighted by Deputy Assistant Commissioner Allison and Mr Dean Ingledeu, Director of Community Protection, Westminster City Council. (QQ 337, 338)

46. The Metropolitan Police Service proposed a statutory noise limit “monitored by ... Westminster City Council” which would need “powers of seizure for those found exceeding this limit”. (Ev61) Mike Schwarz, of Bindmans, told us that a power of confiscation would mark a “serious inroad into human rights” particularly without “due process” for the individual concerned. (Q 251) However, Professor Feldman considered that such a power was likely to be compatible with human rights legislation, provided the individual was given an opportunity to review “the legality of the confiscation before an independent and impartial tribunal” and provided that the failure to authorise the use of the loudspeaker was itself lawful. (Ev66, para 26)
47. The Serjeant at Arms proposed that, where there was “repeated complaint by people being disrupted and harassed” the police should have power to “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”. (Q 463) However, Mr McNulty stated that it was best left to the Home Office to work with the police and Parliamentary authorities to develop a “coherent framework”. (Q 509)
48. **We accept that all demonstrations have the potential to create noise and that the reasonable use of loudspeakers should be allowed in the area around Parliament. Depending, however, upon the time of day and the level of background noise from traffic, there are exceptional occasions during which the duration and volume of noise from loudspeakers causes serious disruption to large numbers of Members, staff and others within Parliament. There is a need either to develop or make better use of existing powers to ensure that in those exceptional cases the police or other authorities can control noise, including the use of loudspeakers by both groups and individuals. While a range of approaches have been suggested to us, we welcome the Home Office Minister’s commitment to work with the Parliamentary authorities and others to develop a “coherent framework”. As a minimum, there should be a statutory power to move an individual, or to confiscate sound equipment.**

Permanent protests

49. As we noted above, Brian Haw has staged a permanent protest opposite the Houses of Parliament since 2001. An unsuccessful attempt was made by Westminster City Council in 2002 to remove him on the grounds that he was causing an unlawful obstruction of the highway.²⁵

²⁵ Westminster City Council v Brian Haw [2002] EWHC 2073 (QB) (Gray J)

General considerations

50. The 2003 Commons Procedure Committee report recommended the introduction of new legislation to prohibit “long-term demonstrations”, on the grounds that they “limit the number of demonstrations and undermine the aesthetic and environmental value of Parliament Square as an important heritage square”.²⁶ SOCPA has not resulted in such a prohibition. Deputy Assistant Commissioner Chris Allison told us that there was no justification for using existing SOCPA powers to limit the duration of demonstrations, and added that he was “certainly not asking for” such a power. (Q 318)
51. The presence of the permanent protest has divided opinion within Parliament, although there appears to be a majority against. For instance, in 2003 43 MPs backed an amendment to the Anti-Social Behaviour Bill, tabled by Graham Allen MP, to give the Secretary of State a power to require individuals “forming part of any permanent or semi-permanent group on Parliament Square should be dispersed”.²⁷ In response, 24 MPs signed an Early Day Motion in support of Brian Haw’s permanent protest.²⁸
52. Mr McNulty told us that an outright ban on permanent protest was unlikely to be lawful: “there is almost, to use the planning lexicon, an established use there; for instance, the particular individual has been there for some time”. However, he added: “I am not sure I would want 15 static long term demonstrations in the Square”. (QQ 510–512, 515) Professor Feldman argued that ensuring access to Parliament and preventing disturbance from noise could be a legitimate basis for a ban, but “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”. (Ev66, para 8)
53. Mr McNulty also noted the potential impact of the proposals, which we have described above, to redevelop Parliament Square and re-configure the traffic: “Until we do get some sort of reconfiguration of the public highway and the traffic around the Square, we are stuck with [the current encampment] ... I do not think much is going to change unless the configuration of the whole Square is going to change”. (QQ 510–511) But he noted the practical difficulties of differentiating between “consecutive temporary demonstrations” and a permanent protest. (Ev 79)
54. We also heard evidence on three specific aspects of permanent protests: their visual impact, the extent to which they prevent other demonstrations taking place, and the security risks they created.

Visual impact

55. The Clerk of the House of Commons called permanent and overnight protests “unsightly” and said they “may cause additional difficulties as more pedestrians are attracted to Parliament Square as a result of proposals on World Squares”. (Ev02, para 20)
56. We acknowledge the deep concerns that have been expressed that the unsightly appearance of semi-permanent encampments detracts from the

²⁶ Procedure Committee, Third Report (2002–03), *Sessional Orders and Resolutions* (HC 855), paras 21–22.

²⁷ Procedure Committee Third Report (2002–03), para 20.

²⁸ EDM (No 1452) dated 20 June 2003; see also EDM (No 1483) dated 8 July 2004

visual aspect of Parliament Square. However, the Joint Committee on Human Rights has concluded that this would not be a legitimate basis for introducing a ban on permanent protests.²⁹ Deputy Assistant Commissioner Chris Allison also told us that it should not be for the police to make “arbitrary decisions” about the appearance of a protest: “I do not see that role for the police at all”. (Q 312)

Impact on other demonstrations

57. There has been some comment to the effect that a permanent protest can restrict other demonstrations. For instance, Dr Julian Lewis MP told the Government’s consultation that he was opposed to individuals “seeking permanently to colonise a public place and to deny the use of it as an amenity to other members of society—or for that matter to other would-be protesters.”³⁰ Mr McNulty thought that a static demonstration “may well conflict” with other demonstrations, noting that it was important “to balance all these competing rights and responsibilities that go with them”. (Q 512) He also felt there was a need to “seriously reflect” on the possible conflict between a static permanent demonstration and other demonstrations. (Q 511)
58. However, Baroness Mallalieu told us that she was not aware of any other individuals having been prevented from demonstrating as a result of Mr Haw’s permanent protest, while Mr Schwarz noted that there was no evidence of a “conflict in terms of time or space or politics between protesters”. (QQ 256, 265) We note that the Chairman of the Joint Committee on Human Rights, Andrew Dismore MP, raised one example of such a conflict during a recent evidence session of the Joint Committee.³¹ In response, Mr Welsh of Liberty described this as a “one off case”.³²

Security risk from permanent protests

59. The Serjeant at Arms argued that permanent protests, and the use of tents in particular, represented a security risk: “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”. (Q 469, Ev2A, para 9) Mr McNulty stated that permanent protests do not cause a security concern, save for the presence of “semi-permanent structures”. (Ev 79) He added that the GLA’s byelaw, rather than primary legislation, was the most appropriate way of addressing such encampments and structures. (Ev80) Professor Feldman also noted the evidence of Deputy Assistant Commissioner Allison that security and other risks could be satisfactorily addressed by imposing conditions on a demonstration instead of introducing a ban. He concluded that it was “very possible that a court, in this country or in Strasbourg, would consider [a ban] ... to be disproportionate and so not necessary in a democratic society”. (Ev66, para 10, 11)

²⁹ Scrutiny: First Progress Report, 4th Report of Session 2004–05, at paragraph 1.137, available at <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/jtrights.htm>

³⁰ Not printed (but available in the House of Lords Record Office)

³¹ Joint Committee on Human Rights, *Policing and Protest*, HC 826-i, uncorrected transcript of evidence, Q 19, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/uc826-i/uc82601.htm>

³² Joint Committee on Human Rights, *Policing and Protest*, HC 826-i, uncorrected transcript of evidence, Q 20, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/uc826-i/uc82601.htm>

60. **We note that opinion is divided in relation to whether permanent and overnight protests should be allowed to continue outside the Houses of Parliament, although there appears to be a majority against within Parliament. We see merit in distinguishing between permanent protests on the one hand, and the more traditional one day marches and demonstrations on the other. We call for a careful and comprehensive review of permanent protests, especially in light of the possible redevelopment of Parliament Square.**

The power to impose conditions on grounds of security risk

61. Section 134 of SOCPA gives the police a power to impose conditions on demonstrators to prevent a security risk. Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, has stated that existing security arrangements around Parliament and the available powers under counter terrorism legislation make the provisions in SOCPA unnecessary.³³ Mr McNulty agreed, while adding that the barriers and other security apparatus installed since the introduction of SOCPA provided a further reason to repeal the power. (QQ 490, 491, 516) The majority of responses to the Government's consultation, *Managing protest around Parliament*, were also opposed to continuing the power in the future for a wide range of reasons.³⁴
62. However, the Metropolitan Police Service told us that, despite being used sparingly, "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" without which the risks would be "far higher". (Ev61) For instance, "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." (Q 61)
63. **We accept the Metropolitan Police Service's evidence that the police should continue to have a power to impose conditions on demonstrations in Parliament Square to prevent a security risk in the future, including in relation to lone protestors.**

Imposing conditions on grounds of public safety

64. Section 134 of SOCPA also gives the police a power to impose conditions on demonstrators where necessary to prevent a public safety threat. The Metropolitan Police Service maintains that this power is important and has helped, for instance, to prevent individuals from burning flags under circumstances where it could have led to injury. (Ev61) However, the Home Office has stated that the police can adequately address public safety in future by imposing conditions under sections 12 to 14 of the Public Order Act 1986. (Ev57, para 40)
65. **We do not accept that there is a need for the police to be able to impose conditions over and above those currently available under the Public Order Act 1986 to prevent a public safety risk in the future.**

³³ HL Deb, 26 January 2007, Col 1378

³⁴ *The Governance of Britain, Analysis of Consultations*, Cm 7342-III, paras 26, 36

Prior authorisation

66. Sections 132 to 134 of SOCPA make it an offence to demonstrate around Parliament without the prior authorisation of the Metropolitan Police Commissioner. In order to obtain authorisation the organisers of a demonstration must give the police at least 24 hours' notice in writing. Where "reasonably practicable", six days' notice is required.
67. The introduction of an authorisation requirement under SOCPA was described by Milan Rai as a "very serious change" empowering police to "effectively neuter political protest". (Q 217) He also highlighted the complex administrative process involved for protestors and the police alike. (Q 217) Mr McNulty told us that the requirement for prior authorisation was "anti-democratic and runs against the vein of spontaneous protest". (Q 517)
68. Deputy Assistant Commissioner Allison stated that he understood the concerns about prior authorisation. (Q 308) He accepted that authorisation should be dropped in future, but that the Metropolitan Police Service has requested a compulsory prior notification scheme for groups of two or more individuals to support the effective management of protests around Parliament:
- "Prior to the [SOCPA] scheme coming into force, emergency police reserves had to be called in to manage assemblies around Parliament on a regular basis. While the MPS does not believe that prior notification should exist for all assemblies across the country, it does believe that prior notification should be required for assemblies that take place in the close proximity of Downing Street and Parliament itself. The MPS believes that prior notification is necessary to allow it to effectively manage the very large number of protests that take place in a small area."³⁵
69. This was supported by the Serjeant at Arms, who stated that a notification requirement should apply to a smaller area than that covered by the present authorisation requirement. (Ev02, paras 16 to 17) Some kind of prior notification requirement was supported by approximately 10% of those individuals who responded to the Government's consultation. This included a number of responses that favoured a requirement applying only to larger groups with suggested figures ranging from 20 to 500 or more individuals as the trigger level.³⁶
70. The Government is opposed to any form of compulsory notification. Upon the publication of the Draft Bill and White Paper, the Ministry of Justice released a press statement making it clear that: "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".³⁷ Mr McNulty, and others, have doubted whether there were serious problems with the policing of protest before the authorisation requirement was introduced. (Q 72)
71. The Government's consultation also produced responses that match the evidence we received: "prior notification would stifle spontaneous protest, that notification should be encouraged as best practice and that in practice

³⁵ The Metropolitan Police Service's response to the Government consultation, *Managing Protests around Parliament*

³⁶ Analysis of Consultation Responses, para 33.

³⁷ 25 March 2008, available at <http://www.justice.gov.uk/news/newsrelease250308a.htm>

large groups of demonstrators would inform the police of their intentions”.³⁸ Gareth Crossman of Liberty also stated that there were clear practical benefits to giving notice to the police on a voluntary basis because “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”. (Q 276)

72. **We support the removal of the legal requirement to obtain prior authorisation from the Metropolitan Police Commissioner before protesting in the vicinity of Parliament. We note the clear practical benefits of giving prior notification to the police and we encourage the practice of doing so. We do not, however, believe that there should be a legal requirement to do so.**

Enforcement

73. The Metropolitan Police Service has stated that police powers of arrest in relation to SOCPA were inadequate:

“the MPS has dealt with a number of individuals who have chosen to deliberately commit offences under SOCPA. A power of arrest has existed in some of these cases, an example being where a protestor refused to provide any details. However, the MPS is increasingly having to deal with those who choose to protest in the SOCPA area in situations where a power of arrest does not exist and despite being formally reported for an offence, they continue to commit that offence. In those cases, the MPS is powerless to prevent a continuance of the offence and those committing the offence continue to break the law, so undermining it. The MPS believes that a power to arrest should exist to prevent individuals continuing to commit an offence after they have been formally reported for it. This could be achieved by an amendment to s24(5) PACE [the Police and Criminal Evidence Act 1984].”³⁹

74. This position was supported by the Clerk of the House of Commons, who told us that without such powers “there would be little effective control of these areas, nor would there be any means of controlling excessive noise from loudspeakers”. (Ev02, para 19) Professor Feldman told us that the power of arrest was “very properly limited to ensure that it is used to interfere with people’s fundamental rights only when necessary”. He expressed particular concerns about extending the power of arrest to target minor protest offences that are closely tied to the right to free assembly. He concluded that the case for increased powers in this area “falls somewhere between the unpersuasive and the fanciful”, in light of the evidence that he had reviewed. (Ev66, para 34) Liberty and Bindmans have also expressed doubts about whether the current power of arrest is inadequate. (Q 240, 251)
75. Mr McNulty acknowledged the “confusion” around whether the police had power to arrest an individual who continues to commit an offence after an officer has issued a warning, while stating his belief that the power of arrest can be exercised in those circumstances. (Ev 79) He explained that the issue

³⁸ Analysis of Consultation Responses, para 34.

³⁹ The Metropolitan Police Service’s response to the Government consultation, *Managing Protests around Parliament*

would be addressed as part of Home Office's ongoing review of the Police and Criminal Evidence Act. (QQ 525–527; Ev79)

76. **We note the differences of opinion about the adequacy of police powers of arrest. We welcome the commitment by the Home Office Minister to remove any “confusion” as part of the review of the Police and Criminal Evidence Act 1984 that is being carried out by the Home Office. Had we been given further time for our inquiry, we might have obtained further evidence that would have enabled us to provide a more useful assessment of the adequacy of existing powers.**

CHAPTER 3: ATTORNEY GENERAL AND PROSECUTIONS

Background

77. The office of the Attorney General is an historic one, with roots stretching back as far as the 13th Century. The title of “Attorney General” is first thought to have been used in the 15th Century, whilst the title of the second law officer, the “Solicitor General”, was first recorded early in the 16th Century. The role gradually attained its modern shape—the Attorney became legal adviser to the Crown in the 17th Century, and the Law Officers’ Department was created in 1893. In the words of the Government’s recent consultation paper, “[o]ver the years the role of the Attorney General has therefore developed from being the legal representative of the sovereign to being an important figure in Government and finally a salaried Minister of the Crown.”⁴⁰ The Attorney presently has three key roles:

- (i) Legal adviser to the Crown;
- (ii) Guardian of the public interest, including decisions on individual prosecutions; and
- (iii) Minister of the Crown with responsibility for superintending the prosecutorial authorities, and (with the Home Secretary and the Secretary of State for Justice) for criminal justice policy.

Though the Attorney is a Minister and a Member of Government, she exercises the first two of these functions independently of Government and independent of collective ministerial responsibility. She is however subject to collective responsibility in respect of her function as Minister with responsibility for the prosecuting authorities and for criminal justice policy.

78. The debate on the role of the Attorney General has been given impetus by three controversies during the tenure of the previous Attorney, Lord Goldsmith:

- (i) The nature of the Attorney’s advice to the Prime Minister on the legality of the invasion of Iraq in 2003;
- (ii) The 2006 decision by the Serious Fraud Office to halt an investigation into whether BAE Systems had paid bribes to Saudi Arabian officials in order to secure a defence contract; and
- (iii) The debate over the requirement for the Attorney General to give his assent to any prosecution in the “cash for honours” investigation.

79. *The Governance of Britain Green Paper* stated that the Government was “fully committed to enhancing public confidence and trust in the office of Attorney General”.⁴¹ A consultation document on reform of the role was published shortly afterwards. The House of Commons Constitutional Affairs Committee (now the Justice Committee) published a report in July 2007, calling for a radical reform of the role, including a separation of the Attorney’s “legal” and “political” functions, the former to be given to an independent law officer and the latter to another Government Minister, most

⁴⁰ *The Governance of Britain: A Consultation on the Role of the Attorney General*, July 2007, Cm 7192, para 1.6

⁴¹ Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170, para 54

likely the Justice Minister.⁴² The House of Lords Constitution Committee published a report in April 2008 which outlined the various arguments for and against reform.⁴³ During our inquiry, the House of Commons Justice Committee published a follow-up report in response to the Government's proposals.⁴⁴

The Government's proposals overall

80. The Government's proposals for reform were set out in the Constitutional Renewal Draft Bill, and accompanying White Paper. The Government propose:
- The Attorney should retain his or her role as the Government's legal adviser;
 - The Attorney's legal advice should not be disclosed on a routine basis;
 - The Attorney should remain a Minister and a Member of either House of Parliament, and should attend Cabinet on the invitation of the Prime Minister;
 - The Attorney should produce an annual report on her work to be laid before Parliament, and the Government are open to suggestions for improved Parliamentary accountability;
 - The Attorney's responsibility for criminal justice policy (alongside the Ministry of Justice and the Home Office) should be retained;
 - The Attorney should not have the power to direct an individual prosecution, except in cases affecting national security;
 - The majority of requirements for the Attorney's consent to prosecutions should be abolished or transferred to the relevant prosecutorial director, and the power to halt a trial on indictment (by entering a plea of *nolle prosequi*) should be abolished;
 - The Attorney's superintendence relationship with the prosecutorial directors should be retained and set out in a protocol, with some clauses on the tenure of office of the directors placed in statute;
 - The Attorney's oath of office should be reformed, but not by statute.
81. There have been three broad responses amongst witnesses to the Government's proposals:
- Some witnesses have broadly supported the Government's proposals;
 - Others have argued in favour of a more radical reform;
 - Others have argued that some aspects of the Government's reforms would remove too much power from the Attorney.

⁴² Constitutional Affairs Committee, 5th Report (2006–07), *Constitutional Role of the Attorney General* (HC 306)

⁴³ Constitution Committee, 7th Report (2007–08): *Reform of the Office of Attorney General* (HL 93)

⁴⁴ Justice Committee, 4th Report (2007–08), *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (HC 698)

The Attorney General's role as legal adviser and as a Government Minister

82. The Government propose that the Attorney should remain as the Government's chief legal adviser and as a Minister within the Government. The Attorney General told the Committee that it was easier for an Attorney "of similar rank" to give "trenchant and robust" advice to Government colleagues, and emphasised the value of the Attorney sitting "at the apex of all the legal advice which is given" to government. To "uproot and pull out" the present arrangements would risk replacing them with a mechanism without "the same force, the same resonance, the same efficacy, the same potency as it has now". (Q 627) The Bar Council agreed that "the maintenance of a Law Officer at the heart of government is essential in an increasingly legalistic and regulated world". (Ev55, para 13) Some former Attorneys agreed. Lord Lyell of Markyate told the Committee that it was possible for a "political" figure to fulfil the role because "[t]here is a really strong ethos in the office that you will be completely independent and straightforward in your advice giving". (Q 587) Lord Morris of Aberavon agreed that "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". (Q 588) Professor Robert Hazell, Director, Constitution Unit, University College London, thought that "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". (Q 71)
83. Others disagreed. Professor Vernon Bogdanor, Professor of Politics and Government, Brasenose College, University of Oxford, argued that "one of the consequences of the Iraq war [is] that the public, in general, do not believe any more that people are capable of wearing more than one hat". (Q 14) Former Lord Chancellor and Solicitor General, Lord Falconer of Thoroton agreed that public perception that the Attorney was part of "the gang" made it necessary for the Attorney to be "a trusted, independent figure ... [who] is no longer part of the government itself". (QQ 191, 194) Professor Jeffrey Jowell argued that the role of legal adviser should, as in other "Westminster-style" democracies like Ireland or India, "be performed by an independent Attorney General who is not under the shadow of the perception of political bias ... We have had some very independent Attorneys, but I think they have had to fight against their own political inclinations in order to be so".⁴⁵ The Justice Committee concluded that "the ambiguity of the Attorney General's position in the public eye remains. As a consequence the Draft Bill does not fully satisfy the concerns ... about the need to reform the office and restore public confidence in the office of Attorney General."⁴⁶
84. **We have carefully considered the evidence we have received and the recommendation of the House of Commons Justice Committee. We recognise that there are different and strongly held views on this issue. On balance, however, we are not persuaded of the case for separating the Attorney General's legal and political functions. We therefore support the current arrangement which combines these functions, and support the retention of the Attorney's present status as a Government Minister.**

⁴⁵ *ibid.*, Q 5

⁴⁶ *ibid.*, para 40

Disclosure of the Attorney General's legal advice

85. The Government have argued that the Attorney General's legal advice should not be published on a routine basis.⁴⁷ The Attorney General told us that there were "serious difficulties", in particular in terms of the disclosure of sensitive information, as well as the fact that, "like any proper legal advice, it will include an analysis of the competing arguments and risks." She foresaw a risk that disclosure would mean that lawyers and clients were less "brutally frank" with each other, thus undermining the quality and fullness of the advice given. (Q 628) A number of witnesses, including Sir Michael Wood, a former Foreign and Commonwealth Office (FCO) Legal Adviser, agreed with the Government's arguments, whilst Elizabeth Wilmshurst, a former FCO Deputy Legal Adviser, also felt that the frankness of legal advice would be compromised by the prospect of publication. (Ev18, paras 4–5, Q 27)
86. Whilst few witnesses argued in favour of full disclosure of legal advice, some argued for greater transparency. For instance, Lord Mayhew of Twysden told us that "the character of the advice should be made public". (Q 589) Others argued that advice about the legality of armed conflict should be published. Lord Falconer thought that it was "inconceivable" that the Attorney's advice in relation to the use of force could remain confidential: "[t]he 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". (Q 203) Lord Morris agreed that "if the responsibility is going to be on Parliament to decide we are going to war ... then Parliament should be fully informed". (Q 589) Lord Goldsmith suggested that the legal advice should be "set out in some detail and Parliament can then judge that". (Q 660) The Bar Council agreed that "[w]here assurance on legality is likely to be a crucial underpinning to executive action in the international sphere ... 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." (Ev55, para 18)
87. The Attorney General told us there was "an appropriate honourable compromise ... 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." (Q 628)
88. **The Government should be accountable to Parliament for its actions. For Parliament properly to discharge its accountability function, it must be sufficiently informed of the basis—including the legal basis—for the actions of Government.**

Parliamentary accountability and transparency

The Attorney General's attendance at Cabinet

89. The current Attorney General has been asked by the Prime Minister to attend all Cabinet meetings in her capacity as the legal adviser to the

⁴⁷ Ministry of Justice, *The Governance of Britain—Constitutional Renewal*, March 2008, Cm7342-I, para 66

Government.⁴⁸ She told us that “[a]ttendance at Cabinet is very much a matter for the Prime Minister ... and I do attend whenever I am able to do so”. She suggested that it was advantageous to be able to “get your legal advice [in] early”, since it is not always possible to predict in advance legal issues that would arise in Cabinet. She also claimed that the Attorney’s more pronounced criminal justice policy role means “it has become increasingly important for the Attorney ... to be the spokesperson for the development of that prosecutorial policy within the criminal justice framework”. (QQ 634–635) Lord Goldsmith broadly agreed, and pointed out the difficulties that had arisen when he had only attended Cabinet when the Cabinet Secretary said there was a specific issue where legal advice would be required. (Q 663)

90. This has not always been the arrangement. Lord Mayhew argued: “It never was [the practice] in my day, nor in the days of my predecessors ... I do not think it is conducive to belief in his detachment from government that he should go as of right”. (Q 594) Lord Morris agreed that the present arrangements were “a very unhappy practice” because “[T]here is a point in being a little distant from political colleagues [and] aloof from his colleagues”. (Q 595) Lord Falconer thought that the Attorney should only attend Cabinet to give legal advice as required. For him, this debate demonstrated “why the Attorney General should become an independent figure, because he is unquestionably perceived to be a member of ... the political government”. (Q 202) On the other hand, the Prime Minister argued that regular attendance at Cabinet was not a recent innovation: “I do not believe it is the case that in the last ten years the Attorney General has rarely attended the Cabinet. The Attorney General has mainly attended the Cabinet”.⁴⁹
91. **Whilst we accept that attendance at Cabinet is ultimately a matter for the Prime Minister, we endorse the Constitutional Affairs Committee’s recommendation that “the old convention with respect to the Attorney General’s attendance at Cabinet should be re-established.”⁵⁰ We recommend that the Attorney should only attend Cabinet when the Prime Minister, on specific occasions, requires her legal advice, not routinely on the assumption that it might be required; or when Cabinet is considering matters on which the Attorney has Ministerial responsibility.**

The Attorney General as a Member of either House of Parliament

92. The Attorney General told the Justice Committee that it was necessary for Attorneys to be a Member of either House of Parliament in order to deliver Parliamentary accountability, and in particular to allow Members “to grill them, if necessary, within an inch of their lives.” She added that “no-one has suggested [an accountability] construct which improves upon that which we currently have.”⁵¹ A number of witnesses agreed. Professor Hazell argued that since “the law officers have to be accountable, they have to be accountable to Parliament, and the best way for them to be directly

⁴⁸ Liaison Committee, Minutes of Evidence, 3 July 2008, HC 192-ii, QQ 131–132

⁴⁹ *ibid.*, Q 132

⁵⁰ Constitutional Affairs Committee, 5th Report (2006–07), *Constitutional Role of the Attorney General* (HC 306), paragraph 86

⁵¹ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, *op cit.*, QQ 46–52

accountable to Parliament is for them to be Members of Parliament, of either House”. (Q 68) All the former Attorneys who gave evidence to us reached a similar conclusion. (QQ 595, 663)

93. Other witnesses disagreed. JUSTICE argued that “[a] statutory legal adviser could be held accountable through a Parliamentary Committee in the same way as the [Parliamentary] Ombudsman”. (Ev45, para 17) Professor Jowell also referred to the example of the Ombudsman, and noted that the independent Irish Attorney appears before select committees as and when appropriate.⁵² Lord Falconer suggested that a more appropriate accountability model for the non-political role currently undertaken by the Attorney would be the Director of Public Prosecutions. (Q 200)
94. Some witnesses considered which of the two Houses it was more appropriate for the Attorney to sit in. The Attorney General has been a member of the House of Lords since 1999. Professor Jeremy Horder, Criminal Commissioner, Law Commission, and Member, Criminal Justice Council, saw some advantage in the Attorney sitting in the Lords, since it created “a little bit of distance in the public eye, at any rate, from the hurly-burly of party ... politics”. (Q 606) Lord Morris said that he would prefer it if the Attorney sat in the Commons, whereas Lord Goodhart thought that this might create a conflict of interest between the requirement to give unpopular device and the desire to retain his or her seat. (Q 595, Ev05, para 4)
95. Roger Smith, Director of JUSTICE, argued that it was “a bit unsatisfactory” that the Commons were only able to hold the Solicitor General directly to account, when, as in recent times, the Attorney General sits in the Lords.⁵³ Lord Lyell suggested that the Lords should have a regular question time for an Attorney sitting in the Lords, while Lord Carlile of Berriew saw no reason why the Attorney should not answer questions in the House of Commons. (QQ 595, 605)
96. **We recommend that, in order to deliver effective accountability, the Attorney General should continue to sit in one of the two Houses of Parliament. Which House should be determined by the Prime Minister’s choice as to who is the most qualified candidate.**

Parliamentary scrutiny of the work of the Attorney and the Attorney’s office

Annual Report

97. Clause 16 of the Draft Bill requires the Attorney General to lay an annual report before Parliament “on the exercise of the functions of the Attorney General during the year.” (This would be in addition to the annual Departmental Report of the Law Officers’ Departments.⁵⁴) However, the Attorney would not be required to include in this report any information that she judges might impinge on legal professional privilege, could prejudice national security or seriously prejudice international relations, or that would prejudice the investigation of a suspected offence or proceedings before a court. The Attorney General told us how important the annual report was and that it should not be underestimated. She said that it would meet a need

⁵² *ibid.*, QQ 9, 14

⁵³ *ibid.*, Q 19

⁵⁴ See e.g. Law Officers’ Departments Departmental Annual Report 2008, Cm 7406, May 2008.

amongst the public and politicians alike to understand what the Attorney did. (QQ 646–647) Professor Jowell and Lord Goldsmith both agreed that it was a positive development (Q 654).⁵⁵

98. A number of witnesses had specific concerns about the extent to which it would increase accountability. Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University, and Global Witness were both concerned that there would be less than effective Parliamentary oversight of the annual report. (Ev36, para 9, Ev39) Lord Carlile suggested that there could be more frequent periodic reports that were subject to scrutiny by Parliamentary committees. (Q 618) The Justice Committee concluded that it was “hard to gauge what the new Annual Report would add to the existing system. Without further information we are unable to reach a firm conclusion about whether it will significantly add to the process of accountability of the Attorney General.”⁵⁶
99. **We welcome the proposal for an annual report on the exercise of the Attorney’s functions which will enhance Parliamentary scrutiny and public awareness of the work and functions of the Attorney General.**

Improved Parliamentary accountability mechanisms

100. Some witnesses suggested new or improved mechanisms for ensuring the Attorney’s accountability to Parliament. The Government suggested that one option would be for a new select committee to scrutinise the work of the Attorney General and the Attorney General’s office, although they stressed this was a matter for Parliament.⁵⁷ Democratic Audit supported this proposal and Lord Goldsmith was also sympathetic. (Ev04, para 51, QQ 682–684) However, the Justice Committee concluded that there was no need for an additional, specific committee to scrutinise the Attorney General: “we have that function and look forward to exercising it increasingly.”⁵⁸ The Bar Council agreed. (Ev55, para 16)
101. **We agree with the House of Commons Justice Committee that the current arrangements for select committee scrutiny of the Attorney General and her office are sufficient and work well. There is no need for an additional committee.**

The Attorney General’s role in the formulation of criminal justice policy

102. The Attorney General told the Justice Committee that it was important that the Attorney should retain her current criminal justice policy responsibilities because this helped “to make sure that each part of the system worked in a better and more conjoined way ... Having an Attorney General whose main focus is going to be on prosecutorial authority and the roles that they play is very important”.⁵⁹ Sir Ken Macdonald, Director of Public Prosecutions, told us that previously it had been felt that “prosecutors had too limited a role and they should be more influential ... We have deliberately driven a process in which prosecutors have some influence on the development of criminal

⁵⁵ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, op cit., Q 4

⁵⁶ *ibid.*, para 71

⁵⁷ *The Governance of Britain—Constitutional Renewal*, op cit., para 59

⁵⁸ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, op cit., para 89

⁵⁹ *ibid.*, paras 33–5

justice policy ... It is absolutely critical from our point of view ... to have, through the Attorney, a seat at the top table when criminal justice discussions are taking place”. (Q 636) The other prosecutorial directors agreed, as did Lord Goldsmith. (QQ 637, 667)

103. Others were less convinced. Lord Lyell thought that the Attorney acting formally as a part of tripartite ministerial responsibility alongside the Home Office and the Ministry of Justice did not sit “particularly easily with the role in general”. Lord Morris agreed that there was “a danger of being too mixed up with policy”, and Lord Mayhew thought the combined roles meant that the Attorney could get herself into a position where her independence “does seem to be rather diminished”. (Q 596) Lord Falconer agreed that the Attorney’s policy role had made “his or her independent role much more obliterated and confused”. (Q 197) The Justice Committee concluded that there were “other mechanisms for ensuring that the prosecution authorities have a voice” and that “[t]he Ministerial role of the Attorney General in relation to criminal justice policy should be separated from the role of legal adviser.”⁶⁰
104. **We acknowledge that the Attorney General plays a valuable role in championing the prosecutorial authorities in criminal justice policy formulation. We therefore agree with the Government that the Attorney General’s functions in relation to criminal justice policy should be retained.**

The Attorney General’s role in prosecutions

Removing the Attorney’s power to direct prosecutions in individual cases

105. Clause 2 of the Draft Bill removes the Attorney’s power to give a prosecution direction in relation to an individual case. Such powers would rest with the prosecutorial directors. The Lord Chancellor argued that this change was “very significant” and Professor Jowell told the Justice Committee that it would mean that there would be “less opportunity for the Attorney to interfere in the prosecutorial process”. (Q 778)⁶¹ The Corner House believed that the proposal was “an important principle enshrining the independence of prosecutors”, (Ev10) and the Justice Committee also approved of this transfer of powers.⁶²
106. On the other hand, Sir Ken Macdonald was sceptical about the practical impact of this change. He told us that he had always been “something of an agnostic in this debate about whether there was a 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”. (Q 638)
107. Other witnesses were hostile to the proposed change. Several of the former Attorneys stated that, though it was a power that was rarely if ever used, it should be retained. (QQ 597–598) Lord Morris argued that it was the “ultimate nuclear weapon because unless you have the power, how can the director in each department be made to listen to your decision?” Lord Lyell

⁶⁰ *ibid.*, para 88

⁶¹ *ibid.*, Q 4

⁶² *ibid.*, para 42

argued that, since the Attorney was answerable to Parliament for any decision, the power should be retained on grounds of Parliamentary accountability: “[Y]ou cannot have responsibility without power.” Lord Mayhew agreed, and added that “you would end up with something much less accountable and much less satisfactory”. He argued that the Government was seeking “to feed an asserted perception that anybody holding the present functions and responsibilities ... cannot be trusted to exercise them fairly and with integrity”. The Bar Council and Lord Mackay of Clashfern also expressed their concern over the proposal. (Ev55, paras 21–26, Ev47, paras 3–5, 8)

Exception to the ban in cases affecting national security

108. Clause 12 of the Draft Bill sets out the Government’s proposal that the Attorney should have a power to direct if the Attorney is “satisfied that it is necessary to do so for the purpose of safeguarding national security.” The Attorney General argued that such a power was necessary “because of the importance of that issue to our country and because the fundamental nature of government is to make the safety and security of our citizens of primary importance”.⁶³ She argued that, as the independent guardian of the public interest, and, pending reform of the oath, of the rule of law, the Attorney was the appropriate Minister to exercise these powers.⁶⁴ The Bar Council thought that the proposals were “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.” (Ev55, para 22) Lord Carlile agreed that it was a necessary power. (Q 617)
109. Other witnesses had deep concerns. Democratic Audit thought that the proposal was “entirely improper”, in particular since “[t]he 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.” (Ev04, para 47) The Corner House and JUSTICE also felt that the change from an ill-defined discretionary power to an explicit statutory power marked an increase in the Attorney’s powers. (Ev10, Ev45, para 6) Professor Bogdanor saw “very considerable danger” in the proposal, since “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 ... that this has in fact happened in the recent past”. (Q 17) Mark Ryan suggested that any proposed use of the power should be immediately brought to the attention of a specially appointed Select Committee, which could alert Parliament of any concerns. (Ev36, para 8) JUSTICE argued that the Attorney should only have a power to make a submission on national security to the prosecutorial director. (Ev45, paras 4–13) The Corner House recommended that a system of “strong checks and balances” needed to be in place. (Ev10)
110. Several witnesses made comments on particular aspects of the national security provisions, specifically clauses 12(1), 13(5) and 14(3).
111. The Justice Committee and Democratic Audit (Ev04, paras 46–47) were particularly concerned about clause 12(1)(a), which would give the Attorney

⁶³ *ibid.*, Q 76

⁶⁴ *ibid.*, Q 77

the power to halt an investigation by the Serious Fraud Office. The Government justified this power on the basis that the Director of the Serious Fraud Office was the only one of the prosecutorial directors who has an investigative function.⁶⁵ However, the Justice Committee concluded that there was no justification for such powers.⁶⁶ Professor Horder was also concerned that this clause went too far. (Ev63)

112. Professor Jowell and a number of others were concerned that clause 13(5) (whereby a certificate signed by the Minister is “conclusive evidence” that a direction on the grounds of national security was necessary) was an ‘ouster’ clause that would prevent judicial review of any decision, “which is really contrary to every tenet of the rule of law which requires access to courts to challenge ministerial decisions”.⁶⁷ The Justice Committee,⁶⁸ The Corner House and Global Witness made similar points. (Ev10, 39) However, Mark Ryan argued that the use of judicial review in this context would be inappropriate. (Ev36, para 8) Professor Feldman argued that the possibility of judicial review would be dependent upon the approach of the courts to any certificate issued under clause 13(5). (Ev66, paras 35–41) He also disagreed with Professor Jowell that the proposed clause would be vulnerable to challenge under the Human Rights Act. (Ev38a, para 34, Ev66, paras 40–41)
113. Professor Horder was concerned about clause 14(3), which states that information need not be included in a report to Parliament which is required whenever the power to direct is exercised, if the Attorney is satisfied that (a) a claim to legal professional privilege could be maintained, (b) the inclusion of the information would prejudice national security or would seriously prejudice international relations, or (c) the inclusion of the information would prejudice the investigation of a suspected offence or proceedings before any court on the grounds that it was too broadly drafted. He recommended that clause 14(3)(b) should make no reference to international relations, because, as currently drafted, the sub-clause would “put the UK in danger of breaching its international obligations”, and that, “[i]f 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”. (Ev63) The Justice Committee concluded that “accountability to Parliament cannot be a sufficient safeguard since the Reports to Parliament are unlikely to contain all the information relating to making the decision to halt proceedings or an investigation.”⁶⁹ The Corner House and Global Witness raised similar objections. (Ev10, p4, Ev39)
114. **We sympathise with the Government’s concern to ensure operational independence for the prosecutorial authorities, but we are not convinced that removing the Attorney General’s power to give a prosecution direction is an appropriate route for achieving this. We were impressed by the strength of the evidence we received that the “nuclear option” of being able to stop a prosecution must be retained, and that the most appropriate person to exercise it is the Attorney**

⁶⁵ *ibid.*, QQ 59–64

⁶⁶ *ibid.*, para 45

⁶⁷ *ibid.*, Q 22

⁶⁸ *ibid.*, para 51

⁶⁹ *ibid.*, para 52

General, as she is directly accountable for its exercise to Parliament. Removing this power would mean that the Attorney would have responsibility without power. We recommend that the Attorney General should retain the power to give a direction in relation to any individual case, including cases relating to national security. This should continue to be on a non-statutory basis. We see merit in the Attorney General reporting to Parliament if she gives a direction in relation to an individual case and we recommend that the Government establishes a procedure for the Attorney to do so. If, however, the Government removes the Attorney's power to give a direction in an individual case, we agree that the Attorney should retain the power to intervene for the purpose of safeguarding national security, subject to the requirement to report to Parliament.

Transfer or abolition of most of the requirements for the Attorney's consent to individual prosecutions

115. Clause 7 and Schedule 1 of the Draft Bill outline the Government's proposals for transferring or abolishing most of the current requirements for the Attorney General's consent to individual prosecutions, although the requirement would be retained in a small number of cases "which are particularly likely to give rise to consideration of public policy or public interest".⁷⁰ In a letter to the Committee, the Attorney General noted that "[d]etermining which of the ... categories each offence falls into is not straightforward" and that "further work is needed on this aspect of the draft Bill. In particular, discussions with the prosecuting authorities are on-going." (Ev76, see also Ev72)
116. A number of witnesses commented on the proposals. Lord Lyell agreed that the various consent requirements "have become a little bit of a hotchpotch over the years. A substantial number of them are, quite rightly, left with the Attorney", and there are some "which are to be handed over to the Director in the draft Bill which actually I would keep with the Attorney". (Q 581) Lord Mayhew agreed that "there is a strong case for rationalising the list of offences". (Ev67) Others such as Democratic Audit argued that the requirement for consent should be transferred entirely to the DPP or other appropriate directors, in order to "depoliticise decisions over prosecutions". (Ev04, para 48) The Corner House argued that "there should be a proper public and Parliamentary debate about which offences would continue to require the Attorney's consent". (Ev10)
117. The question of how Parliamentary accountability would be retained when consent requirements are transferred was also raised in evidence. The Attorney told us that "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". (Q 645) In a subsequent letter to the Committee, she added that it would still be open for the Attorney to seek information about a case "and to convey that information to Parliament in response to Parliamentary Questions or otherwise". (Ev76) However, Professor Horder told us that "I regard it as wrong to think that there should be accountability to Parliament for the conduct of prosecutors in individual cases". (Ev63)

⁷⁰ *The Governance of Britain—Constitutional Renewal*, op cit., para 90–92

118. **We support the Government’s proposal that the majority of requirements for the Attorney’s consent to individual prosecutions should be transferred or abolished, with a small number retained by the Attorney. We do, however, recommend that further work should be undertaken to determine the category into which each consent requirement falls, and to ensure there is an effective accountability mechanism if and when powers are transferred.**

*Abolition of the power to halt a trial on indictment (by entering a plea of *nolle prosequi*)*

119. Clause 11 of the Draft Bill proposes to abolish the Attorney’s power to halt a trial on indictment (by entering a plea of *nolle prosequi*). The Attorney General told the Committee that this was in line with the proposals to end the power to direct and to refine the range of offences for which the Attorney’s consent to prosecute is required. (Ev76) A number of witnesses, including The Corner House and Democratic Audit, supported the Government’s proposals, (Ev10, Ev04, para 49) whilst Professor Horder asserted that the *nolle prosequi* power was not necessary because “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”. (Ev63) The Justice Committee was uncertain of the utility of the proposal, but thought that it would “in a small way remove some power over prosecutions from the Attorney General.”⁷¹
120. However, some of the former Attorneys did not agree. Lord Morris conceded that the *nolle prosequi* power was “an ultimate power not often used these days”, but referred to specific cases where he had seen fit to use the power, and “[h]ence, it is important to maintain it, and I think the Government are going ... the wrong way completely.” Lords Lyell and Mayhew agreed. (QQ 601–602) Lord Goldsmith told the Committee that the fact this power existed was probably more important than its exercise. (Q 678) In response to these comments, the Attorney General conceded that the proposal to abolish the *nolle prosequi* power risked creating a “gap” in which neither the prosecuting authority nor the Attorney would be able to stop a prosecution. “For this reason we are considering whether it is appropriate to modify the powers of the main prosecuting authorities to discontinue proceedings [but t]his in turn raises difficult issues.” (Ev76)
121. **In line with our recommendation in paragraph 114 that the Attorney should retain a power to direct, we recommend that the power to halt a trial on indictment (*nolle prosequi*) should be retained. We invite the Government to investigate how greater Parliamentary accountability for its use might be provided.**

The Attorney General’s superintendence function

Retention of the Attorney General’s superintendence function

122. The Governance of Britain White Paper argued that the Attorney General should maintain her superintendence functions over the Director of Public Prosecutions (DPP), the Director of the Serious Fraud Office (DSFO), and

⁷¹ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, op cit., paras 66–69

the Director of Revenue and Customs Prosecutions (DRCP). The Government argued that superintendence was necessary because Ministers had a legitimate interest in the objectives and policies of the prosecutors, because it would prevent the Directors being drawn into the political arena, and because the Attorney was in the best position to do the job as an independent lawyer and guardian of the public interest.⁷² The Directors themselves told the Committee how much they valued their relationship with the Attorney. (QQ 636–637, 640–642) The Bar Council agreed that the relationship was “appropriate and necessary and that no other Minister would be appropriate for this role”. (Ev55, para 20)

123. Other witnesses were less convinced. Professor Bogdanor argued that an independent legal adviser “should not be responsible for superintending the prosecuting authorities”. (Q 17) Professor Horder saw “the organisational logic of giving the superintendence role to the Ministry of Justice or to the Home Office”, adding, however, that “so long as the prosecution services and the AG are content that the current arrangements work well, I see no pressing reason for change”. (Ev63)
124. **We agree that the Attorney General should retain her superintendence function in relation to the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions.**

The protocol

125. Clause 3 makes provision for a new protocol setting out “how the Attorney General and the Directors are to exercise their functions in relation to each other.” The protocol has not yet been published, although the Draft Bill indicates the areas it should cover. The proposal of a protocol was welcomed by the Bar Council, (Ev55, para 27) and Lord Lyell, who told us that the superintendence relationship “is an area which ... has not been spelt out and could probably quite usefully be spelt out”. (Q 581) Sir Ken Macdonald told us that it was a critical document since it set out the superintendence relationship for the first time, and it therefore “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”. He did not want the protocol to be set out on the face of the Bill, as he wished to preserve some element of flexibility. (Q 641) The Attorney herself emphasised that this was a “living document” that was “not necessarily going to be one which will be permanently set in stone because it may have to change and adapt”. (Q 640)
126. Witnesses expressed some specific concerns about the status of the protocol and the extent of Parliamentary scrutiny of it. In their joint submission to the Committee, Lords Lyell, Mayhew and Morris argued that “[i]t 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”. (Ev40) Global Witness and The Corner House also argued for stronger Parliamentary scrutiny of the protocol. (Ev39, Ev10) Professor Horder, although generally in favour of a protocol, thought that the elements of the protocol set out in the Draft Bill were “slightly curious”, for instance clause 3(2)(h) on media relations, and 3(2)(i) on complaints. He

⁷² *The Governance of Britain—Constitutional Renewal*, op cit., paras 70–75

also argued that in addition to consulting the Directors about revisions to the protocol, as specified in the Draft Bill, the Attorney should also consult with other interests such as the police. (Q 621) The Justice Committee regretted that the Draft Bill had been published before the protocol was ready, and called for it to be published before the Bill is introduced.⁷³

127. **We welcome the proposal for a protocol setting out how the Attorney General and the prosecutorial directors should exercise their functions in relation to each other. However, we recommend that the proposed protocol should be published in draft and subjected to Parliamentary scrutiny before the Bill is introduced. We also recommend that any future revisions of the protocol be the subject of scrutiny by the House of Commons Justice Committee.**

Qualifications and tenure of office of the Directors

128. Clauses 4 to 6 provide new provisions about the tenure of office of the prosecutorial directors. The Attorney General wrote to the Committee explaining that the new provisions setting a five year term, and ensuring that the Director may only be removed under certain circumstances, provide “a significant enhancement to the security of tenure for the Directors”, since “[c]urrently, the Directors are appointed for whatever term of office the Attorney considers appropriate (which has ranged from 1 year to 5 years) and are dismissible by the Attorney subject only to the limitations of contract law and public law.” (Ev76) In his written evidence to the Committee, the Director of Revenue and Customs Prosecutions, David Green asserted that “[g]reater flexibility would be achieved by maintaining the ability of the Attorney to reappoint a serving Director for a term of less than 5 years.” (Ev69) The Attorney General, however, stated that there might be a case for a limit on re-appointment, both to re-emphasise independence and to prevent a Director becoming “stale”. This was an area “where the Government is still thinking”. (Ev76)
129. Democratic Audit and JUSTICE welcomed the new clauses, (Ev04, para 46, Ev45, para 10) but Global Witness argued that it was “inappropriate for the Directors to be appointed by the Attorney General as long as s/he remains a member of the Executive”, and that any “decision to remove the Directors should be subject to an independent and impartial review”. (Ev39) The Corner House questioned whether the proposals met the security of tenure criteria for public prosecutors set out by the Council of Europe in 2000. (Ev10) Professor Jowell was particularly concerned that a Director could be dismissed by the Attorney as “unfit” for failing to have regard to the (as yet unwritten) protocol.⁷⁴ The Justice Committee argued that this left the position of the Directors unclear: “The Directors ought to have clearer security of tenure than is apparent in the Draft Bill.”⁷⁵ In her letter to us, the Attorney General rebutted these claims, claiming that “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.” (Ev76)
130. **We welcome the proposed new clauses relating to the tenure of office of the Directors, but recommend that the Bill be amended to make**

⁷³ *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, op cit., paras 53–58

⁷⁴ *ibid.*, QQ 27–30

⁷⁵ *ibid.*, para 63

clear that it will be possible for the Directors' terms of office to be renewed.

Oath of office

131. The Government are committed to reforming the oath of office of the Attorney General, but are not planning to place it on a statutory basis. The Attorney General told the Committee that that was simply because “we do not need to have a piece of legislation. I do not think it is any more complex than that. I tend to take the view ... that if you do not need legislation then we should not have it”. (Q 648) Lord Goldsmith agreed. (Q 686)
132. There was general agreement amongst witnesses that it was necessary to reform the oath, and several argued that it would be best to do so by way of statute. Lord Mayhew argued that “it had better be achieved by statute”, although he was more concerned with the fact that the Bill made “no reference to the traditional role of the Attorney General as the guardian of the public interest”. (Ev67, Q 600) The Bar Council thought that a statutory approach was essential, to “giv[e] it Parliament’s full endorsement”. (Ev55, para 15) The Constitution Committee believed that the responsibilities of the Attorney (and possibly other ministers) in upholding the rule of law should be acknowledged in statute, and that the Attorney’s oath of office should be updated through primary legislation. (Ev71, paras 9–11) The Justice Committee agreed that the Attorney’s oath of office “should be reformed to cover the duty to uphold the Rule of Law.”⁷⁶
133. **We agree with the Government that the oath should be reformed, but like the Government, we do not believe that it is necessary to put the oath on a statutory basis.**

⁷⁶ *ibid.*, paras 93–96

CHAPTER 4: COURTS AND TRIBUNALS

Background

134. The Executive has historically been responsible for judicial appointments, most notably through selections made by the Lord Chancellor. For many years the process was viewed as “largely a closed system” that, while maintaining a world class judiciary, promoted the “establishment mould”.⁷⁷ The Constitutional Reform Act 2005 (the 2005 Act) marked a significant change to the appointments process. It established the Judicial Appointments Commission (JAC) as an independent body to carry out selection exercises based solely on merit. The role of the Lord Chancellor was reduced to accepting, rejecting or requiring a reconsideration of the JAC’s selected candidate. A statutory duty was also imposed on the Lord Chancellor and other Ministers to maintain judicial independence.⁷⁸
135. The then Lord Chief Justice, Lord Woolf, hailed the 2005 changes as “a gigantic step forward in our constitutional arrangements ... the future independence of the judiciary will be safer than it has ever been”.⁷⁹ The then Lord Chancellor, Lord Falconer of Thoroton, told us that the careful and lengthy process of consultation and reform led to “proper accountability” for appointments, as part of “a sensible constitutional settlement ensuring proper independence in the appointment of judges”. (Q 169)
136. The JAC was officially launched in April 2006 and, following the introduction of its new selection processes in October 2006, has been fully operational for less than two years.⁸⁰ We have heard criticisms of inefficiencies and delays leading to difficulties for candidates and a shortage of judges in a number of courts. (QQ 102, 107, 117, 129, 180, Ev37)⁸¹ There has also been concern about the lack of measurable progress towards achieving a diverse judiciary.⁸² Baroness Prashar, Chair of the JAC, has acknowledged “teething problems” but describes the reforms as a “quiet revolution” as part of which the JAC has made a good start.⁸³
137. In July 2007 the Government announced, in *The Governance of Britain* Green Paper, its intention of further reviewing the judicial appointments process, including the role of the Executive and “conceivably a role for Parliament itself”.⁸⁴ This led to a consultation paper, *The Governance of Britain: Judicial Appointments*, published in October 2007, which outlined a range of options including the complete surrender of the role of the Executive and the introduction of post-appointment hearings before Parliamentary select committees. During the consultation process, the Lord Chancellor stated

⁷⁷ *The Governance of Britain, Judicial Appointments*, Consultation Paper CP 25/07, para 3.3

⁷⁸ Constitutional Reform Act 2005, section 3

⁷⁹ HL Deb, 7 December 2004, Col 759

⁸⁰ JAC’s Annual Report 2006/07, *Committed to Selection on Merit*, HC 632, 4 July 2007, page 15

⁸¹ See also The Lord Chief Justice’s Review of the Administration of Justice in the Courts, HC 448, March 2008, paragraphs 4.29 to 4.31.

⁸² ‘Judicial diversity goes into reverse’, *The Guardian*, 19 May 2008, available at <http://www.guardian.co.uk/uk/2008/may/19/law>

⁸³ JAC’s Annual Report 2006/07, *Committed to Selection on Merit*, HC 632, 4 July 2007, pages 2–3

⁸⁴ Cm 7170, para 71

that his “default setting” was “to leave things where they are because the system was changed only a couple of years ago”.⁸⁵

138. The Draft Bill and White Paper propose a number of reforms to the appointments process, including the repeal of the Prime Minister’s residual role and the removal of certain powers of the Lord Chancellor in relation to appointments below the High Court. Other proposals are aimed at reviewing accountability arrangements or attempting to reduce bureaucracy by, for instance, transferring responsibility for medical checks from the JAC to the Lord Chancellor.⁸⁶
139. A number of witnesses, including the JAC and the Bar Council, recognised the need to address the procedural inefficiencies and delays, but argued that it was far too early to pursue “wholesale reform” or “significant changes” to the “carefully calibrated” balance achieved in the 2005 Act. (QQ 88, 107, 279)⁸⁷ Lord Falconer made his concerns plain:
- “I am genuinely disturbed by what seem 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.” (Q 169)
140. The JAC favoured a period of “effective implementation ... [to] enable a later assessment to be fully informed by a body of evidence on its consequences.”⁸⁸ In contrast, Andrew Holroyd, President of the Law Society, told us “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”. (Q 88) Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University, agreed that it was “never too early” to correct problems that have been identified. (Ev36, para 11)
141. **The Constitutional Reform Act 2005 made fundamental changes to the judicial appointments process by introducing a “carefully calibrated” balance between the roles of the Executive, the judiciary and the newly-created Judicial Appointments Commission. We accept the need to improve the efficiency and performance of the process in light of problems experienced to date, but it is far too soon to propose significant reform, only two years after the changes were introduced. The delicate relationship between judicial independence and democratic accountability for appointments should not be reassessed until the new system is fully established and a comprehensive body of evidence is available to assess its operation.**
142. The following sections of this Chapter examine the various legislative and policy reforms that are proposed in Part 3 and Schedule 3 to the Draft Bill and the White Paper. Where those proposals are inconsistent with our view

⁸⁵ Constitutional Affairs Committee, Meeting with the Lord Chancellor, 9 October 2007, HC 987-ii, QQ 110–112

⁸⁶ Part 3 and Schedule 3.

⁸⁷ JAC’s response to the Government consultation on judicial appointments, available at http://www.judicialappointments.gov.uk/docs/17-1Response_to_Ministry_of_Justice_Consultation_Paper_-_version_17-01-2008_.pdf, January 2008.

⁸⁸ JAC’s response to the Government consultation, above, para 5.

that it is too early for significant reform, we nonetheless outline the evidence that has been received and comment on it, to inform future consideration.

The Role of the Executive

The Prime Minister

143. Part 1 of Schedule 3 of the Draft Bill removes the Prime Minister’s residual role in the judicial appointments process, in which he makes a recommendation to the Queen that the Lord Chancellor’s nominated candidate be appointed to the Supreme Court.⁸⁹
144. The majority of witnesses supported this change, including the Lord Chief Justice who emphasised that the Prime Minister could only “forward” the Lord Chancellor’s nomination and should therefore be removed from the process as he was unable to contribute. (Ev56, page 2) Timothy Dutton QC, Chair of the Bar Council, also stated that the new statutory selection process made it unnecessary for there to be a “prime ministerial filter”, contrary to the position prior to the 2005 reforms. (Q 91) However, JUSTICE maintained that appointments to the Supreme Court affected the whole of the United Kingdom and should therefore be made by the Prime Minister “rather than the Lord Chancellor of England and Wales.” (Ev45, para 21) In this context we note the JAC’s statutory duty to consult the First Minister in Scotland, the First Minister for Wales and the Secretary of State for Northern Ireland as part of the selection process.
145. **While there is no need for urgent reform, we accept the proposal to remove the Prime Minister’s residual role in relation to appointments to the Supreme Court. The additional check that the Prime Minister used to provide on the Lord Chancellor’s nomination is no longer necessary in light of the statutory selection processes introduced by the Constitutional Reform Act 2005.**

The Lord Chancellor

146. Part 5 of Schedule 3 removes the Lord Chancellor’s discretion to reject or require reconsideration of the JAC’s selected candidate in relation to appointments below the High Court. During an inquiry into the proposals that led to the current law, the then Constitutional Affairs Committee noted that “The balance of democratic accountability for judicial appointments and judicial independence is hard to strike. Witnesses who generally agreed on the need for reform disagreed on the extent to which the Government should have the final say in appointments.”⁹⁰ Both the Government’s consultation and the evidence that we have received demonstrate a similar range of views about the desirability of altering the Executive’s role.⁹¹
147. Lord Phillips of Worth Matravers, the Lord Chief Justice, while generally opposed to “radical or fundamental reform”, supported this proposal on “pragmatic” grounds. He stated that it “removes nothing of significance and may help to speed things up” since the volume of junior level appointments

⁸⁹ Constitutional Reform Act 2005, section 26

⁹⁰ *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48–1, para 131.

⁹¹ White Paper, para 106; Analysis of Consultations, paras 161–168.

means the Lord Chancellor could “usually add nothing in practice”. (Ev56, page 2) Mark Ryan was also in favour. He told us “it would help to realign our constitutional arrangements in accord with a purer separation of powers.” (Ev36, para 11) Joshua Rozenberg and Frances Gibb accepted that appointments to the High Court and above were different because they were fewer, attract greater security of tenure and were more likely to be significant since, as the Lord Chancellor highlighted, their judgments set binding precedents for the future. (QQ 128, 757) These views were shared by the Judicial Appointments and Conduct Ombudsman and the Lord Chief Justice. (Ev35)⁹²

148. Some witnesses were in favour of reforms that went further than the Government’s proposal. For instance, the Law Society argued for the complete removal of the Lord Chancellor from the judicial appointments process in order to increase judicial independence, transparency and openness and remove “the continued perception of appointments as a source of patronage by ministers.” (Ev42, para 8) Frances Gibb wished to limit the Lord Chancellor to assuming overall responsibility for the process without being involved in individual appointments, while Joshua Rozenberg suggested that the Lord Chancellor might need to retain a role only in relation to the most senior judiciary. (QQ 21, 128)
149. Those witnesses opposed to significant further reform of the appointments process, such as the JAC and the Bar Council, were also generally opposed to the Government’s proposal on the grounds of poor timing or lack of evidence. (Ev55, para 32) The Lord Chancellor told us that this was a personal proposal of his own, rather than a response to external demand. (Q 756) While agreeing that fundamental changes should not be introduced, he did not consider this proposal overstepped the threshold of undesirable major reform, given his view that “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.” (Q 757)
150. In contrast, Lord Falconer argued that the proposal would affect the vast majority of appointments made by the Lord Chancellor, including some 430 of the 458 selections made by the JAC in its first year of operation. He described it as a “very significant” change: “in the vast majority of judicial appointments there will be no accountability at all ... 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”. (QQ 169–171)
151. In response, the Lord Chancellor stated that Lord Falconer was wrong to suggest that the limited powers at issue could be used to reject an individual candidate on grounds of general concerns about diversity. (Q 756) That may be right, but Lord Falconer’s wider concern about the significance of the Government’s proposal was underlined by the White Paper’s suggestion that it may produce an “accountability gap” for appointments below the High Court, as discussed below.

⁹² See also the House of Lords Constitution Committee, Meeting with the Lord Chief Justice, 9 July 2008, uncorrected transcript, Q 32, available at <http://www.publications.parliament.uk/pa/ld/lduncorr/const090708ev1.pdf>

152. A number of witnesses, such as the Law Society, were opposed to creating a divide between different levels of the judiciary. Professor Dame Hazel Genn, Judicial Appointment Commissioner and Professor of Socio-Legal Studies, University College London, stated: “if there is a constitutional argument for the executive being involved in these appointments ... [it] applies all the way down the judicial hierarchy ... [otherwise it] 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.” (Q 284) The JAC also objected “given that judges at all levels can have a direct and profound impact on the public and business.” (Ev52, para 24) Lord Falconer stated that the proposal, taken together with other changes in Part 3 and Schedule 3 of the Draft Bill, marked a “handing over” of power to the judiciary. (Q 173)
153. **We oppose the proposal to remove the Lord Chancellor’s power to reject or require reconsideration of the Judicial Appointments Commission’s selected candidate in relation to appointments below the High Court. The new system has not been in operation long enough to justify such a significant and controversial departure from the balance achieved by the 2005 reforms. We are also concerned about treating junior level appointments in a different way from senior level appointments, particularly given the importance of decisions made by the junior judiciary to the public.**

Accountability

154. The Lord Chancellor is accountable to Parliament for the judicial appointments process. In addition, the Judicial Appointments and Conduct Ombudsman has jurisdiction to determine complaints made by individual candidates or, following a request by the Lord Chancellor, to carry investigations into the procedures of the JAC.⁹³ The JAC also publishes an annual report, while its Commissioners and Chief Executive have made themselves available to attend meetings with Parliamentary select committees, including as part of this inquiry. A further informal process of review also takes place through “regular trilateral meetings between the Chairman of the JAC, Lord Chancellor and Lord Chief Justice to discuss any concerns.” (Ev26)

Power to set targets or issue directions

155. The White Paper raises the prospect of giving the Lord Chancellor a power to set targets or issue directions to the JAC in order to avoid an “accountability gap in the event that the Lord Chancellor is removed” from the selection process below the High Court: “if he is to be held accountable for any failure of the JAC, he arguably needs to have the means at his disposal to reduce the risk of failure”.⁹⁴
156. The Government has recognised that the proposal raises “complex issues”.⁹⁵ It was strongly opposed by a majority of witnesses, including the JAC and the Law Society. They argued that it would undermine the independence of the appointments process, which was a primary reason for the creation of the

⁹³ Constitutional Reform Act 2005, sections 101, 104 and 105.

⁹⁴ White Paper, para 124

⁹⁵ White Paper, para 128

JAC. (Ev42, para 33, Q 289) The Lord Chief Justice expressed similar concerns, arguing that the Lord Chancellor's existing power to terminate an unsatisfactory selection exercise gave sufficient control. (Ev56) He also stated that at the minimum, the exercise of any new power should be subject to the Lord Chief Justice's agreement and to Parliamentary approval under the affirmative resolution procedure. (Ev56)

157. Other witnesses were prepared to accept a narrow power, restricted to issues such as timeliness and efficiency levels. For instance the Bar Council argued that anything broader was “not justifiable and could lead to the weakening of the quality of the judiciary.” (Ev55, para 39) The JAC, amongst others, was sceptical even about a narrow power:

“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 concerned only at arm's length operates ... [and the effect of targets] is normally to concentrate resources on the area covered with adverse effects on the overall efficiency of the organisation.” (Q 289)

158. Professor Robert Hazell, Director, Constitution Unit, University College London, argued that the Lord Chancellor's responsibility for the appointments process justified the new powers, provided there was close scrutiny of their exercise by the House of Lords Constitution Committee and the House of Commons Justice Committee. He argued that the JAC could publish a special report to highlight its concerns if it considered particular targets or directions were inappropriate. (Q 76)
159. **We do not accept that it is appropriate to give the Lord Chancellor a power to set targets or to issue directions to the Judicial Appointments Commission. Such a power would have the potential seriously to undermine the independence of the appointments process, which was a primary reason for the 2005 reforms.**

A new role for Parliament?

160. The White Paper acknowledges the valuable scrutiny that is already performed by Parliamentary select committees, but questions whether there could be merit in a joint meeting of the House of Commons Justice Committee and the House of Lords Constitution Committee “to hold the system to account on an annual basis.”⁹⁶ There was broad support for some form of select committee scrutiny of the JAC's progress and procedures, although relatively few witnesses commented on the additional benefit that might arise from a joint meeting. (QQ 92, 110, Ev04, para 60) The Lord Chief Justice considered that the proposal might be “fruitful” but felt it was properly a matter for Parliament to decide. (Ev 56)
161. **We support the role of select committees in holding the judicial appointments process to account. Whilst we note the Government's proposal for the House of Commons Justice Committee and the House of Lords Constitution Committee to hold an annual joint meeting, we leave it to those individual committees to determine whether it might improve scrutiny overall. Either way, we also note that increased Parliamentary scrutiny will not require legislation in order to be implemented.**

⁹⁶ White Paper, para 133

162. The White Paper restates the Government's intention to subject future appointments as Chair of the JAC to pre-appointment scrutiny by the appropriate Parliamentary committee.⁹⁷ This proposal was supported by the JAC and Democratic Audit, although the Judicial Appointments and Conduct Ombudsman were against a general requirement for Commissioners to be subject to pre-appointment hearings. (Ev52, para 57, Ev04, para 60, Ev35)
163. **We welcome the Government's undertaking that future appointments to the Chair of the Judicial Appointments Commission will be subject to pre-appointment scrutiny by the appropriate Parliamentary committee.**
164. A substantial majority of respondents to the Government's consultation were opposed to Parliament being given any role in the selection or making of judicial appointments, including particularly strong concerns about confirmation hearings.⁹⁸ Strong concerns were expressed about the risk of politicising the process, including by the Law Society, the Bar Council and Frances Gibb, although the Constitution Unit and Graham Allen MP were in favour of Parliamentary hearings for the most senior levels of the judiciary. (QQ 92, 111, Ev07, para 7.3, Ev17, para 13) Democratic Audit also drew attention to what it saw as the potential benefits of the model for post-appointment hearings that has been developed in Canada. Professor Hazell hoped that the idea might be reconsidered in future. (Ev04, para 60, Q 76)
165. **We note that giving Parliament a role in the appointment of individual judges remains controversial and is widely opposed, particularly the suggestion of "confirmation hearings". Any future re-assessment of Parliament's role should await a comprehensive review of the appointments process, as recommended in paragraph 201.**

Key Principles

166. Part 2 of Schedule 3 to the Draft Bill introduces statutory key principles for the JAC and others involved in the appointments process, namely to act independently and in a way that is "fair, transparent, efficient, flexible, proportionate and effective". The White Paper states that statutory principles should help to guide the bodies involved in the appointments process and provide a better basis on which to hold them to account.⁹⁹ In general, the evidence that we received recognised that the principles identified in the Draft Bill were the right ones. (QQ 99–100, Ev56) However there was strong opposition to placing the principles in legislation. The Lord Chief Justice stated:

"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." (Ev56)

⁹⁷ White Paper, para 132

⁹⁸ White Paper, para 133

⁹⁹ White Paper, para 116

167. The JAC was also opposed to putting the principles into statute. The JAC explained that it already published key principles in its Annual Report and introducing statutory principles that are vague or not clearly defined “could lead to confusion and increase the potential for challenge, possibly by unmeritorious application for judicial review”. (Ev52, paras 9–10) Jonathan Sumption QC, a JAC Commissioner, gave the example of a candidate attempting to rely upon the principle of flexibility to judicially review a decision to refuse a late application. He argued that the proposal “has the propensity to make us a great deal less efficient without achieving any compensating advantage.” (Q 300)
168. **We welcome the proposal to introduce key principles but are not convinced that they should be statutory. We encourage the Lord Chancellor to keep their impact under review in case the Judicial Appointments Commission is proved right in its argument that they are too broad to be meaningful or could lead to an unacceptable increase in speculative litigation.**

Judicial Appointments Commission Panel

169. Part 3 of Schedule 3 places a duty on the JAC to establish a panel representing potential candidates. Under the proposal, the panel would have power to make representations to the JAC, including an opportunity to make representations about the JAC’s draft annual report prior to its publication. The JAC would then be required to consider those recommendations.
170. The Law Society welcomed the proposal as an “additional check” in relation to diversity issues whilst also supporting a greater separation of powers: “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.” (QQ 90–96, 101, Ev42, para 17) Others, such as the Bar Council, stated that the JAC already achieved this objective through its various internal groups, including its Advisory Group and Diversity Forum. (Ev55, para 43) The JAC maintained that these groups were working well and provided a more flexible, as well as a less expensive, alternative to the proposed statutory panel. (Ev02, paras 16–17) The Lord Chief Justice deferred to the JAC’s view, while JUSTICE argued that a statutory panel would simply add an additional layer of bureaucracy. (Ev56, Ev45, para 22)
171. **We oppose the proposal to establish a statutory Judicial Appointments Commission panel. The Judicial Appointments Commission has already formed working groups which benefit from being more flexible and potentially less expensive.**

Non-Statutory Eligibility Criteria

172. Part 2 of Schedule 3 gives the Lord Chancellor the power to set non-statutory eligibility criteria concerning, for instance, the qualifications, experience and expertise that is required for a judicial post. The proposal is intended to remove uncertainty about who holds this power at the present time:

“At present, legislation is unclear on where ultimate responsibility for non-statutory eligibility lies and, as a result, currently the Lord Chancellor and the JAC jointly consider what is appropriate. There can,

therefore, be some degree of tension between the JAC's statutory requirement to have regard to the need to encourage diversity in the range of persons available for selection for appointments and the business need to ensure that specific posts are filled by those best able to do the job needed."¹⁰⁰

173. The JAC stated that it was best placed to determine the criteria in consultation with the Lord Chancellor and Lord Chief Justice, particularly given its statutory duty to promote diversity. (Q 279) The Law Society and Frances Gibb agreed, although they noted that in future the Lord Chancellor will be subject to the same statutory duty to promote diversity as the JAC. (QQ 93, 135, Ev42, paras 12–15 and 35)
174. The Lord Chief Justice told us that the JAC was not in an appropriate position to set eligibility criteria, which need to take into account the requirements of a particular court or location:

“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 ... 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.” (Ev56)

175. **We agree that the Lord Chancellor should be given the power to determine non-statutory eligibility criteria, although we strongly encourage the Lord Chancellor to seek the concurrence of the Judicial Appointments Commission and the Lord Chief Justice or his delegate in respect of each determination.**

Improving the process: reducing bureaucracy and delay

176. As noted above, there have been early problems with the judicial appointments process, including procedural inefficiencies and delays. A large majority of witnesses called for these problems to be addressed, although there was concern about using legislation to make further changes to a process that has been criticised for being “over-engineered” and “unduly cumbersome”. (Q 107)¹⁰¹ For instance, Frances Gibb stated: “If there are changes to be made ... they are procedural things, bureaucratic points that do not require Parliament to intervene”. (Q 107) Lord Falconer told us: “The one thing you do not want to do is to blunder in with more legislation.” (Q 180)

Medical checks

177. Part 6 of Schedule 3 makes a minor change to the appointments process by transferring responsibility for medical checks from the JAC to the Lord Chancellor, and introducing a statutory power to require candidates to

¹⁰⁰ *Governance of Britain: Judicial Appointments*, para 4.61

¹⁰¹ See also the Lord Chief Justice's Review of the Administration of Justice in the Courts, HC 448, March 2008, para 4.29.

undergo a medical assessment prior to selection. JUSTICE stated that medical checks should be the responsibility of the JAC. (Ev45, para 22) However, the majority of our witnesses, including the Lord Chief Justice and the JAC, were in favour of the proposal as it would speed up the process, despite ambiguity about whether it would require legislation. (Q 285)

178. **We welcome the transfer of responsibility for medical checks from the Judicial Appointments Commission to the Lord Chancellor, although we question whether this proposal would actually require legislation to be implemented.**

Vacancy Notices and Forecasting

179. A key criticism of the appointments process has been the inadequate forecasting of vacancies and either a failure of the Lord Chancellor to issue vacancy notices in a timely manner or the inability of the JAC to act before a notice is received. (Q 180) The White Paper states that consideration is being given to whether legislation is necessary to allow the JAC to take formal steps before a vacancy notice is received (paragraphs 120–121). Both the JAC and the Lord Chief Justice were encouraged by recent improvements to the forecasting process, in view of which the JAC no longer considered it necessary to pursue a legislative change. (Ev52, paras 39–41) Lord Falconer argued that these issues should be resolved without further legislation. (Q 180)
180. **We welcome the progress that has been made towards improving the forecasting of judicial vacancies and we encourage the Lord Chancellor to resolve the remaining procedural inefficiencies, as far as possible without introducing further legislation.**

Exclusion of appointments from the Schedule 14 list

181. Part 4 of Schedule 3 gives the Lord Chancellor a power to exclude nominated posts from the list of appointments that require a JAC selection pursuant to Schedule 14 to the 2005 Act. The exercise of proposed power is subject to the Lord Chancellor consulting the Lord Chief Justice and an Order being approved under the affirmative resolution procedure.
182. The White Paper states that the aim of the power is to allow vacancies to be filled by a deployment where this is more appropriate than a full selection procedure, suggesting that the proposal “emerged in discussions with the judiciary and the JAC”.¹⁰² However the Lord Chief Justice told us that the Government’s proposal failed to meet the need that has been identified, which is “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 Lord Chancellor, Lord Chief Justice and Senior President of Tribunal as appropriate.” (Ev56)
183. The JAC was also strongly opposed. They told us that “the whole approach of removing posts from Schedule 14 of the CRA is defective and open to abuse ... 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”. (Ev52, para 20) The House of Lords Delegated Powers and Regulatory Reform Committee was content with the

¹⁰² White Paper, para 138

proposal from a technical standpoint.¹⁰³ The House of Lords Constitution Committee, however, drew attention to the “Henry VIII” power in this Part (i.e. a power that allows Minister to change primary legislation by way of secondary legislation):

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. (Ev71, para 17)

184. **We oppose the proposal to give the Lord Chancellor a broad delegated power to remove posts from the statutory list of appointments requiring a selection by the Judicial Appointments Commission. We recommend that the proposal be amended to meet the more limited need that has been identified by the Lord Chief Justice, namely the flexible deployment of existing judges to the same level of appointment subject to the approval of the Lord Chancellor, the Lord Chief Justice and the Senior President of the Tribunal as appropriate.**

Deployments, authorisations and nominations

185. Part 8 of Schedule 3 removes the Lord Chief Justice’s requirement to consult or concur with the Lord Chancellor prior to deploying, authorising, nominating, or extending the service of specific judicial posts. It also creates a delegated power to achieve the same result in relation to other judicial posts in the future. The White Paper refers to general support for this proposal during the Government’s consultation (paragraph 119).
186. At present, the Lord Chief Justice is also required to gain the concurrence of the JAC prior to authorising a Circuit Judge or Recorder to sit as a Deputy High Court Judge.¹⁰⁴ The JAC suggested that the best way of balancing efficiency against transparency is to require it to approve the procedure that is operated by the Lord Chief Justice in relation to “each type of significant designation or nomination”. (Ev52, para 37) The Draft Bill implements this suggestion, but only in relation to Deputy High Court Judge authorisations.¹⁰⁵ This would exclude, for instance, a designation to become a Presiding Judge. (Ev52, para 36) The Law Society indicated that such important decisions should only be made following a full selection process carried out by the JAC. (Ev42, paras 28–30) Although the JAC accepted that decisions of this type can be of “real significance to the administration of justice” it did not accept that this was a necessary role, provided the process has been approved. (Ev52, para 37)
187. **In broad terms, we welcome the proposal to allow the Lord Chief Justice to deploy, authorise, nominate or extend the service of judicial office holders without being required to consult or gain the concurrence of the Lord Chancellor. However, we recommend that**

¹⁰³ Ev70, para 4

¹⁰⁴ Supreme Court Act 1981, section 9

¹⁰⁵ Schedule 3, para 45

the process used by the Lord Chief Justice to make “significant” authorisations and nominations be approved by the Judicial Appointments Commission in order to balance the need for efficiency against the importance of maintaining a transparent process. The Lord Chancellor and the Lord Chief Justice should work with the Judicial Appointments Commission and others to identify those kinds of authorisations and nominations that should be subject to this procedure.

Size, composition and re-appointment of the JAC

188. The White Paper invites the Committee to comment upon the possible reform of the size and composition of the JAC, particularly in light of the proposal to introduce a JAC panel (which we have rejected). There are currently 15 Commissioners including two professional members, five judicial members, six lay members, one tribunal member and one lay justice. Some witnesses supported change, including the Judicial Appointments and Conduct Ombudsman, who argued that the size of the JAC should be reduced and the composition altered to include members with business and public relations skills. (Ev35) Graham Allen MP argued that one or more Members of Parliament should be Commissioners. (Ev17) Other witnesses, such as the JAC and the Lord Chief Justice, favoured the *status quo* on grounds that it was working well and represented “a complex settlement of issues raised during lengthy Parliamentary debates just three years ago.” (Ev52, para 61) Both the Law Society and Bar Council specifically opposed any reduction in the number of professional Commissioners. (Q 101)
189. The White Paper also invites views on whether the process for reappointing Commissioners should be reviewed. At present each Commissioner can serve terms of up to five years’ duration with a maximum of 10 years service in total.¹⁰⁶ In the absence of a formal reappointment process, each Commissioner is required to reapply for their position at the end of their term. The Lord Chief Justice was in favour of making it easier to reappoint Commissioners. (Ev 56) The JAC agreed, subject to reviewing the “detail of the proposed procedures in relation to any decision of the Lord Chancellor not to reappoint a particular Commissioner.” (Ev52, para 67)
190. **We consider that it is too soon to undertake a general review of the size and composition of, and reappointment process applying to, the Judicial Appointments Commission. There does not appear to be any urgent need for change.**

Disclosure of information

191. The White Paper invites views on whether section 139 of the 2005 Act should be amended to make it clear that confidential information obtained as part of the selection process can be disclosed to the police for the purposes of investigating a crime. The proposal would bring the judicial appointments process into line with other organisations. It is supported by the JAC. (Ev52, para 70)

¹⁰⁶ Constitutional Reform Act 2005, Schedule 12, para 13

192. **We support the proposal to bring section 139 of the Constitutional Reform Act 2005 into line with other legislation permitting the disclosure of information for the purposes of investigating a crime.**

Diversity

193. During our inquiry the JAC explained the wide range of steps that it is taking to fulfil its statutory duty to promote diversity at all levels of the judiciary. (QQ 296–298) Professor Dame Hazel Genn also explained that the “culture” in some law firms was holding back some solicitors from applying for judicial posts. She stated that it would take a “sophisticated strategy” to resolve the issue, which the JAC was working towards. (Q 296) The Law Society accepted that the JAC was a young organisation and told us that it would keep a “very close eye” on the overall number of applications from solicitors in the “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”. (Q 95)
194. The JAC has stated that its efforts to widen the pool of candidates were “beginning to show results” but, disappointingly, figures released in April 2008 showed the percentage of judicial posts awarded to women or black and minority ethnic applicants was lower than in 2006.¹⁰⁷ This led a commentator, Marcel Berlins, to conclude:
- “... it may be too soon to reach the verdict that the JAC has failed to do its job on the diversity front. One year’s poor statistics is not enough. Yet the figures are disturbing enough to justify the minister of justice setting up some sort of mini-inquiry. A laudable reform appears to be going astray.”¹⁰⁸
195. Other recent reports suggest that the process for selecting a successor to the current Lord Chief Justice, Lord Phillips, has been viewed as “a done deal” with parts of it being “run like an old boys’ network”, contrary to the main purpose for establishing the JAC.¹⁰⁹
196. There has been some support for diversity quotas, including from a Senior Liaison Judge for Diversity, Mrs Justice Dobbs, who is reported as being concerned about “woefully slow” progress to date.¹¹⁰ However, this idea was generally opposed in evidence to our inquiry. For instance, Joshua Rozenberg told us: “[a]ny 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 ... and it is damaging to public confidence in the judiciary”. (Q 134) Lady Justice Hallett, one of the JAC’s Commissioners, has expressed concerns about the breadth of the “available pool” of candidates, but regarded positive discrimination to be patronising and stated

¹⁰⁷ JAC Annual Report 2007/08, HC 274, 10 July 2008, page 3, ‘Judicial diversity goes into reverse,’ The Guardian, 19 May 2008, available at <http://www.guardian.co.uk/uk/2008/may/19/law>

¹⁰⁸ ‘Judicial diversity goes into reverse,’ The Guardian, 19 May 2008, available at <http://www.guardian.co.uk/uk/2008/may/19/law>

¹⁰⁹ ‘Search for top judge is ‘a done deal’ The Observer, Jamie Doward, 6 July 2008 available at <http://www.guardian.co.uk/uk/2008/jul/06/law.justice>

¹¹⁰ ‘High Court judge wants to bring in ethnic quotas’, The Times, 18 October 2007, available at <http://business.timesonline.co.uk/tol/business/law/article2682096.ece>

that it would compromise the overriding principle of selection on merit.¹¹¹ The Bar Council maintained that the better approach was to hold the JAC to account for its progress. In this context, we note the Lord Chancellor's power to direct the JAC to deal with specific issues in its annual report. (Q 89)¹¹²

197. **We are disappointed by the lack of measurable progress towards increasing diversity at all levels of the judiciary, although we acknowledge the short period of time during which the Judicial Appointments Commission has been operating. We encourage the Judicial Appointments Commission and others, including the Lord Chancellor and the Lord Chief Justice, to continue exploring the best ways of addressing this important issue.**

Statutory salary protection

198. Clause 20 of the Draft Bill introduces statutory salary protection for tribunal judges to mirror the protection that is offered to judges in other courts. We have not received any evidence that opposes this proposal and it has been supported, for instance, by the Law Society. (Ev42, para 2)
199. **We welcome the proposal to give statutory salary protection to tribunal judges.**

Other changes

200. The JAC has called for a range of other statutory changes to be made to the appointments process that are not included in the Draft Bill. They include: the repeal of the statutory procedure for drawing up lists of candidates; the introduction of a statutory duty to require the Lord Chancellor adequately to resource the JAC; and the repeal of the Lord Chancellor's power to issue guidance. (Ev52, paras 71 to 81) **Some of the proposals received support during our inquiry and we hope that the Government will keep them under review.**

Conclusion

201. **Our overall view is that most of the proposals to reform the judicial appointments process are premature.** We comment upon whether the proposals should be omitted from the Draft Bill at paragraph 378 below. **Once the Judicial Appointments Commission is fully established we believe it would benefit from a comprehensive review by the Government and either or both of the House of Commons Justice Committee and the House of Lords Constitution Committee. This review should precede any legislative reform of the appointments process.**

¹¹¹ 'Why so few women in the High Court?', The Daily Telegraph, 15 May 2008, available at <http://www.telegraph.co.uk/news/newstoppers/lawreports/rozenberg/1577897/Why-so-few-women-in-the-High-Court.html>

¹¹² Constitutional Reform Act 2005, Schedule 12, para 32

CHAPTER 5: RATIFICATION OF TREATIES

Background

202. In *The Governance of Britain* Green Paper the Government stated that the procedure for allowing Parliament to scrutinise treaties, known as the Ponsonby Rule, should be formalised and placed on a statutory footing. The key features of the Ponsonby Rule (established by Arthur Ponsonby, Parliamentary Under-Secretary for Foreign Affairs, in 1924) are the publication of a treaty as a Command Paper and the laying of the Command Paper before both Houses of Parliament for at least 21 sitting days before ratification. Coupled with this is a Government undertaking to provide time for a debate should one be requested.
203. A number of reforms to the process have taken place in recent years, including the provision of explanatory memoranda alongside each treaty, sending each treaty subject to ratification to the relevant Commons departmental select committee (following a recommendation by the House of Commons Procedure Committee in 2000¹¹³), and, if a treaty is deemed to raise significant human rights issues, to the Joint Committee on Human Rights. Other reforms have also been recommended to the process. In 2000, the Wakeham Commission on reform of the House of Lords suggested that a scrutiny committee on treaties be established.¹¹⁴ In 2004, the House of Commons Public Administration Select Committee (PASC) called for a new statutory provision in relation to the ratification of treaties, whilst Lord Lester of Herne Hill has tabled Private Members' Bills seeking to set conditions for the ratification of treaties.¹¹⁵ Whilst we were undertaking our inquiry, PASC published a follow-up report on the Government's proposals, the conclusions of which we refer to below.¹¹⁶
204. The Government published a consultation document on this issue in October 2007.¹¹⁷ Their preferred proposals for reform are contained in the Draft Bill and accompanying White Paper. In brief, the Government propose:
- **The system for Parliamentary approval:** The Ponsonby Rule should be placed on a statutory footing, with the 21 day sitting period enshrined in legislation, and the effects of a negative vote in the Commons and the Lords set out in statute for the first time. The Draft Bill also provides a mechanism for the re-presentation of a treaty that has been subject to a negative vote.
 - **Exceptions and exceptional circumstances:** The Draft Bill sets out a) an exceptional circumstances procedure whereby the requirement for

¹¹³ Procedure Committee 2nd Report (1999–2000), *Parliamentary Scrutiny of Treaties*, HC 210

¹¹⁴ *A House for the Future: Royal Commission on the Reform of the House of Lords*, January 2000 (Cm 4534)

¹¹⁵ 2003: *Executive Powers and Civil Service Bill [HL]*; 2006: *Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill [HL]*

¹¹⁶ Public Administration Committee, 10th report (2007–08), *Constitutional Renewal: Draft Bill and White Paper* (HC 499)

¹¹⁷ Ministry of Justice, *The Governance of Britain—War powers and treaties: limiting Executive powers*, October 2007, Cm 7239

Parliamentary approval can be forgone in certain circumstances, and b) statutory exceptions to the Ponsonby Rule.

- **Definitions** of “treaty” and “ratification”.
- **Parliamentary scrutiny:** The Government make some suggestions as to how the system of Parliamentary scrutiny might be improved.

Putting the Ponsonby Rule on a statutory footing

205. The Lord Chancellor told us that the Government’s proposals were significant, because “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”. He therefore argued that it was essential to demonstrate that MPs “will not only have a say but they will have a decisive say ... over treaties”. (Q 720) Some witnesses agreed with the proposal to place the Ponsonby Rule on a statutory basis, including Sir Michael Wood, former Foreign and Commonwealth Office Legal Adviser, JUSTICE, and Peter Riddell, Chief Political Commentator, *The Times*, and Chairman, Hansard Society. (Ev18, para 2, Ev45, para 23, QQ 4, 9) The Bar Council argued that it would be a “positive and beneficial reform”. (Ev55, para 47) Professor Eileen Denza, Visiting Professor of Law, University College London, asserted 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.” (Ev51, para 1)
206. There was little outright opposition to the proposal to place the Ponsonby Rule on a statutory footing *per se*. However, Sir Franklin Berman, a former Foreign and Commonwealth Office Legal Adviser, argued that since there was no reason to fear that governments would stop complying with the Ponsonby Rule, “no useful purpose would be served by legislating”, and “[i]t would be a waste, both of Parliamentary time and of opportunity, to legislate to such minimal effect.” He was also concerned that statutory intervention could introduce a “harmful degree of formalism”, and could “raise the spectre of future attempts by sectional interests to secure judicial control”. (Ev34, paras 4–6) The Clerk of the House of Commons and the Clerk of the Parliaments were concerned that a proposal to place Parliamentary procedure in statute risked “blurring the constitutional separation between the courts and Parliament”. The Clerks noted that there were “strong arguments of principle ... 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”. (Ev65, paras 24–25) It is worth noting in this context that Mr Ponsonby himself was sceptical about the statutory route:

“legislation [is] a clumsy and undesirable method of accomplishing our purpose ... 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.”¹¹⁸

207. A number of others expressed ambivalence about the effectiveness of such a reform. Democratic Audit was of the opinion that, while a statutory basis for treaty making was desirable, the proposed arrangements were inadequate. (Ev04, para 29) Unlock Democracy were disappointed at the mechanism the Government had chosen and the accountability that those proposals embodied. (Ev58) PASC argued that “[t]his part of the draft bill ... establishes a very weak form of Parliamentary safeguard”.¹¹⁹ All of these witnesses were of the opinion that the Government was focussing on the wrong issue, and instead should focus on ways of improving Parliamentary scrutiny of treaties. We address some of their concerns in paragraphs 233 to 238 below.
208. **We agree that the Government’s proposal to place the Ponsonby Rule on a statutory footing is a “positive and beneficial” reform.**

The detail of the resolution

The 21 day sitting period for laying treaties before Parliament

209. The Government have proposed to retain the 21 sitting day laying period, noting that the majority of respondents to its consultation supported—or did not express opposition to—21 sitting days as the standard laying period.¹²⁰ This provision is set out in clause 21 of the Draft Bill. Sir Michael Wood argued that 21 days “have proved to be satisfactory in practice, and seem to strike the right balance between Parliament and the Executive in this matter.” (Ev18, para 8) Professor Denza agreed that the history of the Ponsonby Rule suggested there would be no great advantage in entitling Parliament to request an extension of the 21 days. (Ev51, para 1)
210. Some other witnesses disagreed. The Bar Council wondered “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 ... 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.” (Ev55, para 49) Witnesses including Democratic Audit and M J Bowman, Director of the University of Nottingham Treaty Centre, argued along similar lines. (Ev04, para 33, Ev41) M J Bowman also suggested that, in cases of unusual complexity, 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”. (Ev41)
211. PASC thought that “21 days seems like very little time for Parliamentary scrutiny and a possible vote”.¹²¹ The Clerk of the House of Commons and the Clerk of the Parliaments noted that scrutiny of treaties in recent years had generally been undertaken through the conducting of inquiries and

¹¹⁸ HC Deb (1924) 171, c2002–03

¹¹⁹ *Constitutional Renewal: Draft Bill and White Paper*, op cit., para 84

¹²⁰ Ministry of Justice, *The Governance of Britain—Constitutional Renewal*, March 2008, Cm7342-I, paras 152, 157

¹²¹ *Constitutional Renewal: Draft Bill and White Paper*, op cit., para 87

publishing of reports by select committees. They raised the concern that, in the light of the “agreed role of select committees in ensuring Parliamentary scrutiny”, 21 days might be insufficient. They also noted a previous commitment by Ministers that, where a committee indicated it would need more than 21 days to conduct an inquiry, the Foreign and Commonwealth Office (FCO) would be willing to show flexibility in timing. The Clerks questioned whether it was 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.” (Ev65, paras 31–33)

212. **We conclude that, whilst a 21 day sitting period will be sufficient time for Parliamentary scrutiny of treaties in the vast majority of cases, there is a need for a mechanism to be set out in statute to increase this period in exceptional circumstances. The new Joint Committee on Treaties, which we recommend in paragraph 238, would have an important role to play in such circumstances.**

Parliamentary control: the effect of negative votes in the Commons and Lords

213. Clause 21 of the Draft Bill proposes that the Commons should have the power to prevent a treaty from being ratified for so long as it continues to oppose it. A negative vote in the House of Lords would only be able to delay the ratification of a treaty, if the Government still wished to proceed and the Commons was not opposed. The Lord Chancellor told us that this was “the fundamental, substantive difference” that the Government’s proposals would bring, because at present “even were Parliament under the Ponsonby Rule to vote against a treaty, it could still be ratified. I believe that to be unacceptable.” (QQ 711, 750) Other witnesses, such as Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow, and Democratic Audit, agreed that this was a positive development since the Ponsonby Rule would be strengthened, by being given legal effect. (Ev01, para 9, Ev04, para 30)
214. The Bar Council argued that “the giving of legal effect to a negative vote would be a principled step in accord with Parliament’s democratic role and authority.” (Ev55, para 47) Others welcomed the differential effect of negative votes in the Commons as opposed to the Lords. Elizabeth Wilmhurst, a former Foreign and Commonwealth Office Deputy Legal Adviser, argued that the suggested provision for the House of Lords was “quite elegant” in that it gave the Lords “a real voice.” (Q 22) MJ Bowman thought that “a reasonable balance” of respective powers had been struck, so long as the current composition of the Lords continued. (Ev41) Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University, also noted that this part of the Draft Bill had been drafted in the context of a partially reformed House of Lords, and that it might be necessary to give a fully reformed House greater powers. (Ev36, para 12)
215. Some witnesses were concerned that the drafting of these provisions was unclear. M J Bowman argued that the drafting of clause 21(5)(b), on the effect of a vote in the Commons and the Lords, “seems flaccid, inelegant and open to possible misinterpretation”. (Ev41, B) Professor Robert Blackburn, Professor of Constitutional Law, King’s College London, also told PASC that the drafting of clause 21(5) was a “bit obtuse; you have to read it two or

three times to actually get any meaning out of it.”¹²² Anthony Aust, former Foreign and Commonwealth Office Deputy Legal Adviser, made a similar point. (Ev16, para 8)

216. Although there was broad support for the respective roles of the Commons and Lords, there were some objections to the balance of power between Parliament and Government implied in the proposals. PASC pointed out that Parliament would have the opportunity to object “only if the Government decides to provide the opportunity for Parliament to object”, since it “would be for Members to demand a vote, and for the Government, if willing, to find the opportunity for this vote to take place.”¹²³ Mark Ryan suggested that the negative resolution procedure proposed in the Bill should be replaced by an affirmative 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.” (Ev36, para 15, see also Ev09, para 14)
217. **We agree with the Government’s proposals in terms of the relative effects of a negative vote in the Commons and the Lords, as set out in clause 21 of the Draft Bill, at least while the Lords retains its current composition. We note concerns in evidence about the confusing drafting of this clause, and therefore recommend that the Government clarify and simplify the drafting of this part of the Bill.**

Government’s ability to re-present a treaty

218. The *Constitutional Renewal* White Paper proposes that the Government should have the right to re-present a treaty that has been subject to a negative vote in either House. If it wished to do so, the Government would have to lay an explanatory statement before both Houses and re-start the 21 day sitting period from the beginning. As noted above, the Commons would have the power to continue to block a treaty, whilst a treaty subject to a negative vote in the Lords could be passed so long as the Government had laid an explanatory memorandum explaining why it wished to proceed.¹²⁴ A number of witnesses were in broad agreement with the Government’s approach. Elizabeth Wilmshurst said that “[o]ne could think of all sorts of reasons why the Government should be able to submit and resubmit.” (Q 21) Professor Tomkins did not “have a problem with ... endless dialogue or discourse” between Parliament and the Executive, noting that either side was only likely to be “bloody minded” if there was “reasonable ground for behaving in this way ... if there is a genuine disagreement, let that disagreement be had.” (Q 21) M J Bowman agreed that such a power was important, and that the Commons’ right to delay treaties indefinitely should therefore be conditional on the Government’s right to re-introduce certain documents. (Ev41, A)
219. Others were less convinced. Peter Riddell thought that a provision whereby a treaty could be submitted no more than once in each session of Parliament might be a sensible way to proceed. (Q 9) Mark Ryan argued that the proposal raised “an issue of constitutionalism and whether the executive should just simply accept a decision of the democratically elected House of

¹²² *ibid.*, Q 49

¹²³ *ibid.*, paragraphs 82, 84

¹²⁴ *The Governance of Britain—Constitutional Renewal*, *op cit.*, paragraph 158

Commons that a treaty should not be ratified.” (Ev36, para 13) PASC thought that this was “constitutionally dangerous territory”, pointing out that the Commons has “a long-standing rule that the same question should not be put to it twice in the same Parliamentary session”. PASC therefore concluded that in the event of a negative vote in the Commons, “the Secretary of State should respect this view, and the House should not be asked to consider the same question again before the next Parliamentary session. Clause 21 of the draft bill should be amended accordingly.”¹²⁵

220. **We agree with the Government that the Secretary of State should be able to re-submit for Parliamentary approval a treaty which either House has resolved should not be ratified.**

Exceptions and exceptional circumstances

Alternative procedures in exceptional circumstances

221. Clause 22 of the Draft Bill makes provision for alternative procedures for consulting and informing Parliament so as to provide flexibility when needed in exceptional circumstances. Such instances might include when a treaty needs to be ratified during a recess, or when “delay would be detrimental to the national interest.” In such cases, they would “inform and consult Parliament by the most expeditious and practical means available”.¹²⁶ Sir Michael Wood agreed that 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.” (Ev18, p4) Professor Denza agreed, noting that past occasions of exceptional circumstances “have usually been accepted by Parliament without challenge.” She argued that the safeguards that the Government proposed “seem to be adequate and sufficiently flexible for the purpose.” (Ev51, para 1)
222. A number of other witnesses expressed concern at the proposal, on various grounds: that it gave Government too much control over when the “exceptional” procedure should be followed; that the drafting was vague; that the safeguards proposed in respect of the procedure were not included in the Bill itself; and that the definition and application of “exceptional” circumstances could be justiciable.
223. PASC argued that it was not right for the Government alone to decide when Parliamentary ratification could be bypassed, arguing that “[a] safeguard that can be ignored at will is no safeguard at all.” PASC therefore recommended that the Draft Bill should either define the circumstances in which a treaty might need to be ratified in such a manner, or make it for Parliament to waive the requirement for its approval within 21 days.¹²⁷ Graham Allen MP, Professor Tomkins, Mark Ryan and M J Bowman also argued that the circumstances in which Ministers could bypass the treaty ratification procedure were too vaguely drawn. (Ev17, para 11, Ev01, para 10; Ev36, para 14; Ev41, B) JUSTICE suggested that clause 22(1) could be tightened by adding the words “by reason of urgency”. (Ev45, para 24) Democratic

¹²⁵ *Constitutional Renewal: Draft Bill and White Paper*, op cit., paras 88–9

¹²⁶ *The Governance of Britain—Constitutional Renewal*, op cit., para 159

¹²⁷ *Constitutional Renewal: Draft Bill and White Paper*, op cit., para 87

Audit also had reservations that the power to bypass Parliamentary ratification was based on the Secretary of State's own judgment, and felt the proposal should be deleted altogether. Failing that, "as a minimum" there should be more detail in the Draft Bill about the circumstances in which the Parliamentary procedure could be set aside, "and the alternative measures that will ensure accountability." (Ev04, para 31)

224. The Bar Council expressed concern that not all of the safeguards mentioned in the White Paper were contained in the Draft Bill, in particular that there was no reference to mechanisms to consult Parliament on alternative more rapid means. It made a number of suggestions about how this power could more adequately be controlled, including a mandatory requirement on the Secretary of State to consider consulting Parliament on a different, shorter timetable; an oral or written Ministerial statement explaining the exceptional circumstances; and taking steps to consult Parliament on a faster basis and consult Opposition leaders and others as appropriate during a recess. (Ev55, paras 50–51)
225. The Clerk of the House of Commons and the Clerk of the Parliaments noted that, because the Draft Bill would allow the Government "exceptionally" to ratify a treaty without fulfilling the statutory conditions, and no definition of "exceptionally" was given, the definition and its application could "become a matter for the courts as well as for Parliament." (Ev65, para 34)
226. **We agree that, in exceptional circumstances, there should be a means by which the Government can ratify a treaty without it being subject to the Parliamentary approval process. However, it would require full justification. If the power under clause 22 is invoked, the requirement for a statement laid before Parliament under clause 22(3)(b) must include a requirement for detailed information on the nature of the exceptional circumstances. The Government should also indicate in its response to our report the kind of circumstances—such as extreme urgency—in which it would consider ratification under clause 22. Subject to these considerations, we are content with the proposed drafting of clause 22.**

Statutory exceptions to the Ponsonby Rule

227. Clause 23 of the Draft Bill sets out the types of treaties that will be excepted from the provisions of clause 21, principally certain European Union and taxation treaties, since they are subject to separate Parliamentary scrutiny mechanisms. The *Constitutional Renewal* White Paper states that the Government are continuing to investigate whether any other categories should be excluded from the requirements of the Bill, and if any are identified, they will be proposed in the form of an additional clause on the face of the Bill.¹²⁸ We received few comments about the specific proposals currently in the Draft Bill. PASC concluded that "[t]hese exemptions give us no cause for concern."¹²⁹ However, Sir Michael Wood argued that clause 23 should include a power to add further exceptions: "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

¹²⁸ *The Governance of Britain—Constitutional Renewal*, op cit., paras 161–3

¹²⁹ *Constitutional Renewal: Draft Bill and White Paper*, op cit., para 83

statutory instrument requiring an affirmative resolution of each House.” (Ev18, para 7)

228. **We agree that the present exceptions to the Ponsonby Rule should be outlined in statute, as proposed in clause 23. We further recommend that the Government continue to investigate whether any other categories of treaties should be excluded in a similar manner, with a view to publishing a definitive list by the time of the Bill’s introduction.**

Definitions

229. Clause 24 defines “treaty” as an agreement in writing between States or between States and international organisations, and binding under international law. “Ratification” means an “act” which establishes as a matter of international law the UK’s consent to be bound by that treaty. An “act” is defined as the deposit or delivery of an instrument of ratification, accession, approval or acceptance, or the deposit or delivery of a notification of completion of domestic procedures.
230. We received little evidence on the suitability of these definitions *per se*, although Anthony Aust did question why the clause describes a treaty as “*binding under international law*”, rather than “*governed by international law*” as set out in the Vienna Conventions on the Law of Treaties. (Ev16, para 9) There was a substantial body of evidence suggesting that the documents currently covered by the Ponsonby Rule (and hence by the proposals in the Draft Bill) might be too narrowly defined. The House of Commons Foreign Affairs Committee told us 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.” (Ev75, para 2) Peter Riddell agreed, highlighting documents such as a recent US/UK memorandum of understanding on missile defence, or an exchange of letters between the Prime Minister and the American President on Trident in 2006, which were “far more important than 90 per cent of treaties going through”. (Q 9) Graham Allen MP made a similar point. (Ev17, para 11) Mr Ponsonby himself, when announcing the Government’s new approach in 1924, stated that treaties “do not cover the whole ground, and His Majesty’s Government desire that Parliament should also exercise supervision over agreements, commitments and undertakings by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist”.¹³⁰
231. The Lord Chancellor told the Committee that scrutiny of such documents “would have to be done on an *ad hoc* basis ... What, however, we have to deal with here is the legal status of those 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 a memorandum were disclosable, albeit in confidence, it might be examined by a Select Committee”. (Q 752)

¹³⁰ House of Commons Deb, Col 2004–05, 1 April 1924

232. **Whilst we accept the Government’s proposed definitions of treaties covered by the Ponsonby Rule and the proposed statutory process, we also recognise the case for enhanced scrutiny of other treaty-like documents, such as memoranda of understanding. We therefore recommend that Government and Parliament investigate ways of enhancing the scrutiny of such documents. The Joint Committee on Treaties, which we propose in paragraph 238, would have an important role to play in this process.**

Parliamentary scrutiny

233. Whilst some witnesses, such as Sir Michael Wood (Ev18) and Professor Steven Haines, Professor of Strategy and the Law of Military Operations, Royal Holloway College, University of London, (Q 19) were relatively content with the system of Parliamentary scrutiny, a number of other witnesses expressed their concern that the present system was ineffective. Democratic Audit was one of several witnesses to point out that “the Ponsonby Rule does not in practice lead to debates, let alone votes, being held on treaties.” Indeed, it pointed out that the Government had admitted as much in its consultation paper. Therefore the proposals “would have no practical impact, since ... 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.” (Ev04, paras 29, 32, see also Q 19)
234. In this context, a number of witnesses attached importance to the need to reform Parliamentary procedure and practice. For instance, the Bar Council asserted that “it is important that each treaty put before Parliament is given scrutiny and that institutional mechanisms are in place to ensure this is done.” (Ev55, para 52) However, M J Bowman sounded a note of caution, suggesting that it would be necessary for Parliament to develop expertise in the international (as well as the national) dimension of treaty-making as a prerequisite to any enhanced role. (Ev41) In addition, three specific proposals emerged.
235. First, a new sifting committee on treaties. Democratic Audit suggested such a committee could liaise with relevant select committees to decide if a Commons vote was required, with the power to request a debate or vote, or an extension of the 21 day sitting period, if required. (Ev04, para 33) Unlock Democracy made a similar suggestion, (Ev58) whilst Elizabeth Wilmshurst and Graham Allen MP were also sympathetic to this idea. (Q 19, Ev17, para 11) The Foreign Affairs Committee recommended that this idea be examined, in particular because of what it perceived to be a current lack of capacity within Parliament to scrutinise individual treaties. (Ev75, para 3) Professor Robert Hazell, Director, Constitution Unit, University College London, was also in favour of such a sifting committee. He argued that select committees had not on the whole risen to the challenge of treaty scrutiny, with the “shining exception” of the Joint Committee on Human Rights. He also argued that this “would be a classic kind of Lords function, following the example of the Committee on the Merits of Statutory Instruments.” (Q 87) The Constitution Unit also suggested that a joint committee was an alternative option, as has been established in Australia. (Ev07, para 9.2) However, Professor Denza, whilst acknowledging the need for more systematic scrutiny, thought that this should be undertaken by the sub-committee of the Foreign Affairs Committee, rather than a new

committee.¹³¹ (Ev51, para 2) The Lord Chancellor thought “very strongly that the work of the Commons and the work of the Lords should complement each other.” (QQ 753–754)

236. Second, an improved mechanism for the scrutiny of treaties prior to signature. Democratic Audit and the One World Trust suggested a “soft mandating” mechanism to give Parliament the opportunity to discuss the Government’s position in treaty negotiations, as well as wider international organisations. (Ev04, paras 34–35, Ev03) Unlock Democracy made suggestions along the “soft mandating” line, citing in particular the practice of the Danish Parliament. (Ev58) The Foreign Affairs Committee also suggested that some mechanism for improved scrutiny of negotiations before signing might be appropriate. (Ev75, para 2) M J Bowman was sympathetic to the idea, suggesting that “the mechanics of such a system” could be explored through a trial or pilot study. (Ev41) However, Sir Michael Wood argued that such scrutiny would “not be practical” in many cases, since negotiations are often conducted behind closed doors and “the very fact that negotiations are taking place at all is a matter of considerable sensitivity”. He added that it might not be possible for the Government to reveal its negotiating hand without damaging consequences. (Ev18, p4)
237. Third, a new mechanism for requesting a Parliamentary debate or vote. The Foreign Affairs Committee noted that “it is not proposed that decisions on ratification will automatically be put before Parliament.” (Ev75, para 1) The Committee also noted that if either House was invited to take a decision, the Draft Bill does not specify the procedures which would be followed. Unlock Democracy suggested that an Early Day Motion (EDM) signed by 10% of MPs could trigger a debate. (Ev58) The One World Trust argued that the current tacit understanding that a request for a debate through the “usual channels” would be granted by government should be replaced by a formal requirement for a debate or vote if so requested, for instance through a committee request, the Liaison Committee or a broadly supported EDM. (Ev03) A number of witnesses thought that a new treaties committee should have a role in requesting a debate. The Clerk of the House of Commons and the Clerk of the Parliaments argued that select committees could be given the power, through standing orders, to ensure that the House debated treaties to whose ratification they were opposed. This could be achieved via a “filter” by the Liaison Committee. The Clerks also noted that, “[b]ecause 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.” (Ev65, para 30) The Lord Chancellor accepted that “the arrangements for getting a vote have been left at large, basically for the usual channels and for people to make a noise”, but “the anxiety of business managers ... is that if you lay too much down in a Bill in terms of procedure, the discretion of business managers may be limited.” He suggested that one solution might be to “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”. (QQ 750–751)
238. **We have noted the widespread view in evidence that Parliament and its committees do not make effective use of existing scrutiny mechanisms. This may simply be due to the many competing**

¹³¹ Under Standing Order No 152(3), the Foreign Affairs Committee has power to appoint a sub-committee.

demands on committees' time and resources. It would be disappointing if for this reason the Government's proposals to give Parliament a statutory role in the approval of treaties had no effect in practice. We therefore recommend that a new Joint Committee on Treaties be established. This Committee should be large enough to include a range of expertise from both Houses, but small enough to operate efficiently and effectively. The tasks of the Joint Committee could include sifting treaties to establish their significance; assessing whether an extension to the 21 day sitting period is required in respect of a particular treaty (as recommended in paragraph 212); and scrutinising (or considering new ways of scrutinising) other treaty-like documents (as recommended in paragraph 232). We envisage this Committee would support existing select committees in the scrutiny of treaties and would work to ensure the current gaps in scrutiny are filled.

CHAPTER 6: THE CIVIL SERVICE

Background

239. It is now 154 years since Northcote and Trevelyan called for a Civil Service Act of “a few clauses” to set in legislation the framework for the modern civil service. But the civil service continues to be managed under the royal prerogative. Much happened in the intervening years—in Parliament and outside—before the publication of the Constitutional Renewal Draft Bill and White Paper in March 2008. Table 1 provides a chronology of the major reports and events.

TABLE 1
Chronology of relevant reports and events

1854	Northcote-Trevelyan Report on <i>The Organisation of the Permanent Civil Service</i>
1928	Treasury circular setting out the general principles governing the obligations and standards of conduct of civil servants
December 1987	Memorandum of Guidance on the Duties and Responsibilities of Civil Servants in relation to Ministers, issued by the Head of the Civil Service
November 1994	Treasury and Civil Service Select Committee report on <i>The Role of the Civil Service</i> , which called for a deliberately limited piece of legislation ¹³²
January 1996	Civil Service Code introduced, setting out responsibilities and duties of civil servants
April 2003	Committee on Standards in Public Life report <i>Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service</i> ¹³³
December 2003	Lord Lester of Herne Hill introduces private member’s bill <i>Executive Powers and Civil Service Bill</i> ¹³⁴
January 2004	House of Commons Public Administration Select Committee (PASC) report <i>A Draft Civil Service Bill: Completing the Reform</i> ¹³⁵
November 2004	Government White Paper <i>A Draft Civil Service Bill: A Consultation Document</i> ¹³⁶ , which the Lord Chancellor told the House of Lords Constitution Committee would form the template for the current legislation ¹³⁷
January 2006	Lord Lester of Herne Hill introduces private member’s bill <i>Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill</i>
June 2007	PASC report on <i>Machinery of Government Changes</i> ¹³⁸

¹³² Fifth Report of Session 1993–94, paragraphs 116 and 117

¹³³ Ninth Report of the Committee on Standards in Public Life, Cm 5775

¹³⁴ Subsequently amended to become the *Civil Service (No 2) Bill*

¹³⁵ First Report of Session 2003–04, HC 128-I

¹³⁶ Cm 6373

¹³⁷ House of Lords Constitution Committee, Meeting with the Lord Chancellor, 23 October 2007, Q 47

¹³⁸ Seventh Report of 2006–07, HC 672

June 2007	PASC report on <i>The Business Appointment Rules</i> ¹³⁹
July 2007	Government Green Paper <i>The Governance of Britain</i> ¹⁴⁰ which committed the Government to bring forward “concise and focused” legislation on the civil service
March 2008	Government <i>Constitutional Renewal</i> White Paper and Draft Bill ¹⁴¹
June 2008	PASC report <i>Constitutional Renewal: Draft Bill and White Paper</i> ¹⁴²

240. In 17 clauses, Part 5 of the Draft Bill puts a statutory framework around the civil service setting out its role, governance and values; puts the Civil Service Commissioners on a statutory footing; and sets out the historic principle of appointment on merit on the basis of fair and open competition. Overall, the civil service provisions in the Draft Bill have received overwhelming support. Like our witnesses, **we welcome the Government’s intention to put the civil service on a statutory footing.** In this Chapter we comment in more detail on the individual clauses and recommend some improvements we would like to see made to the Draft Bill.

Definitions (clauses 25 and 41)

241. There is no outright definition of the civil service in the Draft Bill. Clause 25 states that Part 5 applies to “the civil service of the state” and lists those parts that are excluded from this general definition: the security and intelligence services (covered by a separate statutory framework); Government Communications Headquarters (GCHQ); and the Northern Ireland Civil and Court services. This approach contrasts with the Government’s 2004 Draft Bill in two ways. First, it takes a general approach to defining the civil service, whereas Schedule 1 to the Government’s 2004 draft bill set out each part of the civil service to which the Draft Bill applied, as well as those parts excluded from it. Second, it excludes GCHQ, which was included in the 2004 draft bill. We examine each in turn.

General approach to defining the civil service

242. We heard a number of concerns about the Government’s general approach. The First Division Association (FDA) argued that the Draft Bill “lacks clarity” about who is a civil servant. Both they, the Public and Commercial Services Union (PCS) and Prospect called for clarification of the terms ‘Servant of the Crown’, ‘Crown Servant’ and ‘Crown Employee’—all used in the Draft Bill. (Ev21, para 10, Ev25, para 21) The Better Government Initiative questioned whether the lack of a precise definition in the Draft Bill was “because the meaning of the [civil service] 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.” (Ev19) The unions also raised concerns that the Draft Bill did not “appear to guarantee the

¹³⁹ Sixth Report of 2006–07, HC 651

¹⁴⁰ The Governance of Britain, Cm 7170, July 2007

¹⁴¹ Cm 7342-I and II

¹⁴² *Constitutional Renewal: Draft Bill and White Paper*, House of Commons Public Administration Select Committee, Tenth Report 2007–08, HC 499

employment status of civil servants under law”. PCS argued that the Draft Bill should be amended “to provide that those civil servants that fall within Part 5 should be deemed to have contract of employment within the meaning of ... the Employment Rights Act 1996.” (Ev25, paras 17 and 21. See also Ev21, para 7)

243. We also heard evidence supporting the Government’s approach. Sir Christopher Kelly, Chairman of the Committee on Standards in Public Life, told us that the approach “puts more focus on the exceptions”, making them identifiable. (Q 408) The Cabinet Secretary was content with the clarity of definitions and said 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”. (Q 552)
244. Defining who is a civil servant is clearly not easy and has been a matter of debate for some time. We note that the PASC had “no objection to either way of defining the civil service, so long as it is clear which public servants are civil servants and which are not.” **Whilst we support the Government’s approach to the definition of the civil service in the Draft Bill, we note concerns about the ambiguity of who is and who is not a civil servant. Before the Bill is introduced, the Government should provide greater clarity about who is a civil servant and address the unions’ concerns about employment status.**

Exclusion of GCHQ

245. GCHQ is excluded from the definition of the civil service by clause 25(1)(c) of the Draft Bill. The consequence of this exclusion is that two statutory provisions would not apply to GCHQ: access to the Civil Service Commissioners; and the requirement to recruit staff on merit on the basis of fair and open competition.
246. Some witnesses were unhappy that GCHQ was excluded. PCS argued that the exclusion “may render the accountability process incomplete”. (Ev25, para 4) The Committee on Standards in Public Life was “not clear” why GCHQ was now excluded. (Ev20, para 6. See also Ev50, para 5) The First Civil Service Commissioner was concerned “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”. (Q 559) However, we also heard significant support for the Government’s treatment of GCHQ. The Cabinet Secretary, two former Cabinet Secretaries, Lord Wilson of Dinton and Lord Turnbull, Sir Richard Mottram and Professor Peter Hennessy, Attlee Professor of Contemporary British History, Queen Mary, University of London, supported treating GCHQ in the same way as the Security and Intelligence Agencies. (Q 407, 429, 431, 552)
247. As noted in paragraph 245, the Draft Bill contains no requirement for staff at GCHQ to be recruited on merit. Lord Wilson, Lord Turnbull and Sir Richard Mottram agreed that there should be a non-statutory obligation on Agencies to recruit on merit. (Q 407, 429, 431, 552) Sir Christopher Kelly supported this and agreed “the presumption is that is where you start and then you have to justify the exceptions.” (Q 408) The Cabinet Secretary pointed out the practical limitation of an absolute requirement for appointment on merit: “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”. (Q 552)

248. The Civil Service Commissioners were “not persuaded” of the decision not to include GCHQ in the statutory process of appeals to the Commissioners, a facility which is currently open to them. (Ev50, para 5) However, Lord Turnbull argued that GCHQ needed a separate confidential complaints procedure, “because there are a number of differences in the way those services operate.” (QQ 429–431) Sir Richard Mottram argued it would be “undesirable” for legislation to place a statutory duty on GCHQ to open up its personnel files to scrutiny of the Commissioners. (Q 407)
249. **We agree with the Government’s approach to treating GCHQ in the same way as the other Security and Intelligence Agencies by excluding them from the definition of the civil service in the Draft Bill. But in taking this approach, the Government must ensure that GCHQ staff are given the same right of access to an independent complaints mechanism as the other Agencies. We also seek an assurance from the Government that, as a general rule, staff at GCHQ will be recruited on merit.**

The Civil Service Commission (clause 26 and Schedule 4)

250. The Civil Service Commission is currently constituted on the basis of a prerogative Order in Council. Clause 26 of the Draft Bill puts the Civil Service Commission on a statutory footing as a non-departmental public body (NDPB). Schedule 4 sets out the main functions and terms of appointment of the Commissioners. We explore three issues arising from these provisions.

Financial and operational independence of the Commission

251. Part 2 of Schedule 4 sets out how the Commission will operate, including provision in paragraph 16(2) that the Minister, in providing funds to the Commission, “may impose conditions about how some or all of the money is to be used”. PASC expressed concern that it was “not appropriate for the Executive to have the power to control not only how much money is made available to the Commission, but also how that money should be spent”. PASC invited us to consider further how complete financial and operational independence could be achieved.¹⁴³ The Civil Service Commissioners told us that this issue of independence was “crucial to how the Commission will in future be perceived”. (Ev50, para 20)
252. Several witnesses argued that legislation in itself provided a degree of independence. (Ev36, para 4, Ev25, para 6) The First Commissioner was more ambivalent: “In some ways, I suppose, you could argue that we will have more independence once our remit is actually defined in statute”. She argued for additional provision in the Draft Bill “to safeguard the Commission from government interference” in the exercise of its functions. (Q 562 and Ev50, para 20)
253. On the specific issue of funding, the Civil Service Commissioners argued that a key aspect of their independence was “sufficient funding to enable [the

¹⁴³ *Constitutional Renewal: Draft Bill and White Paper*, House of Commons Public Administration Select Committee, Tenth Report 2007–08, HC 499, paragraph 54

Commission] to meet its responsibilities effectively ... 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." (Ev50, para 22) Lord Wilson told us that any Civil Service Commissioner "worth their salt would make a special report to Parliament" if they felt their funding was inadequate. (Q 439) Lord Turnbull argued that there were ways to "ring-fence" the Commission's budget and that "more can be done to give the Commission an assurance". (Q 439)

254. **We share the concern expressed by the Public Administration Select Committee and many of our witnesses that the current provisions of the Draft Bill do not do enough to guarantee the financial and operational independence of the Civil Service Commission. The Government should look again at what amendments need to be made to safeguard the Commission's independence from Government. In particular, we recommend that the Draft Bill be amended to require the Commissioners to report annually to Parliament on the adequacy of their funding.**

Appointment of the First Commissioner and other Commissioners

255. Paragraphs 2 and 3 of Schedule 4 of the Draft Bill make provision for the appointment of the First Commissioner and other Commissioners. The First Commissioner is appointed for a five-year, non-renewable term on the basis of a recommendation from the Minister for the Civil Service to Her Majesty. In making a recommendation, the Minister must consult the First Ministers for Scotland and Wales and the leaders of the main opposition parties. The other Commissioners are appointed for five-year, non-renewable terms on the basis of a recommendation from the Minister to Her Majesty. The Minister must have the agreement of the First Commissioner for the appointment of Commissioners unless he is satisfied it is appropriate to appoint without the First Commissioner's agreement.
256. Lord Turnbull told us that he would prefer the First Commissioner's term of office to be seven years, "which would also make it possible to promote an existing Commissioner to First Commissioner and still leave time for a viable term of office." (Ev59) The First Commissioner argued five years was "probably the right amount of time" to maintain distance between the regulator and departments. (QQ 563–564) **We agree with the Government that a five-year term is appropriate for the First Civil Service Commissioner.**
257. In its recent report, PASC recommended that the Minister should be required not just to consult the Leader of the Opposition about the appointment of the First Commissioner but also to seek their agreement. This was supported by the FDA. (Ev21, para 19) The Constitution Unit went further and suggested the Government should also be required to consult the Chairman of PASC. (Ev07, para 4.5) Lord Turnbull argued that "consult" (rather than having to seek agreement) was "the right word". (Q 439) **We agree that the Minister for the Civil Service should be obliged to consult the First Ministers of Scotland and Wales and the leaders of the main opposition parties about the appointment of the**

First Civil Service Commissioner, but should not be obliged to seek their agreement.

258. The Commissioners made two additional suggestions for amending the Draft Bill. First, the Draft Bill should require Commissioners themselves to be selected on merit on the basis of fair and open competition, to “further underpin their independence”. Second, the Draft Bill should make provision “for the payment of pensions and compensation for loss of office to all Commissioners and not just the First Commissioner.” Although the Commissioners told us that currently it was not their intention to extend these provisions to the part-time Commissioners, such a provision would allow future flexibility “if the part-time nature of the Commissioners’ roles become more full-time.” (Ev50, paras 20–21, Q 562) We support both of these suggestions. **We recommend two amendments to the Draft Bill in respect of the Commissioners. First, Schedule 4 should require the Commissioners to be appointed on merit on the basis of fair and open competition. Second, paragraph 6 of Schedule 4 (Compensation for loss of office of First Commissioner) should be extended to allow compensation for loss of office for all Commissioners.**

Functions of the Civil Service Commission (clauses 32, 37 and 40)

259. The Draft Bill gives the Commission a number of statutory functions. Clause 32 requires the Commission to investigate and consider a complaint made under the Civil Service Code, and make recommendations about how the complaint should be resolved. Under clause 37(1) the Commission must, if it thinks it necessary, carry out reviews of recruitment policies and practices to ensure that the requirement for appointment on merit on the basis of fair and open competition is met. In addition, clause 40 makes provision for the Commission to carry out additional functions, but only with the agreement of the Minister for the Civil Service. We asked witnesses whether these functions were sufficient, and specifically whether the Draft Bill should give the Commission the power to initiate investigations without a complaint having been made and without the approval of the Minister.
260. PCS expressed concern that if consent of the Minister were required to initiate an investigation, it “may bring about conflict of interest”. (Ev25, para 6) Others argued that the role of the Commission should “not be circumscribed” or blocked by Government. (Ev04, para 16–17, Ev07, para 4.5, Ev36, Ev24, para 3) Sir Christopher Kelly told us he found it “a little difficult to understand why, if you are a regulator, you would not want to have this power”. (Q 410) Sir Richard Mottram acknowledged that such a power might have resource implications for the Commission, but argued that resource constraint was not “an appropriate or decisive consideration.” (Q 410)
261. However, the Cabinet Secretary told us he “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 than another, then you get into some difficult territory.” (Q 566) Other witnesses were more uncertain. The First Commissioner said “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 ... Nonetheless, as an independent regulator, it is actually quite difficult to argue that we should not have this power”. She suggested the power might be limited to “investigations where there was

sufficient evidence”. (Q 565) Jonathan Baume, General Secretary of the FDA, explained that the FDA had “been hesitating” on this issue but that “it seems to make sense that that provision is there for the Commission in certain special circumstances which only they can determine.” (Q 386) In written evidence the Commissioners expressed concern that such a power might politicise the Commissioners’ role. (Ev50, paras 11 and 14) Lord Turnbull agreed that it might “provoke attempts by third parties to pursue their grievances by trying to suck in the Commissioners”. (Ev59) Lord Wilson agreed. (Ev60)

262. PASC suggested a compromise: the Commission should have the “power to conduct independent investigations into the operation of the Civil Service Codes, other than in response to specific complaints from civil servants, and without the need for Government consent.”¹⁴⁴ The Commissioners agreed that this approach “might offer the right balance ... the Commission would want to exercise that discretion only in cases where the burden of suspicion was substantial.” (Ev50, para 15) Lord Wilson agreed that the problem would be reduced if “the power was limited to matters relating to compliance with the Codes.” (Ev60, see also Ev20, para 7, Ev19, Ev21, para 23)
263. **We agree with the Public Administration Select Committee and the Civil Service Commissioners that the Draft Bill should be amended to give the Commissioners the right to carry out investigations into the operation of, or compliance with, the Civil Service Codes without a specific complaint having been made and without the consent of the Minister for the Civil Service being required. In order to avoid undue pressure on resources, or any risk of politicising the role of the Commissioners, the drafting of this provision should make clear that the use of this power should be limited to instances where the Commissioners consider there is sufficient evidence to warrant an investigation.**

Ministerial power to manage the civil service (clause 27)

264. Clause 27 gives the Minister a statutory power “to manage the civil service”, including “among other things, appointment and dismissal and the imposition of rules on civil servants”. The power is given to the Secretary of State to manage the diplomatic service. This power is wider than that in the Government’s 2004 draft bill which expressly excluded the “power to recruit, appoint, discipline or dismiss civil servants” and than the current power set out in the 1995 Civil Service Order in Council. PASC noted that the Government had changed its position “dramatically” and concluded that “giving Ministers the general power to appoint and dismiss civil servants does not seem in keeping with the Government’s commitment to a civil service recruited on merit and able to serve administrations of different political persuasions.”¹⁴⁵
265. A number of witnesses shared PASC’s concern. The FDA were worried that there was “no constraint” to prevent Ministers intervening in issues about the employment of individual civil servants. (Ev21, para 8) Jonathan Baume argued “it looks unusual that we will put into statute a power for a politician

¹⁴⁴ *Constitutional Renewal: Draft Bill and White Paper*, Public Administration Select Committee, Tenth Report 2007–08, HC 499, paragraph 49

¹⁴⁵ *ibid.*, para 22

in effect to hire and fire civil servants” and called for this power to be vested in the Head of the Home Civil Service. (QQ 369–371) Lord Turnbull was adamant that “Ministers should not get within a million miles of appointment and dismissal of any particular civil servant ... This particular drafting gives the impression wrongly and it is not what is intended.” (Q 423) The Civil Service Commissioners similarly assumed that the right of the Prime Minister to appoint and dismiss civil servants was “not the intention of the clause” and called for clarification. (Ev50, para 10)

266. We raised these concerns with the Lord Chancellor who explained that “it was originally proposed [in the 2004 draft bill] to retain under the prerogative powers of appointment and dismissal, and what we are seeking to do is to have the powers of appointment, et cetera, in a statutory framework ... there has to be a Minister responsible for the Civil Service to Parliament but in practice whose powers are very constrained”. (Q 758) Lord Wilson told us that the current position was that a Minister could be called to account for the appointment or dismissal of individual civil servants. He reminded us of the dismissal in 1995 of Derek Lewis as Head of the Prison Service: “it was [Michael Howard, then Home Secretary,] who took the decision ... it was Mr Howard who accounted to Parliament for it ... That was formally the correct decision. I am not sure [clause 27] is doing more than a transposition of the position as it already is.” (Q 425)
267. **In principle, we support the approach in clause 27 of the Draft Bill that the Prime Minister should be responsible for the civil service, including ultimately for appointment and dismissal. However, while Ministers can legitimately be consulted about particular moves within the civil service, Ministers should not be involved in appointment or dismissal of individual civil servants without the express approval of the Prime Minister. We invite the Lord Chancellor to follow up on his offer to look again at the drafting of clause 27(3) to reflect this.**

Other obligations on the Minister

268. We heard evidence suggesting that the Draft Bill should contain two obligations on the Minister currently set out in the Ministerial Code. First, an obligation “not to impede civil servants in their compliance with the Code”. The Committee on Standards in Public Life argued that such a legislative statement would “go to the heart of securing the constitutional boundaries between Ministers, the Civil Service and special advisers”. (Ev20, para 9) A number of other witnesses agreed. (QQ 399, 421, 422, Ev15, para i, Ev19, Ev21, para 27)
269. Second, a duty on Ministers “to give fair consideration and due weight to informed and impartial advice from civil servants”. (Ev19, Ev21, para 27) Lord Turnbull explained that “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.” (Q 421) Underlying this question was a concern that Ministers give less weight to civil service advice than previously, or even prevented civil servants from offering advice. For example, Sir Richard Mottram told us that “ministers give relatively less weight to the contribution of the Civil Service in the formulation of policy and in advising generally ... I think that is a pity.” (Q 398) However, PASC took the view that “the question of whether a minister is failing to respect the

absolute clarity about [special advisers’] role and the restrictions”. (Q 573) For the FDA this was the “key issue” and the current wording was “inadequate”. (Ev21, para 25, Q 390) The Committee on Standards in Public Life told us the “provisions fall short of the Ninth Report’s clear recommendation” that legislation should list restrictions on special advisers’ functions. (Ev20, para 13, Q 404)

294. On the specific restrictions witnesses wanted to see, Lord Wilson told us “If one had a choice of one thing which I would change in this [Draft] Bill it would be to add a provision to the effect that special advisers may not recruit, manage or direct civil servants.” (Q 442) Lord Turnbull agreed. (Q 442, Ev59) The Better Government Initiative proposed a specific provision “preventing [special advisers] from commissioning work from civil servants”. (Ev19) Others proposed a provision preventing special advisers exercising management functions over civil servants. (Ev04, para 20, Ev24, paras 13–15) The FDA welcomed PASC’s recommendation that “[i]t 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.” (Ev21, paras 12–13) The Cabinet Secretary told us he could “certainly live with” clauses in the Draft Bill that made it clear that special advisers “do not order civil servants around, look after budgets and those sorts of things.” (Q 572)
295. The Committee on Standards in Public Life argued that, in respect of special advisers, the Draft Bill did not justify the assertion in *The Governance of Britain* Green Paper that the revocation of Article 3(3) of the Civil Service Order in Council 1995 “will be made permanent in the forthcoming legislation.” (Ev20, para 13, Q 404) However, the Lord Chancellor told us 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.” (Q 763)
296. **We agree with the continued treatment of special advisers as temporary civil servants on the grounds that it is preferable for them to work within the same framework as other civil servants. For this reason, we reject the proposal that they be paid from “Short money”, which would have the effect of removing them from the ambit of the Civil Service Code. We note the intention set out in the Green Paper to clarify the role of special advisers. On balance, we do not support calls for restrictions on advisers’ functions to be put on the face of the Draft Bill. However, we recommend that paragraph 7 of the Code of Conduct for Special Advisers should be amended to make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. We recommend that a procedure should be included in the appropriate Code for limiting the numbers of special advisers, preferably not by establishing a cap. We suggest this might be done by confining to Cabinet Ministers (or Ministers in charge of departments) the right to appoint special advisers and by limiting the number of special advisers that each Cabinet Minister should be able to appoint.**

in advance” and that “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.” (Q 557)

305. **The Draft Bill should be amended to require a set of principles governing business appointments for former civil servants to be drawn up which, like the Civil Service Code, should be laid before Parliament and subject to scrutiny by the Public Administration Select Committee.**

A Resolution

311. A detailed House of Commons resolution is the Government's preferred option. The Lord Chancellor told us that a statutory solution might be too prescriptive and restrictive of "genuine military discretion", and that some in the military were concerned that the "detailed rules of engagement" could be subject to line-by-line debate if a statutory solution were adopted, although he himself was "not scared" by a statutory approach. (QQ 746–747) Although Sir Michael Wood, a former Foreign and Commonwealth Office Legal Adviser, had sympathies with the current arrangement, he did concede that a detailed resolution would effectively formalise Parliament's role whilst at the same time being flexible enough to allow for improvements to the mechanism to be made. (Ev18, paras 9–10, 17) Peter Riddell, Chief Political Commentator, *The Times*, and Chairman, Hansard Society, also thought a convention of this kind was "a reasonable compromise" between flexibility and accountability. (QQ 4–5) The Constitution Committee concluded that a 'detailed resolution' would be "an effective way of introducing a new convention similar to that which we recommended in our 2006 report." (Ev71, para 19) The Clerk of the House of Commons and the Clerk of the Parliaments suggested several benefits of a resolution rather than a statutory approach: Parliament would have more control over its own procedures under a resolution than under a statute; a resolution would deliver more flexibility; and it would avoid the risk of blurring the separation between the legislature and the courts. (Ev65, paras 6–9)
312. We received some evidence about the content of the proposed resolution. The Clerk of the House of Commons and the Clerk of the Parliaments noted that the Government's draft "contains statements of major constitutional significance alongside detailed procedural rules". They also suggested that it might be inappropriate for those elements of the resolution which relate to the House's conduct of its own proceedings to be set out in a humble address to the Queen, as currently proposed by the Government. The Clerks noted that the Commons customarily defines and regulates new procedures by means of standing orders. They therefore suggested that the new procedure might be implemented by way of a shorter resolution, including Part 1 of the current draft (general principle that approval is required) and the descriptions of the exceptions in the third and fourth parts, with the details set out in a new standing order: "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". (Ev65, paras 5–7)

A statutory solution

313. Others favoured a statutory approach. David H Smith argued that "Parliament should claim through legislation its right to be the sole source of executive authority." (Ev09, para 20) Former Foreign Office Deputy Legal Adviser, Elizabeth Wilmshurst, and Graham Allen MP valued the force and certainty that a statutory solution would provide. (Q 28, Ev17, para 10) Democratic Audit were concerned that the flexibility of a resolution would be "open to abuse to the detriment of democratic principles and practice". (Ev04, para 22) Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow, argued that flexibility could just as easily be provided through a statutory route as through a resolution. (Q 23) Michael

ambitions of the Green Paper. Professor Hazell described the Draft Bill as “a set of rather disparate items”. (Q 63) Professor Weir agreed, but said we should “take what we can get because the whole move towards constitutional reform in this country is beginning to founder generally”. (Q 2) The Lord Chancellor did not dispute that there was little to connect demonstrations outside Parliament to a civil service Act. (Q 731)

373. Most witnesses who expressed an opinion told us they would prefer the civil service provisions to be in a separate Bill. The Lords Constitution Committee said that “[t]he inclusion of civil service reform as Part 5 of the draft bill is of particular concern to us.” While they were pleased that the Government had “stopped their prevarication over when to bring forward legislation” they were “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”. (Ev71, para 6) Lord Wilson supported a separate Bill but warned that “it is more important to get it on the statute book than to worry about ... whether it is on its own or part of another Bill ... It has taken 150 years to get here and I would not want to spoil the ship for a ha’p’orth of tar.” (Q 416) Professor Hennessy said that although he “regret[ted] it has got to be in this Act, I am relieved that it is there”. (Q 415) However, the Lord Chancellor told us that “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”. (Q 714)
374. The Lords Constitution Committee told us that the Draft Bill contained “five completely separate areas of proposed reform ... 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.” (Ev71, para 5)
375. We put this concern about conglomerating many topics into one Draft Bill to the Lord Chancellor. He told us that “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 ... 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.” (Q 730)
376. **We acknowledge that the Draft Bill contains a number of provisions aimed at improving Parliamentary scrutiny of the executive. Because of the disparate nature of the proposals in the Draft Bill, it is difficult to discern the principles underpinning it. We recognise that the Bill is contained in the Government’s Draft Legislative Programme for the next session and that there are business management priorities in acquiring Parliamentary time for a bill. This should not, however, be the dominant consideration, particularly if there is a risk that effective Parliamentary scrutiny will be compromised. It is clear that further work is needed before the Bill will be ready for introduction in the next session. We call on the Government to take note of our conclusions and to reconsider the form in which the Bill should be presented.**
377. **Ideally, we would like to see the civil service provisions of the Draft Bill presented to Parliament in a separate bill, to become a Civil**

396. In light of the conflicting evidence that we have received during our inquiry, we are concerned that the police may not have adequate powers upon the repeal of SOCPA to maintain the level of access that we call for above. We urge the Home Office to work with the police and other interested parties to resolve this issue. However, we are not persuaded that it requires an outright ban on protest along the strip of pavement and roadway outside all the main entrances of Parliament. (paragraph 36)
397. The legal framework regulating access should apply to sitting days and non-sitting days equally, given the continuous use of Parliament and the need to create certainty for all concerned. At the same time we recognise that protests are less likely to cause disruption to the proper functioning of Parliament at weekends or during recesses, and this should be taken into account in the practical application of any resulting legislation. The Sessional Orders do nothing to enhance police powers and we recommend that the House of Lords Stoppages Orders should be discontinued and that the House of Commons Sessional Orders should not be reintroduced. (paragraph 37)
398. We accept that all demonstrations have the potential to create noise and that the reasonable use of loudspeakers should be allowed in the area around Parliament. Depending, however, upon the time of day and the level of background noise from traffic, there are exceptional occasions during which the duration and volume of noise from loudspeakers causes serious disruption to large numbers of Members, staff and others within Parliament. There is a need either to develop or make better use of existing powers to ensure that in those exceptional cases the police or other authorities can control noise, including the use of loudspeakers by both groups and individuals. While a range of approaches have been suggested to us, we welcome the Home Office Minister's commitment to work with the Parliamentary authorities and others to develop a "coherent framework". As a minimum, there should be a statutory power to move an individual, or to confiscate sound equipment. (paragraph 48)
399. We note that opinion is divided in relation to whether permanent and overnight protests should be allowed to continue outside the Houses of Parliament, although there appears to be a majority against within Parliament. We see merit in distinguishing between permanent protests on the one hand, and the more traditional one day marches and demonstrations on the other. We call for a careful and comprehensive review of permanent protests, especially in light of the possible redevelopment of Parliament Square. (paragraph 60)
400. We accept the Metropolitan Police Service's evidence that the police should continue to have a power to impose conditions on demonstrations in Parliament Square to prevent a security risk in the future, including in relation to lone protestors. (paragraph 63)
401. We do not accept that there is a need for the police to be able to impose conditions over and above those currently available under the Public Order Act 1986 to prevent a public safety risk in the future. (paragraph 65)
402. We support the removal of the legal requirement to obtain prior authorisation from the Metropolitan Police Commissioner before protesting in the vicinity of Parliament. We note the clear practical benefits of giving prior notification to the police and we encourage the practice of doing so. We

General's functions in relation to criminal justice policy should be retained. (paragraph 104)

411. We sympathise with the Government's concern to ensure operational independence for the prosecutorial authorities, but we are not convinced that removing the Attorney General's power to give a prosecution direction is an appropriate route for achieving this. We were impressed by the strength of the evidence we received that the "nuclear option" of being able to stop a prosecution must be retained, and that the most appropriate person to exercise it is the Attorney General, as she is directly accountable for its exercise to Parliament. Removing this power would mean that the Attorney would have responsibility without power. We recommend that the Attorney General should retain the power to give a direction in relation to any individual case, including cases relating to national security. This should continue to be on a non-statutory basis. We see merit in the Attorney General reporting to Parliament if she gives a direction in relation to an individual case and we recommend that the Government establishes a procedure for the Attorney to do so. [f, however, the Government removes the Attorney's power to give a direction in an individual case, we agree that the Attorney should retain the power to intervene for the purpose of safeguarding national security, subject to the requirement to report to Parliament. (paragraph 114)
412. We support the Government's proposal that the majority of requirements for the Attorney's consent to individual prosecutions should be transferred or abolished, with a small number retained by the Attorney. We do, however, recommend that further work should be undertaken to determine the category into which each consent requirement falls, and to ensure there is an effective accountability mechanism if and when powers are transferred. (paragraph 118)
413. In line with our recommendation in paragraph 114 that the Attorney should retain a power to direct, we recommend that the power to halt a trial on indictment (*nolle prosequi*) should be retained. We invite the Government to investigate how greater Parliamentary accountability for its use might be provided. (paragraph 121)
414. We agree that the Attorney General should retain her superintendence function in relation to the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions. (paragraph 124)
415. We welcome the proposal for a protocol setting out how the Attorney General and the prosecutorial directors should exercise their functions in relation to each other. However, we recommend that the proposed protocol should be published in draft and subjected to Parliamentary scrutiny before the Bill is introduced. We also recommend that any future revisions of the protocol be the subject of scrutiny by the House of Commons Justice Committee. (paragraph 127)
416. We welcome the proposed new clauses relating to the tenure of office of the Directors, but recommend that the Bill be amended to make clear that it will be possible for the Directors' terms of office to be renewed. (paragraph 130)
417. We agree with the Government that the oath should be reformed, but like the Government, we do not believe that it is necessary to put the oath on a statutory basis. (paragraph 133)

right in its argument that they are too broad to be meaningful or could lead to an unacceptable increase in speculative litigation. (paragraph 168)

426. We oppose the proposal to establish a statutory Judicial Appointments Commission panel. The Judicial Appointments Commission has already formed working groups which benefit from being more flexible and potentially less expensive. (paragraph 171)
427. We agree that the Lord Chancellor should be given the power to determine non-statutory eligibility criteria, although we strongly encourage the Lord Chancellor to seek the concurrence of the Judicial Appointments Commission and the Lord Chief Justice or his delegate in respect of each determination. (paragraph 175)
428. We welcome the transfer of responsibility for medical checks from the Judicial Appointments Commission to the Lord Chancellor, although we question whether this proposal would actually require legislation to be implemented. (paragraph 178)
429. We welcome the progress that has been made towards improving the forecasting of judicial vacancies and we encourage the Lord Chancellor to resolve the remaining procedural inefficiencies, as far as possible without introducing further legislation. (paragraph 180)
430. We oppose the proposal to give the Lord Chancellor a broad delegated power to remove posts from the statutory list of appointments requiring a selection by the Judicial Appointments Commission. We recommend that the proposal be amended to meet the more limited need that has been identified by the Lord Chief Justice, namely the flexible deployment of existing judges to the same level of appointment subject to the approval of the Lord Chancellor, the Lord Chief Justice and the Senior President of the Tribunal as appropriate. (paragraph 184)
431. In broad terms, we welcome the proposal to allow the Lord Chief Justice to deploy, authorise, nominate or extend the service of judicial office holders without being required to consult or gain the concurrence of the Lord Chancellor. However, we recommend that the process used by the Lord Chief Justice to make “significant” authorisations and nominations be approved by the Judicial Appointments Commission in order to balance the need for efficiency against the importance of maintaining a transparent process. The Lord Chancellor and the Lord Chief Justice should work with the Judicial Appointments Commission and others to identify those kinds of authorisations and nominations that should be subject to this procedure. (paragraph 187)
432. We consider that it is too soon to undertake a general review of the size and composition of, and reappointment process applying to, the Judicial Appointments Commission. There does not appear to be any urgent need for change. (paragraph 190)
433. We support the proposal to bring section 139 of the Constitutional Reform Act 2005 into line with other legislation permitting the disclosure of information for the purposes of investigating a crime. (paragraph 192)
434. We are disappointed by the lack of measurable progress towards increasing diversity at all levels of the judiciary, although we acknowledge the short period of time during which the Judicial Appointments Commission has been operating. We encourage the Judicial Appointments Commission and others,

451. We agree that the Minister for the Civil Service should be obliged to consult the First Ministers of Scotland and Wales and the leaders of the main opposition parties about the appointment of the First Civil Service Commissioner, but should not be obliged to seek their agreement. (paragraph 257)
452. We recommend two amendments to the Draft Bill in respect of the Commissioners. First, Schedule 4 should require the Commissioners to be appointed on merit on the basis of fair and open competition. Second, paragraph 6 of Schedule 4 (Compensation for loss of office of First Commissioner) should be extended to allow compensation for loss of office for all Commissioners. (paragraph 258)
453. We agree with the Public Administration Select Committee and the Civil Service Commissioners that the Draft Bill should be amended to give the Commissioners the right to carry out investigations into the operation of, or compliance with, the Civil Service Codes without a specific complaint having been made and without the consent of the Minister for the Civil Service being required. In order to avoid undue pressure on resources, or any risk of politicising the role of the Commissioners, the drafting of this provision should make clear that the use of this power should be limited to instances where the Commissioners consider there is sufficient evidence to warrant an investigation. (paragraph 263)
454. In principle, we support the approach in clause 27 of the Draft Bill that the Prime Minister should be responsible for the civil service, including ultimately for appointment and dismissal. However, while Ministers can legitimately be consulted about particular moves within the civil service, Ministers should not be involved in appointment or dismissal of individual civil servants without the express approval of the Prime Minister. We invite the Lord Chancellor to follow up on his offer to look again at the drafting of clause 27(3) to reflect this. (paragraph 267)
455. Requirements on Ministers to give fair consideration and due weight to impartial advice from civil servants and not to impede civil servants in their compliance with the Civil Service Code are issues best dealt with in the Ministerial Code. (paragraph 269)
456. There should be a statutory requirement upon the Government to lay the Ministerial Code before Parliament but it should not be subject to any formal Parliamentary approval mechanism. (paragraph 270)
457. It is not clear whether the text of clause 27 as drafted is sufficient to remove all prerogative powers surrounding the statutory power to manage the civil service. This should be clarified before the Bill is introduced. (paragraph 271)
458. We are not persuaded of the case for formal Parliamentary approval of the civil service and diplomatic service codes. The most appropriate form of Parliamentary scrutiny of the codes is that undertaken by select committees, particularly the Public Administration Select Committee; and we welcome their intention to continue to examine closely any substantive revisions to the codes. (paragraph 274)
459. We have considered the views of the Public Administration Select Committee and witnesses, but we are not convinced that the Draft Bill requires amendment to clarify the requirement for civil servants to be

impartial. The Civil Service Code makes expressly clear that impartiality includes political impartiality. (paragraph 278)

460. We are encouraged by the Lord Chancellor's response about amending the Draft Bill to provide a wider duty on civil servants to Parliament alongside the duty to serve the government of the day. We recommend that the Government find a suitable form of words to achieve this. (paragraph 281)
461. The Draft Bill should be amended to limit the exception in clause 34(3)(a) to members of the Royal Household (if indeed they are considered to fall within the definition of the civil service). Appointments to any other posts currently included in this exception should be on merit. (paragraph 283)
462. We recommend that the exception in clause 34(3)(b) for senior diplomatic appointments should be limited to exceptional circumstances and should require the direct approval of the Prime Minister. If the Prime Minister wishes to make political appointments to senior diplomatic posts in exceptional cases, he should be able to do so, but he must be politically accountable for any such decisions. (paragraph 286)
463. We welcome the Commissioners' review of their approach to exceptions under the Recruitment Principles and we are content that exceptions under clause 34(3)(d) could only be made if the Commissioners agree they meet the needs of the civil service. (paragraph 288)
464. We share the widespread welcome from our witnesses for the role special advisers play in Government. Our objective has been to ensure that there is a clear framework within which civil servants and special advisers can operate effectively. In this respect, we agree with the First Commissioner that "good fences make good neighbours". (paragraph 289)
465. We agree with the continued treatment of special advisers as temporary civil servants on the grounds that it is preferable for them to work within the same framework as other civil servants. For this reason, we reject the proposal that they be paid from "Short money", which would have the effect of removing them from the ambit of the Civil Service Code. We note the intention set out in the Green Paper to clarify the role of special advisers. On balance, we do not support calls for restrictions on advisers' functions to be put on the face of the Draft Bill. However, we recommend that paragraph 7 of the Code of Conduct for Special Advisers should be amended to make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. We recommend that a procedure should be included in the appropriate Code for limiting the numbers of special advisers, preferably not by establishing a cap. We suggest this might be done by confining to Cabinet Ministers (or Ministers in charge of departments) the right to appoint special advisers and by limiting the number of special advisers that each Cabinet Minister should be able to appoint. (paragraph 296)
466. Special advisers are by the nature of their role involved in the formulation of the policy the Government is advocating but may in some contexts be well placed to justify its purpose and effectiveness. Where special advisers are used in such a role, it should be made clear that they are acting as special advisers and not as regular civil servants. (paragraph 299)
467. We have recommended in paragraph 296 that the Code of Conduct for Special Advisers be amended to make explicit the functions that special

484. We acknowledge that there are some valuable elements of the clauses on judicial appointments, but there is nothing that cannot wait until the work of the Judicial Appointments Commission beds in under the new arrangements. We concluded in paragraph 141 that it was too soon to propose significant reform of judicial appointments only two years after the changes in the Constitutional Reform Act were introduced. We therefore recommend that the Draft Bill be amended to remove the clauses on judicial appointments. The Government should review this area in due course. (paragraph 378)
485. Balancing the right to protest with the effective functioning of Parliament is an important issue and further work is needed to develop a new framework to manage protests around Parliament. We have recommended in Chapter 2 that before sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCPA) are repealed, further work needs to be done. We are not persuaded that these provisions should form part of a bill dealing with constitutional issues. (paragraph 379)
486. We recognise that the functions of the Attorney General are constitutional and so are relevant to the Draft Bill. If, in light of our recommendations in Chapter 3, there is any requirement for legislation, they could be included in this Draft Bill. (paragraph 380)
487. We recognise that the Draft Bill is a first step in a wider programme of reforms to the constitution planned in the Green Paper. There are many significant reforms outside the scope of this Draft Bill. It would be regrettable if the passing of this Bill prevented further progress in other fundamental areas of reform, and we look forward to the introduction of further reforms as set out in the Government's Green Paper. (paragraph 381)
488. The long title as it stands is insufficiently broad to cover all of the issues we have addressed in our inquiry. We recommend that the Lord Chancellor consider amending the long title to include the objectives of the Green Paper set out in paragraph 349 above. Changing the approach to the long title would enable Parliament to consider wider issues of constitutional reform during the passage of the bill, without obliging the Government to introduce provisions to do so. (paragraph 385)
489. We call on the Government to reflect further on the appropriate title for the Bill before it is introduced. As with our approach to the long title, our concern about the short title stems from our regret that many of the ideas set out in the Green Paper have not been brought forward into the Draft Bill. We commend the Government for taking these first steps towards the stated objective of making Government more accountable to Parliament but would encourage the Government to use this opportunity to make progress beyond these first steps. (paragraph 389)

Member of Council, Hansard Society for Parliamentary Government
Editor, Journal of Legislative Studies (unremunerated but published by commercial publisher)

Council Member, Constitution Unit
Member, Study of Parliament Group

Lord Plant of Highfield

Professor of Jurisprudence, King's College, University of London

Emily Thornberry MP

Non-practising member of the chambers of Mike Mansfield QC
Husband is a Deputy High Court Judge

Lord Tyler

General political advice to Harcourt Public Affairs Ltd (15 Theed Street, London SE1 8ST)

- no contact with or advice to clients
- unremunerated, but provision of press-cuttings service
A director of Make Votes Count (unpaid)

Mr Andrew Tyrie MP

A former Special Adviser

Lord Williamson of Horton

A former civil servant.

Full lists of Members' interests are recorded in the Commons Register of Members' Interest

<http://pubs1.tso.parliament.uk/pa/cm/cmregmem/041203/memi02.htm>

and the Lords Register of Interests

<http://pubs1.tso.parliament.uk/pa/ld/ldreg/reg01.htm>

- ** Lord Goldsmith
- ** Greater London Authority
- Lord Guthrie
- Justice
- * Professor Steven Haines
- Dennis Harrison
- ** Professor Robert Hazell
- * Professor Peter Hennessy
- * Sir Gus O'Donnell KCB, Head of the Home Civil Service
- ** Professor Jeremy Horder, Criminal Commissioner, Law Commission
- House of Commons Foreign Affairs Committee
- House of Lords Constitution Committee
- House of Lords Delegated Powers and Regulatory Reform Committee
- ILEX
- Joint Committee on Human Rights
- ** Judicial Appointments Commission
- ** Law Society of England and Wales
- Law Society of Scotland
- * Liberty
- Local Government Association
- Local Government Information
- Lord Chief Justice
- ** Lord Lyell of Markyate
- ** Lord Mayhew of Twysden
- Lord Mackay of Clashfern
- ** Rt Hon Tony McNulty MP, Minister of State, Home Office
- ** Metropolitan Police
- Baroness Miller of Chilthorne Domer
- ** Lord Morris of Aberavon
- ** One World Trust
- Joe Parker
- * Sebastian Payne
- ** Public and Commercial Services Union (PCS) and Prospect
- * Director of Public Prosecutions
- David Pybus
- Mohammad Abdul Qavi
- * Milan Rai

- Kiron Reid
- ** Revenue and Customs Prosecutions Office
 - * Mr Peter Riddell
 - * Joshua Rozenberg
 - Mark Ryan
 - Emma Sangster, Parliament Square Peace Campaign
 - * Serious Fraud Office
 - * Serjeant at Arms
 - David H Smith
 - Gabriel John Spence
 - Peter Steadman
 - ** Rt Hon Jack Staw MP, Lord Chancellor and Secretary of State for Justice
 - The Corner House
 - ** Professor Adam Tomkins
 - Don Touhig MP
 - ** Lord Turnbull
 - UK Parliamentary Ombudsman
 - ** Unlock Democracy
 - * Westminster City Council
 - * Mr Michael Wills, Minister of State, Ministry of Justice
 - * Elizabeth Wilmshurst
 - ** Lord Wilson of Dinton
 - Sir Michael Wood
 - Derek Wyatt MP

Government and the Government must lay an annual report containing information about the number and cost of special advisers. Are these provisions appropriate?

Is the way the Draft Bill defines ‘civil servants’ and ‘the civil service’ appropriate? Are the exclusions in clause 25(2) appropriate?

Protests

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?

Should Parliament be treated any differently from any other part of the country in terms of managing protests? How should the legitimate expectations of Parliamentarians and Parliamentary authorities be defined? In particular, would the repeal of sections 132 to 138 of Serious Organised Crime and Police Act give rise to a need for new powers for the police or other authorities to:

Ensure free access to, from and around the Parliamentary Estate and to enable Parliamentarians to discharge their roles and responsibilities,

Restrict the use of loudspeakers,

Take account of the particular security risk,

Protect Parliament Square as a world heritage site,

Prevent permanent demonstrations in Parliament Square,

Ensure equal access to the right to protest.

Are Sessional Orders (Orders passed by Parliament which impose an obligation on the Metropolitan Police Commissioner) still an appropriate means to manage protests around Parliament?

Attorney General

Is the Government’s approach to the reform of the Attorney General’s role and powers right?

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?

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?

Do the proposals strike the right balance between accountability of the Attorney General to Parliament for prosecutions and the independence of prosecutors?

When is it appropriate for the Attorney General to attend cabinet?

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?

Should the oath of office of the Attorney General be a statutory requirement like that of the Lord Chancellor?

Should the Attorney General's power to stop a prosecution by way of a *nolle prosequi* be abolished?

Are the provisions of the Draft Bill setting out the tenure of office of the Prosecutorial Directors appropriate?

Should the Attorney General's legal advice be disclosed?

NB—Leave to appeal to the House of Lords was granted on 24 April 2008 from the judgment of the High Court concerning the decision of the Director of the Serious Fraud Office to discontinue the investigation into BAE Systems concerning alleged corruption in relation to the Al Yamamah contract with Saudi Arabia. The case is, therefore, *sub judice*. This means that no reference should be made to the case in the Joint Committee's public proceedings, either by Members or witnesses, or in the written evidence submitted to the Committee. This does not, of course, prevent the Committee or witnesses before it from commenting on the wider issues of the Attorney-General's powers to direct prosecutions.

Judicial Appointments

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?

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?

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 Government is proposing to give new powers to the Lord Chancellor, including:

Powers to set targets or issue directions to the Judicial Appointments Commission (which the White Paper recognises is a complex issue),

Power to set non-statutory eligibility criteria concerning, for instance, the qualifications, experience and expertise that is required for a post,

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,

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?

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?

Should the Government create the Judicial Appointments Commission Panel? If so, are the provisions in the draft Bill adequate?

Is the current size and composition of the Judicial Appointments Commission Board right? Should the process for reappointing Commissioners be simplified?

Treaties

Do the proposals in the Draft Bill give the right balance of power to the two Houses? Is it right that the House of Commons has the power to delay treaties indefinitely? Is it right that the Government can re-introduce a treaty which has been subject to a negative vote in the Commons? How should a negative vote in the Lords (as opposed to the Commons) be treated?

Is there any merit in Parliament seeking to scrutinise draft treaties prior to signature?

Should there be a formal mechanism for Parliament to request an extension of the 21 day sitting day period that treaties are required to be laid before Parliament?

Clause 22 of the Draft Bill makes provision for a treaty to be ratified without parliamentary approval in exceptional circumstances. Is it appropriate for the Secretary of State to have the discretion to decide when exceptional circumstances apply? Should there be a requirement on the Secretary of State to (a) take such steps as he thinks appropriate to consult Parliament or (b) report back to Parliament after a treaty has been ratified under clause 22?

Are the Government's proposed definitions of "treaty" and "ratification" (contained in clause 24 of the draft Bill) right and unambiguous?

Should Parliament change the way it approaches scrutiny of treaties?

War Powers

Is the Government right to adopt a resolution route rather than a legislative route for War Powers? Is the Government's proposal for a detailed House of Commons resolution, as opposed to a statutory or a hybrid solution, appropriate? Will Parliamentary scrutiny of the executive in this area be increased by the proposals in the White Paper?

Does the draft Resolution in the White Paper give Parliament sufficient control over conflict decisions? In particular,

Should the Prime Minister determine the most appropriate timing for seeking parliamentary approval?

Should the Prime Minister decide what information should be supplied to Parliament?

In the event that the mechanism contains exceptions to the requirement for parliamentary approval, should the Prime Minister alone determine if the relevant emergency or security conditions are met?

Should there be a requirement to seek retrospective approval where exceptional circumstances have been deemed to apply?

Should the Prime Minister determine whether the security condition continues to mean that it would not be appropriate to lay a report before Parliament?

Should there be a regular re-approval process?

Is the role of the House of Lords under the proposals right?

Is it appropriate that approval is not required for a conflict decision involving or assisting the special forces?

Have the terms 'conflict decision' and 'UK forces' been adequately defined in the draft resolution?

Members' interests: The full lists of Members' interests as recorded in the Commons Register of Members' Interest and the Lords Register of Interests are noted.

Emily Thornberry declared an interest in that her husband is a deputy High Court judge;

Lord Armstrong declared an interest as a former Head of the Home Civil Service;

Lord Williamson declared an interest as a former civil servant;

Lord Campbell of Alloway declared an interest as a QC (no longer practising);

Lord Hart of Chilton declared an interest as a solicitor;

Lord Tyler and Martin Linton MP declared an interest as Directors (unpaid) of Make Votes Count.

It is moved that Michael Jabez Foster MP do take the Chair.—(*Lord Campbell of Alloway.*)

The same is agreed to.

The Orders of Reference are read.

The Joint Committee deliberate.

Ordered, That written evidence received be shared with the Public Administration Committee and the Justice Committee in the House of Commons and the Joint Committee on Human Rights, pursuant to House of Commons Standing Order No 137A.

Ordered, That the Joint Committee be adjourned to Wednesday 7 May at 4 o'clock.

Wednesday 7 May 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Michael Jabez Foster MP
Baroness Gibson of Market Rasen	Mark Lazarowicz MP
Lord Hart of Chilton	Martin Linton MP
Lord Maclennan of Rogart	Ian Lucas MP
Lord Morgan	Emily Thornberry MP
Lord Norton of Louth	Mr Andrew Tyrie MP
Lord Tyler	Sir George Young MP
Lord Williamson of Horton	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Tuesday 6 May are read.

The Joint Committee deliberate.

The Call for Evidence is agreed to.

Ordered, That the Joint Committee be adjourned to Tuesday 13 May at half-past 1 o'clock.

Tuesday 13 May 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Martin Linton MP
Baroness Gibson of Market Rasen	Fiona Mactaggart MP
Lord Hart of Chilton	Emily Thornberry MP
Lord Maclennan of Rogart	Sir George Young MP
Lord Morgan	
Lord Norton of Louth	
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Wednesday 7 May are read.

The Joint Committee deliberate.

Ordered, That the Lords Constitution and Delegated Powers and Regulatory Reform Committees be invited to submit memoranda to the Committee.

Ordered, That the public be admitted during the examination of witnesses unless otherwise ordered.

Ordered, That written evidence received be published, and that the uncorrected transcripts of evidence given, unless the Committee otherwise order, be published on the internet.

Ordered, That Memorandum number Ev1 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

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 Peter Riddell, Chief Political Commentator of The Times and Chairman of the Hansard Society.

Elizabeth Wilmshurst, Associate Fellow, International Law, Chatham House, 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.

Ordered, That the Joint Committee be adjourned to Wednesday 14 May at 4 o'clock.

Wednesday 14 May 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Martin Linton MP
Lord Hart of Chilton	Ian Lucas MP
Lord Maclennan of Rogart	Fiona Mactaggart MP
Lord Morgan	Emily Thornberry MP
Lord Norton of Louth	Sir George Young MP

Lord Tyler

Lord Williamson of Horton

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Tuesday 13 May are read.

The Joint Committee deliberate.

Ordered, That Professor Rodney Brazier be appointed a Specialist Adviser.

The following witnesses are examined:

Admiral the Lord Boyce, GCB, OBE, DL, Former Chief of the Defence Staff, Field Marshal the Lord Bramall, KG, GCB, OBE, MC, Former Chief of the Defence Staff and Marshal of the Royal Air Force the Lord Craig of Radley, GCB, Former Chief of the Defence Staff.

Professor Robert Hazell CBE, Director, Constitution Unit, University College London

Ordered, That the Joint Committee be adjourned to Tuesday 20 May at half-past 1 o'clock.

Tuesday 20 May 2008

Present:

Lord Armstrong of Ilminster

Martin Linton MP

Lord Campbell of Alloway

Ian Lucas MP

Lord Hart of Chilton

Fiona Mactaggart MP

Lord Morgan

Sir George Young MP

Lord Norton of Louth

Lord Plant of Highfield

Lord Tyler

Lord Williamson of Horton

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Wednesday 14 May are read.

The Joint Committee deliberate.

The following interest is declared:

Lord Hart of Chilton: that his wife is a solicitor and a Recorder

Ordered, That Memoranda numbers Ev02, Ev23, Ev24 and Ev72 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Tim Dutton QC, Chairman, Bar Council, and Andrew Holroyd, President, Law Society

Joshua Rozenberg, Legal Editor, the Daily Telegraph, and Frances Gibb, Legal Editor, The Times.

The Joint Committee further deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 21 May at 4 o'clock.

Wednesday 21 May 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Mark Lazarowicz MP
Lord Fraser of Carmyllie	Martin Linton MP
Baroness Gibson of Market Rasen	Fiona Mactaggart MP
Lord Hart of Chilton	Emily Thornberry MP
Lord Maclennan of Rogart	Mr Andrew Tyrie MP
Lord Morgan	Sir George Young MP
Lord Norton of Louth	
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Tuesday 20 May are read.

The Joint Committee deliberate.

Ordered, That the Chairman seek private meetings with the Speaker and the Lord Speaker to discuss the provisions of the draft Bill relating to protests in the vicinity of Parliament.

Ordered, That Memorandum number Ev03 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Sebastian Payne, Kent Law School, University of Kent, Peter Facey, Director, Unlock Democracy and Michael Hammer, Executive Director, One World Trust

Rt Hon Lord Falconer of Thoroton QC

Ordered, That the Joint Committee be adjourned to Tuesday 3 June at half-past 1 o'clock.

Tuesday 3 June 2008

Present:

Lord Campbell of Alloway	Mark Lazarowicz MP
Lord Fraser of Carmyllie	Martin Linton MP
Baroness Gibson of Market Rasen	Fiona Mactaggart MP
Lord Hart of Chilton	Emily Thornberry MP
Lord Morgan	Sir George Young MP
Lord Norton of Louth	
Lord Plant of Highfield	
Lord Tyler	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Wednesday 21 May are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev04 to Ev11 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Gareth Crossman, Director of Policy, Liberty, Mike Schwarz, Partner, Bindmans, Baroness Mallalieu QC, President, Countryside Alliance and Milan Rai.

The Joint Committee further deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 4 June at 4 o'clock.

Wednesday 4 June 2008

Present:

Lord Armstrong of Ilminster	Martin Linton MP
Lord Campbell of Alloway	Emily Thornberry MP
Baroness Gibson of Market Rasen	Sir George Young MP
Lord Hart of Chilton	
Lord Morgan	
Lord Norton of Louth	
Lord Tyler	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Tuesday 3 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev12 to Ev14 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Baroness Prashar CBE, Chairman, Judicial Appointments Commission, Professor Dame Hazel Genn QC DBE, JAC Commissioner and Professor of Socio-Legal Studies, University College London, Jonathan Sumption QC OBE, JAC Commissioner

Chris Allison, Deputy Assistant Commissioner, Metropolitan Police, Dean Ingledew, Director of Community Protection, Westminster City Council, Kit Malthouse, Deputy Mayor for Policing, Greater London Authority

Ordered, That the Joint Committee be adjourned to Tuesday 10 June at half-past 1 o'clock.

Tuesday 10 June 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Mark Lazarowicz MP
Baroness Gibson of Market Rasen	Martin Linton MP
Lord Hart of Chilton	Ian Lucas MP
Lord Maclennan of Rogart	Fiona Mactaggart MP

Lord Morgan
 Lord Norton of Louth
 Lord Plant of Highfield
 Lord Tyler

Sir George Young MP

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Wednesday 4 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev15 to Ev21 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Jonathan Baume, General Secretary, First Division Association and Charles Cochrane, Director of Policy, Public and Commercial Services Union and Secretary of the Council of Civil Services Unions

Sir Christopher Kelly KCB, Chair, Committee on Standards in Public Life, Sir Christopher Foster, Chairman, Better Government Initiative and Sir Richard Mottram GCB, Better Government Initiative.

Lord Hart declared an interest as a former Special Adviser, and Lord MacLennan as a Member of the Advisory Committee on Business Appointments.

Ordered, That the Joint Committee be adjourned to Wednesday 11 June at 4 o'clock.

Wednesday 11 June 2008

Present:

Lord Armstrong of Ilminster	Martin Linton MP
Lord Fraser of Carmylie	Mr Andrew Tyrie MP
Baroness Gibson of Market Rasen	Sir George Young MP
Lord Hart of Chilton	
Lord Morgan	
Lord Norton of Louth	
Lord Williamson of Horton	
Lord Tyler	

Michael Jabez Foster (*in the Chair*)

The proceedings of Tuesday 10 June are read.

The Joint Committee deliberate.

The following witnesses are examined:

Professor Peter Hennessy, Attlee Professor of Contemporary British History, Queen Mary, University of London, Lord Wilson of Dinton, former Cabinet Secretary and Lord Turnbull of Enfield.

Mr Andrew Tyrie declared an interest as a former Special Adviser

Dr Malcolm Jack, Clerk of the House of Commons, Mr Michael Pownall, Clerk of the Parliaments, Lt General Sir Michael Willcocks KCB, Black Rod and Jill Pay, Serjeant at Arms.

Ordered, That the Joint Committee be adjourned to Tuesday 17 June at half-past 1 o'clock.

Tuesday 17 June 2008

Present:

Lord Armstrong of Ilminster	Mark Lazarowicz MP
Lord Campbell of Alloway	Martin Linton MP
Baroness Gibson of Market Rasen	Emily Thornberry MP
Lord Maclennan of Rogart	Mr Andrew Tyrie MP
Lord Morgan	Sir George Young MP
Lord Plant of Highfield	
Lord Norton of Louth	
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Wednesday 11 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev73 and Ev74 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Rt Hon Tony McNulty MP, Minister for Security, Counter-Terrorism, Crime and Policing, Home Office

Janet Paraskeva, First Civil Service Commissioner, and Sir Gus O'Donnell KCB, Cabinet Secretary and Head of the Home Civil Service

Ordered, That the Joint Committee be adjourned to Wednesday 18 June at 4 o'clock.

Wednesday 18 June 2008

Present:

Lord Hart of Chilton	Martin Linton MP
Lord Morgan	Ian Lucas MP
Lord Norton of Louth	Fiona Mactaggart MP
Lord Tyler	Emily Thornberry MP
Lord Williamson of Horton	Mr Andrew Tyrie MP
	Sir George Young MP

Michael Jabez Foster MP (*in the Chair*)

The Order of Adjournment is read.

The proceedings of Tuesday 18 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev51 and Ev52 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Rt Hon Lord Lyell of Markyate QC, Rt Hon Lord Morris of Aberavon QC and Rt Hon Lord Mayhew of Twysden QC

Lord Carlile of Berriew QC and Professor Jeremy Horder, Criminal Commissioner, Law Commission.

Ordered, That the Joint Committee be adjourned to Tuesday 24 June at half-past 1 o'clock.

Tuesday 24 June 2008

Present:

Lord Armstrong of Ilminster	Martin Linton MP
Lord Campbell of Alloway	Fiona Mactaggart MP
Baroness Gibson of Market Rasen	Emily Thornberry MP
Lord Hart of Chilton	Sir George Young MP
Lord Morgan	
Lord Norton of Louth	
Lord Plant of Highfield	
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster (*in the Chair*)

The proceedings of Wednesday 25 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev02a and Ev53 to 58 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined:

Rt Hon Baroness Scotland of Asthal, Attorney General, Sir Ken Macdonald QC, Director of Public Prosecutions, Richard Alderman, Director, Serious Fraud Office, and David Green QC, Director, Revenue and Customs Prosecution Office

Rt Hon Lord Goldsmith.

Ordered, That the Joint Committee be adjourned to Wednesday 25 June at 4 o'clock.

Wednesday 25 June 2008

Present:

Lord Armstrong of Ilminster	Mr Alistair Carmichael MP
Lord Campbell of Alloway	Mark Lazarowicz MP
Lord Hart of Chilton	Martin Linton MP
Lord Maclennan of Rogart	Ian Lucas MP

Lord Norton of Louth	Fiona Mactaggart MP
Lord Plant of Highfield	Mr Andrew Tyrie MP
Lord Tyler	Sir George Young MP
Lord Williamson of Horton	

Michael Jabez Foster MP (*in the Chair*)

The proceedings of Tuesday 24 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev59 and Ev60 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witness is examined:

Graham Allen MP

The Joint Committee further deliberate

Ordered, That the Joint Committee be adjourned to Tuesday 1 July at 4 o'clock.

Tuesday 1 July 2008

Present:

Lord Armstrong of Ilminster	Mr Alistair Carmichael MP
Lord Campbell of Alloway	Christopher Chope MP
Baroness Gibson of Market Rasen	Martin Linton MP
Lord Hart of Chilton	Ian Lucas MP
Lord Maclennan of Rogart	Fiona Mactaggart MP
Lord Morgan	Emily Thornberry MP
Lord Norton of Louth	Mr Andrew Tyrie MP
Lord Plant of Highfield	Sir George Young MP
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster (*in the Chair*)

The proceedings of Wednesday 25 June are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev14a and Ev61 to Ev65 submitted to the Joint Committee be reported to the House for publication on the internet.

The following witnesses are examined: Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, and Mr Michael Wills MP, Minister of State, Ministry of Justice.

Ordered, That the Joint Committee be adjourned to Wednesday 2 July at 4 o'clock.

Wednesday 2 July 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
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Lord Campbell of Alloway	Mark Lazarowicz MP
Baroness Gibson of Market Rasen	Martin Linton MP
Lord Hart of Chilton	Ian Lucas MP
Lord Maclennan of Rogart	Fiona Mactaggart MP
Lord Morgan	Emily Thornberry MP
Lord Norton of Louth	Mr Andrew Tyrie MP
Lord Plant of Highfield	Sir George Young MP
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster (*in the chair*)

The proceedings of Tuesday 1 July are read.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Tuesday 8 July at half-past 1 o'clock.

Tuesday 8 July 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Martin Linton MP
Baroness Gibson of Market Rasen	Ian Lucas MP
Lord Hart of Chilton	Fiona Mactaggart MP
Lord Morgan	Emily Thornberry MP
Lord Norton of Louth	Sir George Young MP
Lord Williamson of Horton	

Michael Jabez Foster MP, in the Chair

The proceedings of Wednesday 2 July are read.

The Joint Committee deliberate.

Ordered, That Memoranda numbers Ev65 to Ev69 and Ev76 submitted to the Joint Committee be reported to the House for publication on the internet.

Ordered, That the Joint Committee be adjourned to Tuesday 15 July at half-past 1 o'clock.

Tuesday 15 July 2008

Present:

Lord Armstrong of Ilminster	Martin Linton MP
Lord Campbell of Alloway	Emily Thornberry MP
Lord Fraser of Carmylie	Mr Andrew Tyrie MP
Baroness Gibson of Market Rasen	Sir George Young MP
Lord Hart of Chilton	
Lord Maclennan of Rogart	

Lord Morgan
Lord Norton of Louth
Lord Tyler
Lord Williamson of Horton

Michael Jabez Foster MP, in the Chair

The Joint Committee deliberate.

The proceedings of Wednesday 8 July are read.

Ordered, That Memoranda numbers Ev77 and Ev78 submitted to the Joint Committee be reported to the House for publication on the internet.

Ordered, That the Joint Committee be adjourned to Wednesday 16 July at 4 o'clock.

Wednesday 16 July 2008

Present:

Lord Armstrong of Ilminster	Mr Alistair Carmichael MP
Lord Campbell of Alloway	Martin Linton MP
Baroness Gibson of Market Rasen	Mr Andrew Tyrie MP
Lord Maclennan of Rogart	Sir George Young MP
Lord Morgan	
Lord Norton of Louth	
Lord Plant of Highfield	
Lord Tyler	
Lord Williamson of Horton	

Michael Jabez Foster MP, in the Chair

The proceedings of Tuesday 15 July are read.

The Joint Committee deliberate.

Ordered, That Memorandum number Ev79 submitted to the Joint Committee be reported to the House for publication on the internet.

Ordered, That the Joint Committee be adjourned to Tuesday 22 July at 10 o'clock.

Tuesday 22 July 2008

Present:

Lord Armstrong of Ilminster	Christopher Chope MP
Lord Campbell of Alloway	Martin Linton MP
Baroness Gibson of Market Rasen	Ian Lucas MP
Lord Hart of Chilton	Fiona Mactaggart MP
Lord Maclennan of Rogart	Emily Thornberry MP
Lord Morgan	Mr Andrew Tyrie MP
Lord Norton of Louth	Sir George Young MP

Lord Tyler

Lord Williamson of Horton

Michael Jabez Foster MP, in the Chair

The proceedings of Wednesday 16 July are read.

The Joint Committee deliberate.

Ordered, That Memorandum number Ev80 submitted to the Joint Committee be reported to the House for publication on the internet.

A draft Report is proposed by the Chairman.

It is moved that the draft Report before the Committee be read.

The same is agreed to.

Paragraphs 1 to 8 are agreed to.

Paragraph 9 are agreed to with an amendment.

Paragraphs 10 to 23 are agreed to.

Paragraph 24 is agreed to with an amendment.

Paragraphs 25 to 47 are agreed to.

Paragraph 48 reads as follows:

We accept that all demonstrations have the potential to create noise and that the reasonable use of loudspeakers should be allowed in the area around Parliament. Depending, however, upon the time of day and the level of background noise from traffic, there are exceptional occasions during which the duration and volume of noise from loudspeakers causes serious disruption to large numbers of Members, staff and others within Parliament. There is a need to either develop or better use existing powers to ensure that in those exceptional cases the police or other authorities can control noise, including the use of loudspeakers by both groups and individuals. While a range of approaches have been suggested to us, we accept the Home Office Minister's commitment to work with the Parliamentary Authorities and others to develop a "coherent framework". As a minimum, there should be a statutory power to move or arrest an individual, or to confiscate sound equipment.

An Amendment is made.

It is moved by Lord Armstrong of Ilminster in line 11 of paragraph 48, after the second "a" to insert "specific".

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Lord Armstrong of Ilminster

Lord Campbell of Alloway

Christopher Chope

Lord Hart of Chilton

Martin Linton

Mr Andrew Tyrie

Sir George Young

Not Contents

Baroness Gibson of Market Rasen

Ian Lucas

Lord MacLennan of Rogart

Fiona Mactaggart

Lord Morgan

Lord Norton of Louth

Emily Thornberry

Lord Tyler

Lord Williamson of Horton

The Amendment is disagreed to accordingly.

It is moved by Fiona Mactaggart in line 14 of paragraph 48, after “move” to leave out “or arrest”.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Lord Armstrong of Ilminster

Baroness Gibson of Market Rasen

Lord Hart of Chilton

Martin Linton

Ian Lucas

Lord Maclennan of Rogart

Fiona Mactaggart

Lord Morgan

Lord Norton of Louth

Emily Thornberry

Lord Tyler

Lord Williamson of Horton

The Amendment is agreed to accordingly.

Paragraph 48, as amended, is agreed to.

Paragraph 49 is agreed to with an amendment.

Paragraphs 50 to 59 are agreed to.

Paragraph 60 reads as follows:

We note that opinion is divided in relation to whether permanent and overnight protests should be allowed to continue outside the Houses of Parliament, although there appears to be a majority against within Parliament. We see merit in distinguishing between permanent protests on the one hand, and the more traditional one day marches and demonstrations on the other. We call for a careful and comprehensive review of permanent protests, especially in light of the possible redevelopment of Parliament Square, with a view to seeking the removal of encampments (as opposed to individuals) if this is compatible with human rights legislation.

It is moved by Emily Thornberry in line 7 of paragraph 60, to leave out from “Square” to the end of the paragraph.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Christopher Chope

Not Contents

Lord Campbell of Alloway

Christopher Chope

Mr Andrew Tyrie

Sir George Young

Not Contents

Lord Armstrong of Ilminster

- Government.¹⁰ She told us that “[a]ttendance at Cabinet is very much a matter for the Prime Minister ... and I do attend whenever I am able to do so”. She suggested that it was advantageous to be able to “get your legal advice [in] early”, since it is not always possible to predict in advance legal issues that would arise in Cabinet. She also claimed that the Attorney’s more pronounced criminal policy role means “it has become increasingly important for the Attorney ... to be the spokesperson for the development of that prosecutorial policy within the criminal justice framework”. (QQ 634–635) Lord Goldsmith broadly agreed, and pointed out the difficulties that had arisen when he had only attended cabinet when the Cabinet Secretary said there was a specific issue where legal advice would be required. (Q 663)
16. This has not always been the arrangement. Lord Mayhew argued: “It never was [the practice] in my day, nor in the days of my predecessors ... I do not think it is conducive to belief in his detachment from government that he should go as of right”. (Q 594) Lord Morris agreed that the present arrangements were “a very unhappy practice” because “[T]here is a point in being a little distant from political colleagues [and] aloof from his colleagues”. (Q 595) Lord Falconer thought that the Attorney should only attend Cabinet to give legal advice as required. For him, this debate demonstrated “why the Attorney General should become an independent figure, because he is unquestionably perceived to be a member of...the political government”. (Q 202) On the other hand, the Prime Minister argued that regular attendance at Cabinet was not a recent innovation: “I do not believe it is the case that in the last ten years the Attorney General has rarely attended the Cabinet. The Attorney General has mainly attended the Cabinet”.¹¹
 17. The Constitutional Affairs Committee found its witnesses in “unanimous agreement” that [the Attorney General] should not regularly attend Cabinet meetings.
 18. We note the evidence of the present Attorney General that “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 so to do”.¹²
 19. **Whilst we accept that attendance at Cabinet is ultimately a matter for the Prime Minister, we endorse the Constitutional Affairs Committee’s recommendation that “the old convention with respect to the Attorney General’s attendance at Cabinet should be re-established.”¹³ We recommend that the Attorney should only attend Cabinet when the Prime Minister, on specific occasions, requires his or her legal advice, not routinely on the assumption that it might be required.**
 20. **Since we propose to separate the legal and political functions of the Attorney, the need will not arise for the holder of the legal office to attend on matters for which he or she has Ministerial responsibility.**

¹⁰ Liaison Committee, Minutes of Evidence, 3 July 2008, HC 192-ii, QQ 131–132

¹¹ *ibid.*, Q 132

¹² Q634 (24 June 2008)

¹³ Para 86, Constitutional Affairs Committee Report

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.” (Ev55, para 22) Lord Carlile agreed that it was a necessary power. (Q 617)

39. Other witnesses had deep concerns. Democratic Audit thought that the proposal was “entirely improper”, in particular since “[t]he 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.” (Ev04, para 47) The Corner House and JUSTICE also felt that the change from an ill-defined discretionary power to an explicit statutory power marked an increase in the Attorney’s powers. (Ev10, Ev45, para 6) Professor Bogdanor saw “very considerable danger” in the proposal, since “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...that this has in fact happened in the recent past”. (Q 17) Mark Ryan suggested that any proposed use of the power should be immediately brought to the attention of a specially appointed Select Committee, which could alert Parliament of any concerns. (Ev36, para 8) JUSTICE argued that the Attorney should only have a power to make a submission on national security to the prosecutorial director. (Ev45, paras 4–13) The Corner House recommended that a system of “strong checks and balances” needed to be in place. (Ev10)
40. Several witnesses made comments on specific aspects of the national security provisions, specifically clauses 12(1), 13(5) and 14(3).
41. The Justice Committee and Democratic Audit (Ev04, paras 46–47) were particularly concerned about clause 12(1)(a), which would give the Attorney the power to halt an investigation by the Serious Fraud Office. The Government justified this power on the basis that the Director of the Serious Fraud Office was the only one of the prosecutorial directors who has an investigative function.³⁰ However, the Justice Committee concluded that there was no justification for such powers.³¹ Professor Horder was also concerned that this clause went too far. (Ev63)
42. Professor Jowell and a number of others were concerned that clause 13(5) (whereby a certificate signed by the Minister is “conclusive evidence” that a direction on the grounds of national security was necessary) was an ‘ouster’ clause that would prevent judicial review of any decision, “which is really contrary to every tenet of the rule of law which requires access to courts to challenge ministerial decisions”.³² The Justice Committee,³³ The Corner House and Global Witness made similar points. (Ev10, 39) However, Mark Ryan argued that the use of judicial review in this context would be inappropriate. (Ev36, para 8) Professor David Feldman, Professor of English Law, University of Cambridge, argued that the possibility of judicial review would be dependent upon the approach of the courts to any certificate issued under clause 13(5). (Ev66, paras 35–41) He also disagreed with

³⁰ *ibid.*, QQ 59–64

³¹ *ibid.*, para 45

³² *ibid.*, Q 22

³³ *ibid.*, para 51

Emily Thornberry
Lord Williamson of Horton
Michael Jabez Foster

The Amendment is disagreed to accordingly.

Paragraphs 77 to 79 are agreed to.

Paragraph 80 is agreed to with an amendment.

Paragraphs 81 to 87 are agreed to.

Paragraph 88 reads as follows:

The Government should be accountable to Parliament for its actions. For Parliament properly to discharge its accountability function, it must be sufficiently informed of the basis—including the legal basis—for the actions of Government.

It is moved by Lord Armstrong of Ilminster at the end of line 3 of paragraph 88, to add “though not necessarily of the text of the Attorney General’s advice.”

Question, That the Amendment be made, put and negatived.

Paragraph 88 is agreed to.

Paragraphs 89 to 90 are agreed to.

Paragraph 91 is agreed to with an amendment.

Paragraphs 92 to 95 are agreed to.

Paragraph 96 is agreed to with an amendment.

Paragraphs 97 to 148 are agreed to.

Paragraph 149 is, agreed to with an amendment.

Paragraph 159 reads as follows:

We do not accept that it is appropriate to give the Lord Chancellor a power to set targets or to issue directions to the Judicial Appointments Commission. Such a power would have the potential seriously to undermine the independence of the appointments process, which was a primary reason for the 2005 reforms.

It is moved by Fiona Mactaggart in line 2 of paragraph 159, to leave out from “Commission” to the end of the paragraph.

Question, That the Amendment be made, put and negatived.

Paragraph 159 is agreed to.

Paragraphs 160 to 167 are agreed to.

Paragraph 168 reads as follows:

We accept the proposal for statutory key principles, but we encourage the Lord Chancellor to keep their impact under review in case the Judicial Appointments Commission is proved right in its argument that they are too broad to be meaningful or could lead to an unacceptable increase in speculative litigation.

It is moved by Lord Armstrong of Ilminster in line 1 of paragraph 168, to leave out from beginning to “encourage” and insert “We welcome the proposal to introduce key principles but are not convinced that they should be statutory. We”.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Lord Armstrong of Ilminster
 Lord Campbell of Alloway
 Christopher Chope
 Baroness Gibson of Market Rasen
 Lord Hart of Chilton
 Lord Morgan
 Lord Norton of Louth
 Lord Williamson of Horton
 Sir George Young

The Amendment is agreed to accordingly.

Paragraph 168, as amended, is agreed to.

Paragraphs 169 to 186 are agreed to.

Paragraph 187 is agreed to with an amendment.

Paragraphs 188 to 266 are agreed to.

Paragraph 267 is agreed to with an amendment.

Paragraphs 268 to 282 are agreed to.

Paragraphs 283 is agreed to with an amendment.

Paragraphs 284 and 285 are agreed to.

Paragraph 286 is agreed to with an amendment.

Paragraphs 287 and 295 are agreed to.

Paragraph 296 reads as follows:

We agree with the continued treatment of special advisers as temporary civil servants on the grounds that it is preferable for them to work within the same framework as other civil servants. For this reason, we reject the proposal that they be paid from “Short money”, which would have the effect of removing them from the ambit of the Civil Service Code. We note the intention set out in the Green Paper to clarify the role of special advisers. On balance, we do not support calls for restrictions on advisers’ functions to be put on the face of the Draft Bill. However, we recommend that paragraph 7 of the Code of Conduct for Special Advisers should be amended to make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. We recommend that a procedure should be included in the appropriate Code for establishing a cap on the number of special advisers.

It is moved by Fiona Mactaggart in line 10 of paragraph 296, to leave out from “powers” to the end of the paragraph.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Baroness Gibson of Market Rasen
 Martin Linton

Not Contents

Martin Linton
 Lord Maclellan of Rogart
 Fiona Mactaggart
 Lord Tyler

Not Contents

Lord Armstrong of Ilminster
 Lord Campbell of Alloway

Lord Maclennan of Rogart	Christopher Chope
Fiona Mactaggart	Lord Norton of Louth
Lord Morgan	Lord Tyler
Lord Williamson of Horton	Sir George Young

The Amendment is disagreed to accordingly.

It is moved by Lord Armstrong of Ilminster in line 10 of paragraph 296, to leave out from “powers” to the end of the paragraph and add: “We recommend that a procedure should be included in the appropriate Code for limiting the numbers of special advisers, preferably not by establishing a cap”.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Lord Armstrong of Ilminster
 Lord Campbell of Alloway
 Christopher Chope
 Martin Linton
 Lord Maclennan of Rogart
 Sir George Young

Not Contents

Baroness Gibson of Market Rasen
 Lord Morgan
 Lord Norton of Louth
 Lord Tyler
 Lord Williamson of Horton

The Amendment is agreed to accordingly.

It is moved by Lord Armstrong of Ilminster at the end of paragraph 296 to add the words “We suggest this might be done by confining to Cabinet Ministers (or Ministers in charge of departments) the right to appoint special advisers and by limiting the number of special advisers that each Cabinet Minister should be able to appoint”.

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Lord Armstrong of Ilminster
 Lord Campbell of Alloway
 Christopher Chope
 Baroness Gibson of Market Rasen
 Lord Norton of Louth
 Sir George Young

Not Contents

Martin Linton
 Lord Maclennan of Rogart
 Lord Morgan
 Lord Tyler
 Lord Williamson of Horton

The Amendment is agreed to accordingly.

Paragraph 296, as amended, is agreed to.

Paragraphs 297 and 298 are agreed to.

Paragraph 299 is agreed to with an amendment.

Paragraphs 300 to 302 are agreed to.

Paragraph 303 is agreed to with an amendment.

Paragraphs 304 to 317 are agreed to.

Paragraph 318 reads as follows:

We agree that there is a case for strengthening Parliamentary involvement in armed conflict decisions. We also agree with the House of Lords Constitution Committee that the Government's detailed resolution approach is a well balanced and effective way of proceeding.

It is moved by Martin Linton in line 2 of paragraph 318, to leave out from "decisions" to the end of the paragraph and insert: "We also agree with the House of Commons Public Administration Committee that the best approach would be a statutory one, as we accept the reasoning in the Government's Green Paper that prerogative powers should be put on a statutory basis".

Question put, That the Amendment be made.

Objected to; on Question?

Contents

Martin Linton

Lord Maclennan of Rogart

Fiona Mactaggart

Lord Morgan

Lord Tyler

Not Contents

Lord Armstrong of Ilminster

Lord Campbell of Alloway

Christopher Chope

Baroness Gibson of Market Rasen

Lord Norton of Louth

Lord Williamson of Horton

Sir George Young

The Amendment is disagreed to accordingly.

Paragraph 318 is agreed to.

Paragraphs 319 to 378 are agreed to.

Paragraph 379 is agreed to with an amendment.

Paragraph 380 is agreed to.

Paragraph 381 is agreed to with an amendment.

Paragraphs 382 to 389 are agreed to.

The Abstract is agreed to with amendments.

The Appendices to the Report are agreed to.

The Committee agrees that the draft Report, as amended, be the report of the Joint Committee.

Ordered, That certain papers be appended to the Minutes of Evidence.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No 134 of the House of Commons.

Ordered, That the Chairman make the report to the House of Commons and Lord Campbell of Alloway make the report to the House of Lords.

Ordered, That the Joint Committee be now adjourned.