



HOUSE OF LORDS

Select Committee on the Constitution

11th Report of Session 2009–10

Constitutional Reform and Governance Bill

Report

Ordered to be printed 17 March 2010 and published 18 March 2010

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 98

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Constitutional Reform and Governance Bill

CHAPTER 1: INTRODUCTION

The Development of this Bill

1. The Constitutional Reform and Governance Bill was introduced into the House of Commons on 20 July 2009, immediately before the summer recess. Its second reading debate in the Commons took place on 20 October 2009 and its Committee stage in the Commons commenced in early November and was completed in February 2010.¹ The Bill was passed by the Commons on 2 March. Its second reading debate in the House of Lords is scheduled to take place on 24 March 2010.
2. The Bill had a long gestation. It was preceded by a Green Paper of 3 July 2007,² by a White Paper of March 2008,³ and by a Draft Constitutional Renewal Bill of March 2008. The Draft Bill was subject to detailed pre-legislative scrutiny by a specially appointed Joint Committee on the Draft Constitutional Renewal Bill, which reported in July 2008.⁴ The Government's much delayed response to the Joint Committee's report was published on the same day as the Constitutional Reform and Governance Bill, in July 2009.
3. As introduced, the Bill included provisions concerning the following areas: the civil service, the ratification of treaties, membership of the House of Lords, demonstrations in the vicinity of Parliament, human rights claims against devolved administrations, courts and tribunals, national audit, and transparency of Government financial reporting to Parliament. The constitutional implications of these provisions are considered in Chapter 2 of this report.
4. During its passage through the House of Commons the Bill was substantially amended. These amendments are significant both in number and in constitutional importance. **When it was introduced the Bill contained 56 clauses and nine Schedules. By the time the Bill arrived in the House of Lords it contained 95 clauses and 15 Schedules. Many of the Bill's new provisions were added on the final two days of Committee in the Commons and at Report stage in that House: that is to say, late in the legislative process.** The new provisions include: clauses on a referendum on the voting system used for parliamentary elections; substantial amendment to the Parliamentary Standards Act 2009; new provisions concerning the tax status of MPs and members of the House of Lords; and amendments to the Public Records Act 1958 and the Freedom of

¹ For a detailed consideration of the Bill as introduced, see House of Commons Library Research Paper 09/73; for analysis of how the Bill was amended during the Committee stage of its passage through the House of Commons, see House of Commons Library Research Paper 10/18.

² The Governance of Britain (Cm 7170).

³ The Governance of Britain—Constitutional Renewal (Cm 7342).

⁴ HL (2007–08) 166; HC (2007–08) 551.

Information Act 2000, as well as other matters. It is to be noted that none of the new provisions was included in the Draft Constitutional Renewal Bill or in the White Paper that accompanied it. The constitutional implications of these provisions are considered in Chapter 3 of this report.

5. Chapters 2 and 3 of this report examine the substance of the Bill. In Chapter 4 we turn our attention to issues of process. It will be seen that **we are seriously concerned that the consequence of the Government's management of the Bill is that neither House of Parliament will be able to scrutinise the Bill as thoroughly as is appropriate for measures of constitutional reform.**
6. The Draft Constitutional Renewal Bill included provisions that proposed reform of the constitutional position of the **Attorney General**. These provisions were dropped from the Bill. The Draft Bill would have maintained the Attorney General as a Minister within the Government. Whether the Attorney's legal and political functions should be split proved a contentious matter, with witnesses giving sharply different points of view in evidence to the Joint Committee. A minority of six members of the Joint Committee would have preferred such a course to be adopted, but the majority broadly supported the provisions in the Draft Bill. In 2008 we published a report setting out the arguments for and against reform.⁵ In his statement upon the publication of the Bill, the Lord Chancellor and Secretary of State for Justice, Jack Straw MP, said that, "the significant, necessary reforms to the role of Attorney General are being achieved without the need for legislation."⁶
7. The Draft Constitutional Renewal Bill was published alongside a White Paper on *The Governance of Britain*.⁷ Both developed out of the Green Paper which the Government published within a week of Mr Brown becoming Prime Minister.⁸ In addition to the matters provided for in the Draft Bill the White Paper also contained detailed policy proposals on **war powers, flag flying, and reform of the Intelligence and Security Committee**.⁹ The White Paper contained further, less detailed, suggestions for a wider **review of the royal prerogative, on the granting of passports, on public appointments, and on Church of England appointments**. The Constitutional Reform and Governance Bill contains no provisions with regard to these matters. In some cases this may be because reform does not require legislation; in others, however, it suggests that the Government no longer intends to introduce further reform. **We will not comment on this occasion on all of these matters, but we would like to draw the issue of war powers to the attention of the House.**
8. The Committee has a long-standing interest in war powers. In our 2006 report, *Waging war: Parliament's role and responsibility*, we recommended that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the UK to war, intervention in an existing conflict or to environments where there is a

⁵ Reform of the Office of Attorney General, 7th report for 2007–08, HL 93.

⁶ Ministry of Justice press release, 20 July 2009.

⁷ Above, note 3.

⁸ Above, note 2.

⁹ On this last matter, see the Intelligence and Security Committee, *Annual Report for 2007–08*, Cm 7542, paras 9–16.

risk that the forces will be engaged in conflict.¹⁰ In its March 2008 White Paper the Government published a draft resolution giving Parliament a formal voice in the process by which the Government deploys HM Armed Forces in armed combat overseas. The draft resolution was subjected to detailed scrutiny by the Joint Committee on the Draft Constitutional Renewal Bill; we gave evidence to the Joint Committee in which we argued that the resolution ought to give a greater role to the House of Lords, ought to provide for retrospective approval where appropriate, and ought to provide for a process of re-approval where the nature, scale or objectives of the deployment alter. The Joint Committee was however supportive of the Government's position. In October 2009 the Government stated that it was "preparing" a detailed -draft resolution "setting out the processes the House of Commons should follow in order to approve any deployment of the Armed Forces" in conflict overseas.¹¹ In his most recent evidence to us the Lord Chancellor and Secretary of State for Justice stated that work on the draft resolution had proved to be "complicated" but was continuing.¹² **We regret this ongoing delay and we call on the Government to publish this resolution as soon as possible.**

¹⁰ See 15th report (2005–06) *Waging War: Parliament's Role and Responsibility*, (HL Paper 236), para 108. See also 3rd report (2006–07) *Waging War: Parliament's Responsibility—Follow-up*, (HL Paper 51).

¹¹ Ministry of Justice, *Review of Executive Prerogative Powers*, October 2009, para 37.

¹² 10th Report (2009–10) (HL Paper 80).

CHAPTER 2: THE BILL'S ORIGINAL SUBJECT MATTER

The Civil Service

9. Part 1 of the Bill concerns the civil service. It puts aspects of the civil service on a statutory footing for the first time. While every Part of this Bill contains provisions that may be viewed as being constitutional in subject-matter, and without intending to downgrade the significance of any of the Bill's many and diverse provisions, **it is Part 1 of the Bill—the placing of the civil service on a statutory footing—which, from a constitutional point of view, is among the most important features of this Bill.**
10. Placing the civil service on a statutory footing has been anticipated since the Northcote-Trevelyan report of 1854 and has in recent times been strongly advocated by the House of Commons Public Administration Select Committee (PASC), among others.¹³ The Government published a consultation paper on the matter in 2004.¹⁴ The Bill puts the Civil Service Commission on a statutory footing, confers on the Minister for the Civil Service the power to manage the civil service,¹⁵ requires the Minister to publish a code of conduct for the civil service and sets out some minimum requirements for the code (including obligations of political impartiality, integrity, honesty, etc). The Bill provides for the principle of appointment on merit on the basis of fair and open competition, and sets out some exceptions where this principle will not apply. Separate provision is made for special advisers. The Bill does not extend to MI5, MI6, GCHQ or the Northern Ireland Civil Service. Subject to these exceptions, the Bill removes prerogative powers governing the *management* of the civil service, but prerogative powers will be retained in relation to security vetting.
11. The provisions in the Draft Constitutional Renewal Bill concerning the civil service were subjected to detailed pre-legislative scrutiny by the Joint Committee. They were also scrutinised by PASC.¹⁶ Both committees broadly welcomed the Government's proposals, but both identified a number of areas where the legislation might usefully go further. While the Bill contains some modest adjustments to the provisions of the Draft Bill, there is no major change of policy.
12. The Joint Committee was concerned about the following issues:
 - (a) the absence of an outright statutory definition of the civil service; (*this is unchanged in the Bill*)
 - (b) the effects of excluding MI5, MI6 and, especially, GCHQ from the Bill; (*this is unchanged in the Bill*)
 - (c) whether the financial and operational independence of the Civil Service Commission were adequately safeguarded: the Joint Committee recommended that the Commission be required to report annually to Parliament on the adequacy of its funding; it

¹³ See the House of Commons Public Administration Select Committee, 1st Report (2003–04) *A Draft Civil Service Bill: Completing the Reform*, (HC Paper 128).

¹⁴ A Draft Civil Service Bill (Cm 6373).

¹⁵ In respect of the diplomatic service this power is conferred on the Secretary of State.

¹⁶ House of Commons Public Administration Select Committee, 10th Report (2007–08), *Constitutional Renewal: Draft Bill and White Paper*, (HC Paper 499).

further recommended that the Bill should require the Commissioners to be appointed on merit on the basis of fair and open competition;

(the Civil Service Commission will report annually, its report will be laid before Parliament, and its reports may include remarks on funding; Schedule 1 to the Bill includes the requirement that Commissioners should be appointed on merit on the basis of fair and open competition; it may be noted that PASC is of the view that the powers of the Civil Service Commission should be extended; see further paragraph 39 and appendix 1, below)

- (d) whether the Bill was sufficiently clear in requiring that Ministers should have no involvement in the appointment or dismissal of individual civil servants; *(the Bill has been redrafted to clarify this)*
- (e) the Committee recommended that the requirement on Ministers to give fair consideration and due weight to advice from civil servants be dealt with in the Ministerial Code and not in statute; but it further recommended that there should be a statutory requirement that the Ministerial Code be laid before Parliament; *(such requirements on Ministers are contained in the Ministerial Code; there is no provision in the Bill requiring the Ministerial Code to be laid before Parliament: the Bill is concerned not with the Ministerial Code but with the Civil Service Code and the Code of Conduct for Special Advisers)*
- (f) the Constitution Committee (and the House of Commons Public Administration Committee) gave evidence to the Joint Committee to the effect that the Draft Bill was insufficiently clear in enshrining the constitutional principle of the political neutrality of the civil service; the Joint Committee disagreed, and thought that this matter was sufficiently robust in the Draft Bill; *(the relevant clause of the Bill is Clause 7, which is in the same terms as the equivalent clause in the Draft Bill)*
- (g) the Joint Committee welcomed a suggestion by the Lord Chancellor that the Draft Bill could be amended to provide a wider duty on civil servants to Parliament alongside the duty to serve the Government of the day; *(no such duty appears in the Bill)*
- (h) the Joint Committee was concerned that a number of the exceptions to the principle of appointment on merit were too broadly drawn; *(there has been one (immaterial) change to the drafting but the relevant clause, Clause 10 of the Bill, is in material terms the same as it was in the Draft Bill; it is to be noted that while the principle of appointment on merit appears in the Bill, the principle of promotion on merit does not: see further paragraph 39 and appendix 1, below)*
- (i) the Joint Committee was concerned that the code on special advisers should make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. *(this is now provided for in clause 8(5) of the Bill)*

13. The Constitution Committee submitted written evidence to the Joint Committee on the Draft Bill. We stated that while we were pleased the Government had “stopped their prevarication”, we were on the other hand “unconvinced that these important reforms can receive the attention and

