Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill

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Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty the Queen

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Introduction

1. The Government would like to thank the Joint Committee for their report on the Constitutional Renewal Bill. We are very grateful to the Committee for their thorough consideration of these complex and challenging issues.

2. The Government has thought long and hard following the pre-legislative scrutiny of the Constitutional Renewal Bill. This has meant a considerable delay in responding to the reports of the Public Administration Select Committee, the Justice Committee and the Joint Committee on the Draft Constitutional Renewal Bill. However, we judged it was more important to get the responses – and the final Bill – right. The following chapters address the recommendations of the Joint Committee point by point.

3. This response to the Joint Committee is published on the same day as the Constitutional Reform and Governance Bill. This Bill is the result of the process of deliberation that started with the publication of the Draft Constitutional Renewal Bill, and adopts a number of the proposals set out there.

Background

4. On 3 July 2007 the Prime Minister launched the *Governance of Britain* Green Paper, which set out the Government's vision and proposals for constitutional renewal and called on the public, Parliament and all interested organisations to submit their views on these matters.

5. The proposals which form the basis of the Constitutional Renewal Bill have already been subject to much detailed analysis and consultation since the publication of the *Governance of Britain* Green Paper in July 2007. This included consultations on the following.
    - Managing Protest Around Parliament
    - The Role of the Attorney General
    - Judicial Appointments
    - War Powers and Treaties: Limiting the powers if the Executive

6. The Constitutional Renewal Bill was published in draft on 25 March 2008. The draft Bill contained the following provisions:

7. *Managing Protest around Parliament:* The repeal of sections 132-138 of the Serious Organised Crime and Police Act 2005. Repeal of these sections would remove the requirement to give notice of demonstrations in the designated area around Parliament. It would also remove the offence for such demonstrations to be held without authorisation of the Metropolitan Police Commissioner.

8. *Role of the Attorney General:* The draft Bill proposed to make it clear that the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in certain limited cases). The requirement to obtain consent of the Attorney General to a prosecution in certain cases would, in general, have been transferred to specified prosecutors and the Attorney General's power to halt a trial on indictment by entering a *nolle prosequi* would have been abolished. The Government also proposed a requirement that the Attorney General report to Parliament on an annual basis on the exercise of the functions of the Attorney General.

9. *Judicial Appointments:* The draft Bill proposed to reduce the role played by the Lord Chancellor in judicial appointments below the High Court and to remove the need for the Lord Chief Justice to consult or obtain the concurrence of the Lord Chancellor in exercising certain functions. The Government also proposed to remove the Prime Minister from the process for appointing Supreme Court judges.

10. *Treaties:* The draft Bill proposed to formalise the procedure for Parliament to scrutinise treaties prior to ratification to ensure a treaty cannot be ratified unless a copy of it is laid before Parliament for a defined period of 21 sitting days.

11. *Civil Service:* The draft Bill proposed placing the Civil Service on a statutory footing by enshrining in statute the core values of the Civil Service and placing the Civil Service Commissioners on a statutory footing.

12. The Constitutional Renewal White Paper, published alongside the draft Bill, also contained a number of policy proposals that were not included in the draft Bill. Of these the Joint Committee chose to consider the proposals on War Powers, where the Government proposed a House of Commons resolution which set out in detail the processes Parliament should follow in order to approve any commitment of the Armed Forces into armed conflict.

Attorney General and prosecutions

13. In its Green Paper on the role of the Attorney General the Government committed itself to enhancing public confidence and trust in the office of Attorney General. The Attorney General sought to encourage a comprehensive and challenging debate about what the role of the Attorney General should be, in the belief that as a result changes could be made that would enhance the appreciation of the rule of law and confidence in the administration of justice.

14. The key issues identified in the Green Paper were whether the Attorney General should continue to be the Government's chief legal adviser and a Government Minister and whether the Attorney General should remain as superintending minister for the prosecution authorities. Other issues raised were the disclosure of the Attorney General's legal advice, the Attorney General's attendance at Cabinet, the Attorney General's oath of office, and parliamentary scrutiny of the exercise of the Attorney General's functions.

15. Having considered the responses to the consultation exercise extremely carefully the Government set out its proposals in the Governance of Britain White Paper. On the key issues the Government decided that the Attorney General should remain the Government's chief legal adviser and a Minister and a member of one of the Houses of Parliament, and that the Attorney General should continue as superintending minister for the prosecution authorities. The Government proposed to make some legislative changes to the Attorney General's functions in relation to prosecutions and in the months since then the Government has continued to work on changing the working relationship with the prosecution authorities so achieving in practice one of the results that the White Paper's proposals were designed to achieve.

16. The proposals in the White Paper were considered by the Justice Committee and the Joint Committee, and the Government in turn has carefully considered the Committees' responses and recommendations. Detailed responses to the individual recommendations of the Joint Committee are set out below.

17. After the thorough review of, and consultation on, the role of the Attorney General, and after the scrutiny of its proposals, the Government's settled view is that the Attorney General should remain the Government's chief legal adviser, a Minister and member of one of the Houses of Parliament, and that the Attorney General should continue as the Minister responsible for superintending the prosecuting authorities.

18. That is not to say that important changes do not need to be made. The Government has decided that more should be done to clarify the basis on which the Attorney General's functions are exercised and to make more transparent the way in which they are exercised. To this end a number of changes have already been, or will be, made in relation to the Attorney General's superintendence function. As no change in the law is required to bring about these significant reforms the Government has decided not to bring forward any legislation relating to the Attorney General.

19. Examples of the changes that have been made include the work that the Attorney General has done with the prosecutors on a protocol between the Attorney General and the prosecution authorities concerning the relationship between them. The protocol covers the respective responsibilities of the Attorney General and the prosecutors, the circumstances in which the Attorney is to be consulted or given information, the accountability of the Attorney General for the prosecuting authorities, and dealing with complaints. It will provide clarity in the relationship and enhance accountability. The protocol will be published in due course.

20. The Attorney General will continue to recuse herself from key prosecution decisions in individual criminal cases unless the law or national security requires it.

21. The Attorney General will publish an annual report and her oath of office will be changed to require the Attorney General to respect the rule of law. Likewise changes will be made to the terms of the appointment of future Directors to underline their independence.

22. Many of these changes have been made already and the benefits are showing. The work on other changes continues.

Protests

General considerations

23. **Recommendation: 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. (Paragraph 23)**

24. The Government remains committed to the repeal of the SOCPA provisions and is introducing legislation to that effect today.

25. **Recommendation: 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. (Paragraph 24)**

26. As already set out in the Government's Reply to the Seventh Report from the Joint Committee on Human Rights, published in May 2009, the Government is committed to facilitating peaceful protest, and notes the conclusions and recommendations of the Joint Committee on Human Rights' Report *Demonstrating respect for rights? A human rights approach to policing protest* that "whilst protests may be disruptive or inconvenient, the presumption should be in favour of protests taking place without state interference, unless compelling evidence can be provided of legitimate reasons for any restrictions."

27. The central thread running through the Government's approach to reviewing the legislative framework which governs protests around Parliament has been "what is distinct about Parliament that might justify different provisions to those that apply anywhere else in the country?" We have concluded that the ability of Parliament to exercise its democratic functions provides the only possible grounds for distinct provisions to apply. Accordingly, in repealing SOCPA, provision will be made to ensure that access can be maintained to Parliament.

28. **Recommendation: 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. (Paragraph 25)**

29. The Government is clear that the police need clarity on Parliament's expectations in terms of allowing it to exercise its democratic functions, and that the police need the powers to fulfil Parliament's expectations. Clarity will be provided through the legislation being introduced today and through ongoing dialogue between the House Authorities, Parliamentarians and Police. The Government will keep under review the powers needed by the Police.

30. **Recommendation: 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. (Paragraph 26)**

31. The Government has consulted with the Greater London Authority and Westminster City Council on plans to redevelop Parliament Square as part of its current review. While we understand that plans for redevelopment of the Square have been scaled back, the Government remains committed to continuing to work closely with the GLA and WCC to ensure that a coherent approach is taken both to the redevelopment of the Square and the right to protest.

Access

32. **Recommendation: 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.**

33. **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. (Paragraphs 35-36)**

34. The Government wholly agrees that a minimum level of access to the Houses of Parliament needs to be maintained to allow Parliament to exercise its democratic functions, and is bringing forward proposals that give the police powers to secure a level of access to Parliament which is both commensurate with Parliament's expectations and which does not restrict legitimate protest.

35. The powers we propose to provide to the police to secure access to Parliament will apply to a much smaller area than that currently set out in SOCPA. The Government is clear that an exclusion zone would in effect amount to a ban on demonstrations in a certain area. We consider this to be disproportionate.

36. **Recommendation: 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)**

37. The Government as set out in its oral evidence to the Committee agrees the legal framework regulating access should apply on sitting and non-sitting days. One system will provide clarity for police, protestors and users of Parliament.

38. The Government is also clear that Sessional Orders are not a source of legal authority for the control of access to Parliament – they are a statement of the House's expectations on the Commissioner and do not confer any powers on the police. We agree with the Joint Committee that they should be discontinued.

Possible legal frameworks

39. **Recommendation: 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)**

40. The Government is continuing to liaise with Westminster City Council and the Greater London Authority on identifying powers that exist to deal with loudhailers. If the use of loudhailers by anyone including protestors amounted to harassment, alarm or distress then the police may consider charges under section 5 the Public Order Act 1986. This is of course partly dependent on complaints being made to the police.

41. However, it is vital that again we note the assessment of the Joint Committee on Human Rights that, “whilst protests may be disruptive or inconvenient, the presumption should be in favour of protests taking place without state interference, unless compelling evidence can be provided of legitimate reasons for any restrictions.”

42. We are not aware of any evidence that noise around Parliament has gone beyond the threshold referenced above and stopped Parliament exercising its democratic functions. The Government encourages Parliamentarians and Palace of Westminster staff to make known any issues so that they can be dealt with in a timely fashion through existing relevant legislation, and so that this issue can be kept under review.

Security risk from permanent protests

43. **Recommendation: 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)**

44. The Government is clear that to place a restriction on demonstrations simply because of their length would be inconsistent with the State's duty to facilitate peaceful protest and not to unnecessarily restrict protests.

45. Any proposals which did attempt to put a cap on overnight or permanent protests would in any case be difficult to operate and enforce and counter-productive in terms of undermining trust between protest groups and the Government and police.

The power to impose conditions on grounds of security risk

46. **Recommendation: 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)**

47. The Government does not take security threat to Parliament lightly. Again, it is important to emphasise that our review has attempted to identify what is distinct about Parliament that would justify a distinct legislative framework to apply to demonstrations.

48. The Government considers that security concerns should properly be dealt with through provisions and measures that are designed to improve security. We recognise the concerns of those respondents to our consultation on Parliament Square that it is wrong to single out demonstrations as a security risk distinct from other pedestrian traffic and crowds that daily pass though Parliament Square, and we consider that the physical security apparatus around Parliament together with new laws to deal with counter-terrorism and security issues are sufficient to safeguard the security of Parliament.

Imposing conditions on grounds of public safety

49. **Recommendation: 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)**

50. The Government has reviewed this issue carefully and considers that the grounds that the police already have to place conditions on assemblies and marches in the Public Order Act 1986 would already cover any public safety risk.

Prior authorisation

51. **Recommendation: 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. (Paragraph 72)**

52. The Government wholly agrees with the Joint Committee. The corollary of having a compulsory notification system is that an offence for protesting without notification is created, thereby potentially criminalising protest. Once again we need to be conscious that the central aim of the Government's programme of constitutional and democratic renewal is the rebuilding of trust in our democratic and constitutional settlement by ensuring openness, transparency, and accountability. There is a risk that a prior compulsory notification scheme of any sort is likely to increase the numbers of protestors unwilling to work with the police so that the provision becomes counter-productive even in terms of police planning considerations.

53. Moreover, prior notification, as the recent Tamil protests have demonstrated, is impractical when communities feel very strongly about an issue and want to make their views known quickly.

54. We further agree with the Joint Committee that prior notification, where possible, should be encouraged. Evidence to the Committee has noted that it is in everyone's interest to notify in advance – protestors, police and public. We are committed to working with police and campaign groups to promote the advantages of advance notification, and pursuing a voluntary notification scheme.

Enforcement

55. **Recommendation: 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. (Paragraph 76)**

56. The issue of 'ongoing offences' has been raised in the current PACE Review. The PACE Review consultation paper sought views on the need to provide greater clarity on the application of arrest powers where an individual continues or persists with a course of behaviour after an officer has issued a warning.

57. We will seek to find a suitable legislative vehicle in order to clarify the current arrest provisions in PACE to deal with ongoing public order offences. This should directly address a number of the concerns raised in the evidence sessions to the Committee.

Attorney General and Prosecutions

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

58. **Recommendation: 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 Minster. (Paragraph 84)**

59. The Government welcomes the Committee's support for retention of the current arrangement whereby the Attorney General is the Government's chief legal adviser and is a Minister within the Government.

Disclosure of the Attorney General's legal advice

60. **Recommendation: 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. (Paragraph 88)**

61. The legal advice given by the Attorney General is privileged and the Government has never believed that it would be appropriate for that advice to be disclosed routinely. It believes that the interests of good governance are best served by Ministers being able to ask for and receive legal advice in confidence. But the Government also believes that, as part of its accountability to Parliament, it should provide the legal basis for key decisions and it will continue to do so. This will allow Ministers and the Attorney to communicate freely and frankly, while enabling Parliament, being informed of the legal basis for particular actions, to hold the Government to account.

62. The Government therefore welcomes this recommendation.

Parliamentary accountability and transparency

63. **Recommendation: 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." 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. (Paragraph 91)**

64. As the Committee accepts, attendance at Cabinet is a matter for the Prime Minister. In October 2008, the Prime Minister announced that the Attorney General would attend Cabinet only when her responsibilities were on the agenda. Under these arrangements the Attorney General attends Cabinet where she is required to provide legal advice, or where her Ministerial responsibilities are on the agenda.

65. **Recommendation: 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. (Paragraph 96)**

66. The Government notes and welcomes the Committee's recommendation that the Attorney General should continue to sit in one of the two Houses of Parliament. The Government considers that it is important that the Attorney General should be a member of Parliament and therefore directly accountable to it.

67. **Recommendation: 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. (Paragraph 99)**

68. The Government welcomes the Committee's approval of the proposal for an annual report on the exercise of the Attorney's functions. Although the Government has decided not to make the report a statutory requirement, it intends nevertheless that the Attorney should publish a report every year. Like the Committee, the Government believes that such a report will increase Parliament's ability to scrutinise the Attorney, and make the exercise of her functions more transparent.

69. **Recommendation: 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. (Paragraph 101)**

70. While being ready to assist Parliament in establishing new means of holding the Attorney General to account, the Government recognises that it is for Parliament to decide what those new means, if any, might be. The Government notes the Committee’s view of the sufficiency of the current arrangements for select committee scrutiny of the Attorney General and her office.

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

71. **Recommendation: 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. (Paragraph 104)**

72. The Government welcomes the Committee’s support for the retention of the current arrangement. The Government considers that Ministers have a proper interest in the objectives and priorities applied by the prosecuting authorities, and in their use of the resources that are allocated to them, and that keeping that ministerial responsibility with the Attorney General rather than transferring it to a mainstream policy department further protects the prosecuting authorities from the perceived risk of political influence and from possible conflicts of interest.

The Attorney General's role in prosecutions

73. **Recommendation: 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. 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. (Paragraph 114)**

74. The Government believes that, in order to increase public confidence, there needs to be a clearer delineation between the functions of the Attorney General and of the prosecuting authorities. The Government believes that the Attorney General should continue to superintend the prosecuting authorities, but that there should be greater clarity in the separation of the role of Minister with responsibility for the operational delivery of prosecutions and that of making decisions in individual prosecutions.

75. As the evidence to the Committee has exposed, there has been doubt as to the meaning and extent of the power of superintendence in relation to individual prosecutions.

76. The Government believes that greater clarity between operational delivery and decisions in individual prosecutions, and the meaning of superintendence will be best achieved through the protocol between the Attorney General and the directors of the prosecution authorities.

77. But the Government also acknowledges that that there needs to be particular clarity about the Attorney's role in individual prosecutions. The Attorney General announced in 2007 that while the Government consulted on reform of the role she would not make key prosecution decisions in individual criminal cases except if the law or national security requires it. The Attorney General intends to continue with this practice but the Government does not believe that it will be necessary to make any legislative changes in this area.

78. **Recommendation: 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)**

79. The Government welcomes the Committee's support for its proposals in relation to consents to prosecution. The Government considers that, in the long term, some consents to prosecute do need to be abolished or allocated to the person best placed to make them. Work on this will continue and the necessary changes made when parliamentary time allows.

80. **Recommendation: 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)**

81. The Government notes the recommendation. The Government has looked again at the position on the *nolle prosequi* power and considers that it should after all be retained. The power to enter a *nolle* is used very sparingly, usually only where the defendant is unwell and there are no other means to end the proceedings. But it serves an extremely useful purpose and the Government does not intend to remove it.

The Attorney General's superintendence function

82. **Recommendation: 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)**

83. The Government notes and welcomes the Committee's agreement to the retention of the superintendence function.

84. **Recommendation: 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)**

85. The Government notes and welcomes the Committee's support for the protocol. The Government has decided that the protocol should not be a statutory requirement but it still intends that it be published and laid before Parliament once prepared and when, in future, revised.

86. **Recommendation: 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)**

87. The Government accepts the Committee's recommendation that it should be possible for the Directors to serve more than one term. The Government considers that while re-appointment should be possible, there should only be one such re-appointment and that the second term should be limited to two years. The intention therefore is that in practice Directors will be offered a five year contract with the prospect of renewal for a further two years.

88. **Recommendation: 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)**

89. The Government notes and welcomes the Committee's view.

Courts and Tribunals

Background

90. **Recommendation: 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. (Paragraph 141)**

91. The Government notes the concerns expressed by the Joint Committee about making changes to a process which has been in operation for only a short time. However, it is important that the judicial appointments system is considered as part of the wider programme of constitutional renewal.

92. Clearly, the system has already undergone substantial reform under the Constitutional Reform Act 2005, which represented a radical departure from the previous system for appointing judges. The proposals in the draft Bill and White Paper were not intended to unravel the significant reforms already made, but to take into account the backdrop of a wider constitutional reform programme, as well as proposing changes that could be made in light of experience of the system in practice, to make the process as efficient and effective as possible.

93. The Government remains committed to nearly all the proposals seen by the Joint Committee even though it will await the passage of time to develop some of these further and separately from the Bill. The Government does, however, recognise the strength of the concerns expressed against removing the Lord Chancellor from the process for judicial appointments below the High Court, and we are therefore not including this proposal in the Bill.

94. The Government also notes the Joint Committee’s disappointment at the slow rate of progress in increasing the diversity of the judiciary. The Government has already helped to establish a high profile Advisory Panel on Judicial Diversity under the Chairmanship of Baroness Neuberger which will give this matter some real momentum. It will report to the Secretary of State for Justice and Lord Chancellor in November 2009.

The role of the executive

95. **Recommendation: 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 not longer necessary in light of the statutory selection processes introduced by the Constitutional Reform Act 2005. (Paragraph 145)**

96. Under the Constitutional Reform Act 2005, the Prime Minister's role in the process is essentially only a formality. Provided that the Lord Chancellor is able to fulfil his statutory duties with regard to the appointments system, there is no need for the continued involvement of the Prime Minister in the process. The Government welcomes the Joint Committee's support for this proposal and will proceed with removing the Prime Minister from the appointments process.

97. **Recommendation: 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. (Paragraph 153)**

98. The Government acknowledges the concerns expressed by the Joint Committee, and by many of those who gave evidence, about the removal of the Lord Chancellor's role in appointments below the High Court. The Government recognises that the current system has not been in place long, and that there is unease about the extent to which this proposal may remove the necessary controls over the process and affect the Lord Chancellor's statutory duty to uphold the independence of the judiciary. The Government therefore proposes to make no changes to the role of the Lord Chancellor in appointments below the High Court at present and to keep the Lord Chancellor's role in the appointments' process under review.

Accountability

99. **Recommendation: 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. (Paragraph 159)**

100. As the Minister responsible for the maintenance of the justice system, the Lord Chancellor needs to be able to have effective means to ensure that business needs are met. Without such means, there is a risk that any deficiency in the process will lead to delays in the appointment of judges and a subsequent knock-on to the ability of the courts and tribunals systems to deliver justice in a timely manner. The JAC, as a Non Departmental Public Body, must be subject to certain procedures, for example, regarding effective performance and proper control of expenditure. The power to set targets and directions set out in the White Paper would have provided the Lord Chancellor with a mechanism for ensuring that the overall appointments process would be sufficiently robust and that the JAC would operate efficiently and effectively.

101. The Government notes the Joint Committee's objection that targets and directions will undermine the independence of the Judicial Appointments Commission. The Government is absolutely committed to ensuring that the JAC is fully independent in making its selections. However the Government does not agree that the powers of targets and directions proposed impact in any way on that ability.

102. The proposals would have provided the Lord Chancellor with a better ability to satisfy himself that the JAC carries out its duties efficiently and effectively, and therefore fulfil his statutory duty to uphold the independence of the judiciary. They would also have helped promote judicial diversity, something the Joint Committee has identified as a broader necessity, without interfering with the JAC's statutory duty to select solely on merit for individual appointments.

103. Nevertheless the Government feels the processes now in place should be given more time to bed down before making a determination as to whether or not current checks and balances are enough for the purposes identified. The draft proposals are not included in the final Bill.

104. **Recommendation: 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. (Paragraph 161)**

105. We note the Committee's support of a role for Select Committees and agree that this is a matter to be determined by the Committees concerned.

106. **Recommendation: 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. (Paragraph 163)**

107. The Government welcomes the Committee's support for this proposal. The Prime Minister announced on 23 January that he was asking the House of Commons Liaison Committee to consider whether pre-appointment scrutiny would be appropriate for a number of public appointments, including any future Chair of the JAC. The Liaison Committee responded on 5 March welcoming the Government's proposals and endorsing the Government's initial list. The Committee, however, also proposed a number of additional posts for pre-appointment scrutiny. The Government's response was published by the Liaison Committee on 2 June agreeing a list of 60 appointments.

108. **Recommendation: 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 further re-assessment of Parliament's role should await a comprehensive review of the appointments' process, as recommended in paragraph 201. (Paragraph 165)**

109. We note the Committee's concerns about extending the role of Parliament and we agree that it would not be appropriate to extend Parliament's role to scrutiny of the appointment of individual judges.

Key principles

110. **Recommendation: 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. (Paragraph 168)**

111. The Government welcomes the Joint Committee's support for establishing key principles. Setting out key principles will help provide an effective guide for all the bodies involved in the appointments process and allow them to be held to account. However the Government acknowledges that there were strong concerns about placing these principles in the statute. The Government therefore wishes to continue to review the most suitable mechanism for establishing key principles, but has not included them in the Bill.

Judicial Appointments Commission panel

112. **Recommendation: 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)**

113. The Government acknowledges the JAC's commitment to engaging with stakeholders, and the fact that they have set up a number of working groups for this purpose.

114. There are clear benefits to placing a stakeholder panel on a statutory footing. A statutory arrangement would guarantee continued work with stakeholders should the current arrangements lapse, and would ensure that the panel is independent of the JAC and able to regulate its own procedures.

115. After further consideration the Government believes that as the current arrangements in place have given no immediate signs that they are likely to lapse, the need for a statutory requirement to work with stakeholders is less pressing. The proposal is not included in the Bill.

Non-statutory eligibility criteria

116. **Recommendation: 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)**

117. The Government welcomes the support for this proposal. It is right that the Lord Chancellor should set non-statutory eligibility criteria so he can ensure that the business needs are met. The Government however does not agree that it is necessary to introduce a statutory requirement for the Lord Chancellor to seek the concurrence of the JAC or the LCJ. Liaison on the specification for an appointment already takes place between the Ministry of Justice, the JAC and the senior judiciary when a Vacancy Request is issued and this will continue to take place. The Government does not think it is necessary to legislate on non-statutory eligibility criteria at this point but may consider doing so in the future.

Improving the process: reducing bureaucracy and delay

118. **Recommendation: 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)**

119. Transferring responsibility for medical checks from the JAC to the Lord Chancellor, so they can be carried out at an earlier stage, will help shorten the appointments process. This proposal is supported by the JAC who agree that medical checks are a part of the appointments process, rather than the selection process, and should therefore be carried out by the Ministry of Justice. The Government is of the view that, as the current arrangements are set out in legislation, in the interest of avoiding any doubt about the process, the legislation should be altered so it is absolutely clear where the responsibility lies.

120. **Recommendation: 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 a possible without introducing further legislation. (Paragraph 180)**

121. This proposal, to allow the JAC to take the preliminary steps in a selection process before a formal Vacancy Notice, was introduced at the suggestion of the JAC. However, in evidence to the Joint Committee, the JAC stated that they no longer consider legislative change necessary. They explained that broad agreement has been reached that all parties should ensure that, at the start of each financial year, the JAC is provided with full and accurate documentation of all the vacancies over the coming year. They also explained they felt that, despite the unpredictable nature of some of the vacancies, this commitment to work together will provide important efficiency dividends. The Government agrees that it is not necessary to amend the legislation for Vacancy Notices and will continue to work with the JAC to improve the efficiency of the process.

122. **Recommendation: 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 the appointment system subject to the approval of the Lord Chancellor, the Lord Chief Justice and the Senior President of the Tribunal Service as appropriate. (Paragraph 184)**

123. The Government acknowledges the concerns about the broad basis of an order making power.

124. In order to fill vacancies listed in Schedule 14 to the Constitutional Reform Act, the Lord Chancellor is required to ask the JAC to make a selection. There are a number of tribunal and arbitrator posts in Part 3 of Schedule 14 which have a low or intermittent workload or occur sporadically. For these posts, a full, formal JAC exercise does not facilitate a timely appointment and is not an efficient use of resource. This is not a criticism of the JAC, but rather an acknowledgement that the JAC programme for any given year must be planned and agreed in advance and that there will only be limited scope for dealing with unforeseen eventualities. In addition there are temporary posts listed in Schedule 14 which provide cover for vacant leadership roles e.g. Acting President of the Competition Appeal Tribunal. JAC selection is inappropriate for these roles which need to be filled rapidly in order to ensure that business needs are met.

125. The Government has considered the Lord Chief Justice's proposal for the flexible deployment of judicial office holders to a post at the same level. However the Government is of the view that this would significantly extend the Judiciary's involvement in judicial appointments and thus have significant implications for the whole of the judicial appointments system.

126. The Government remains convinced that the most appropriate way to resolve this issue is an order making power to remove offices from Schedule 14. Even so, the Government no longer believes this Bill is the appropriate vehicle for such a change, and in the meantime will explore further non-statutory options available.

127. **Recommendation: In broad terms, we welcome the proposals 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 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 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)**

128. The Government remains committed to removing the requirement for the Lord Chief Justice to consult or gain the concurrence of the Lord Chancellor before deploying, authorising, nominating, or extending the service of judicial office holders. This will help streamline the process and avoid unnecessary delays caused by consultation. However, the Government is of the view that there is no urgent need for these reforms and that these simplifications can be introduced at a later stage.

129. **Recommendation: 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)**

130. The original motivation for this proposal was related to the proposal to introduce a JAC stakeholder panel. The Government queried whether it might be appropriate for the professional members to remain on the Board if the professions were also represented on a stakeholder panel.

131. Without a statutory JAC stakeholder panel the need for this additional proposal is less pressing – it is not included in the Bill.

Disclosure of information

132. **Recommendation: 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)**

133. The Government welcomes the Joint Committee's support for this proposal. This clarification of limited circumstances in which confidential information can be disclosed for the purposes of conducting a criminal investigation will enable the proper investigation of a crime by the police. This proposal is part of the Bill.

Diversity

134. **Recommendation: We are disappointed by the lack of measurable progress towards increasing diversity at all levels of the judicial, 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 Lord Chief Justice, to continue exploring the best ways of addressing this important issue. (Paragraph 197)**

135. Increasing diversity in the judiciary is a key priority. Whilst figures published by the Judicial Appointments Commission show progress at junior levels, the Government recognises that further work needs to be done. A tri-lateral Judicial Diversity Strategy was agreed in 2006 between the Lord Chancellor, Lord Chief Justice and the Chair of the Judicial Appointments Commission. The Lord Chancellor's overall policy aim is to enhance judicial diversity at all levels, whilst ensuring appointment continues to be on merit and lead to appointment of the best candidates.

136. Although the final Bill will not contain proposals to increase the diversity of the judiciary, the recently launched Advisory Panel will seek to identify the barriers to progress on judicial diversity and to make recommendations on how speedier and sustained progress towards a more diverse judiciary at every level and in all courts of England and Wales might be achieved.

Statutory salary protection

137. **Recommendation: We welcome the proposal to give statutory salary protection to tribunal judges. (Paragraph 199)**

138. The Government welcomes the Joint Committee's support for this proposal. Introducing statutory protection for tribunal judges will ensure that they have the same safeguards from executive interference as other judicial office holders. It will also remove the distinction between tribunal judges and other judicial office holders. It will remain in the final Bill.

Other changes

139. **Recommendation: Some of the proposals [made by the JAC] received support during our inquiry and we hope that the Government will keep them under review. (Paragraph 200)**

140. The Government notes the proposals made by the JAC to the Committee, however the Government does not accept the need for these proposals at this stage.

Conclusion

141. **Recommendation: Our overall view is that most of the proposals to reform the judicial appointments process are premature. 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. (Paragraph 201)**

142. The Government does not accept the overall view of the Committee but will continue to review the judicial appointments process as its development progresses. Any investigations by either the House of Commons Justice Committee and / or the House of Lords Constitution Committee would be a matter to be decided by the Committees concerned.

Ratification of Treaties

Putting the Ponsonby Rule on a statutory footing

143. **Recommendation: We agree that the Government's proposal to place the Ponsonby Rule on a statutory footing is a "positive and beneficial" reform. (Paragraph 208)**

144. The Government welcomes the Committee's conclusion that the proposal to place the Ponsonby Rule on a statutory footing is a "positive and beneficial" reform.

The detail of the provisions

145. **Recommendation: We conclude that, whilst a 21 sitting day 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. (Paragraph 212)**

146. The Government welcomes the Committee's conclusion that a 21 sitting day period will be sufficient time for Parliamentary scrutiny of treaties in the vast majority of cases.

147. The Government agrees that there should be flexibility to cater for exceptional circumstances, and can confirm that the commitment given in 2000 to show flexibility where Parliament needs more time to conduct an inquiry or hold a debate on a particular treaty will continue to apply when the statutory provisions are in force.[1]

148. As a result the Constitutional Reform and Governance Bill has been drafted to include a clause to provide that a Minister of the Crown may, exceptionally, extend the period in relation to a particular treaty up to a further 21 sitting days. Such an extension may be granted more than once.

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[1] Government Response of 31 October 2000 to the House of Commons Procedure Committee's Second Report of Session 1999-2000, Parliamentary Scrutiny of Treaties (HC 210).

149. The most important effect of this new clause is that the prohibition in clause 21 of the Draft Bill on ratifying the treaty before the end of the scrutiny period would be extended to apply for the duration of any such extension. This is significant, give that a treaty ratification cannot be undone.

150. The new clause also provides that any vote against ratification during an extended period would have the same legal effect as during the first 21 sitting days.

151. **Recommendation: 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. (Paragraph 217)**

152. The Government welcomes the Committee's endorsement of the substance of the proposals with regard to the relative effects of a negative resolution in the Commons and the Lords. The concerns about lack of clarity in the drafting of the clause 21 of the Draft Bill have been noted and this clause has been re-drafted for the Constitutional Reform and Governance Bill.

153. **Recommendation: 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. (Paragraph 220)**

154. The Government is grateful for the Committee's comments on this point and welcomes their support for the approach proposed in the Draft Bill.

Exceptions and exceptional circumstances

155. **Recommendation: 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. (Paragraph 226)**

156. The Government set out in the Consultation Document “War Powers and Treaties”, published in October 2007, examples of occasions when alternative procedures for informing and consulting Parliament have been used to satisfy the Ponsonby Rule in place of the usual laying period (paragraphs 149 – 155). Six examples have been identified dating back to 1942, which is indicative of how rarely these alternative procedures have been used in the past.

157. The Government has no intention of invoking exceptional procedures in any kinds of situation for which it would not currently consider alternative procedures under the Ponsonby Rule. It is however very difficult to predict in advance what those circumstances might be – by their nature they tend to arise through one-off combinations of factors. These cannot be described in general terms other than that they are exceptional.

158. Clause 22(2)(b) of the Draft Bill set out a new statutory requirement on Government, in any case where clause 22 was invoked, to lay a statement before Parliament to explain why it is doing so.

159. This requirement was intended to ensure transparency and accountability to Parliament, by drawing Parliament’s attention to any deviation from the standard procedures. The use of clause 22 would not necessarily have resulted in less Parliamentary scrutiny of the treaty concerned – on the contrary it may well have resulted in more. Moreover, clause 22(2) contained the safeguard that exceptional procedures may not be invoked after either House has resolved against ratification of the treaty.

160. **Recommendation: 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. (Paragraph 228)**

161. The Government welcomes the Committee’s acceptance of the exceptions proposed in clause 23 of the Draft Bill and has followed the recommendation that it continue to investigate whether any other treaties should be excluded in a similar manner. As a result, clause 24 of the Constitutional Reform and Governance Bill now includes a definitive list of treaties to exclude from the provisions.

Definitions

162. **Recommendation: 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. (Paragraph 232)**

163. The Government notes the Committee's comments. As the Secretary of State for Justice stated in his oral evidence, the significant point in the Draft Bill's definition of a treaty is that it binds the United Kingdom under international law. The Committee refers to "treaty-like documents such as memoranda of understanding", which are non-legally binding documents. A vast range of types of non-binding documents may be generated in international affairs not only by Government Departments but also many other organisations to progress policy interests with their overseas counterparts. Such documents are not within the scope of the Government's proposals regarding ratification of treaties, nor are they currently subject to the Ponsonby Rule. The Government would however be pleased to discuss ways of enhancing Parliamentary scrutiny of non-treaty documents on particular subjects with the relevant select committees.

Parliamentary scrutiny

164. **Recommendation: 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 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 not 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. (Paragraph 238)**

165. The development and operation of such mechanisms are ultimately matters for Parliament itself, in both Houses, to decide upon.

166. The Government will endeavour to support Parliament in whichever methods it chooses to enhance its ability to scrutinise treaties and will be pleased to engage in discussion with or about any new committee which may be proposed for this purpose.

The Civil Service

Background

167. **Recommendation: [W]e welcome the Government's intention to put the civil service on a statutory footing. (Paragraph 240)**

168. The Government welcomes the Committee's endorsement of its proposals for civil service legislation. The Government has now also formally responded to the report of the Public Administration Select Committee whose findings informed the work of this Committee.

Definitions (clauses 25 and 41)

169. **Recommendation: 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. (Paragraph 244)**

170. The Government welcomes the Committee's support for its proposed approach in relation to the definition of the civil service. The proposals apply to all bodies that are employed in the 'civil service of the State', except for those parts of the civil service that are expressly excluded on the face of the legislation. This approach makes clear who is and isn't covered by the legislation.

171. **Recommendation: 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. (Paragraph 249)**

172. The Government welcomes the Committee's endorsement of treating GCHQ in the same way as the other Security and Intelligence Agencies, which are already grouped together in terms of funding and have their own separate statutory provisions.

173. The proposals do not change the status of staff at GCHQ, who will remain civil servants and be governed by their own Code of Conduct incorporating the key principles and values of the Civil Service Code. The Government gives the Committee the assurance that appointments to GCHQ will, as a general rule, continue to be made on merit.

174. GCHQ staff have a number of ways in which to raise concerns, including an internal grievance procedure. They will continue to have access to the independent Staff Counsellor, who is available to any member of the security and intelligence services who has concerns relating to the work of his or her service, or a personal grievance or other problem which it has not been possible to resolve internally.

The Civil Service Commission (clause 26 and schedule 4)

175. **Recommendation: 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. (Paragraph 254)**

176. The Government has listened carefully to the concerns raised by both Committees and by the Civil Service Commissioners. In developing the proposals, the Government, working closely with the Commissioners, considered carefully a range of organisational models to ensure the Commission could operate with a high degree of independence. We believe that the executive non-departmental public body model is the most suitable model to safeguard the Commission’s independence, allowing it to operate at arm’s length from any government department. There are a number of regulatory bodies operating under this model, the Information Commissioner being one example.

177. The proposals provide for the Commission to publish and lay an annual report to Parliament which, as now, can include summary information on the funding of the Commission. It is therefore an obvious vehicle to raise any concerns on the adequacy of funding. The Commission will also be able to issue a special report, as now, to raise concerns outside the timing of the publication of the annual report should it be needed. Furthermore, the proposals do not affect the Commissioners’ access to the Public Administration Select Committee, who provide an important and influential external safeguard to the Commissioners’ role in regulating the Executive.

178. For these reasons, we believe the proposals provide sufficient safeguards for the Commission to operate with a high degree of independence.

179. **Recommendation: We agree with the Government that a five-year term is appropriate for the First Civil Service Commissioner.**

180. **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. (Paragraphs 256-257)**

181. The Government welcomes the Committee's endorsement for its approval of these issues.

182. **Recommendation: 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)**

183. The Government accepts the Committee's recommendations.

184. **Recommendation: 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)**

185. The Government has considered this point carefully in light of the First Civil Service Commissioner's evidence and recommendations of both this Committee and the Public Administration Select Committee. We strongly echo the Committee's view that the proposals should not place any additional, undue pressure on the resources of the Commission or risk politicising its role. The Government believes, firstly, that such a provision is unnecessary and, secondly, would indeed risk the Commissioners being diverted by politically motivated or vexatious correspondence. This, in turn, would have resource implications, about which the Commissioners themselves have voiced concerns.

186. Civil servants can already take complaints or concerns direct to the Civil Service Commissioners who can then investigate and make recommendations. This will continue under the proposals. Commissioners can also approach the Cabinet Secretary with complaints or concerns raised from other sources. The Cabinet Secretary has always taken seriously any approach from the Commissioners if there is a concern which needs investigating. The Government continues to believe this approach strikes the right balance to deliver the correct safeguards while at the same time minimising the risk of politicisation of the Commission's role.

Ministerial power to manage the civil service (clause 27)

187. **Recommendation: 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)**

188. The Government welcomes the Committee's support for its approach in relation to the management of the civil service. The proposals reflect the current position set out in the Civil Service Order in Council, where the power to manage the civil service is vested in the Minister for the Civil Service by the Crown. This is, in turn, delegated to Heads of Departments. It is right that the power to manage should remain with the Minister for the Civil Service, who is ultimately accountable to Parliament for the management of the civil service, including the setting of terms of conditions of the service overall.

189. We can assure the Committee that these proposals do not alter the current position in that the power to appoint and dismiss individual civil servants will, as now, continue to be delegated to the Head of the Civil Service and the permanent Heads of Departments and do not signal a change in Ministerial involvement in individual appointments. The power to appoint is constrained by the subsequent clauses requiring recruitment into the civil service to be on merit following fair and open competition regulated by independent Civil Service Commissioners in accordance with their Recruitment Principles.

190. **Recommendation: 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)**

191. **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. (Paragraphs 269-270)**

192. The Government agrees with the Committee that the duties and responsibilities of Ministers are best dealt with in the *Ministerial Code* and not in legislation which is specific to civil servants.

193. The Government is committed to publishing the *Ministerial Code*. The new *Ministerial Code* was published and laid before Parliament in July 2007. However, for the reasons set out above, we do not believe it would be appropriate to include a requirement to lay the *Ministerial Code* in legislation for the civil service.

194. **Recommendation: 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)**

195. The Government has reviewed the proposals and confirms that the effect of the proposals is to remove prerogative powers with respect to the management of the civil service. The only power which is saved in the prerogative is in relation to security vetting.

Civil service codes (clause 30 to 32)

196. **Recommendation: 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)**

197. The Government welcomes the Committee's conclusion that the civil service and diplomatic codes should not be required to be subject to formal Parliamentary approval. The Public Administration Select Committee provides in-depth scrutiny of the standards of conduct expected of civil servants. It was also one of the key stakeholders consulted on the content of the new *Civil Service Code* before its publication in June 2006. We echo the Committee's welcome of the Public Administration Select Committee's intention to continue to examine closely future revisions of the codes.

198. **Recommendation: 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)**

199. The Government welcomes the Committee's conclusion that the *Civil Service Code* already makes clear what is expected of civil servants in terms of impartiality, including political impartiality.

200. **Recommendation: 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)**

201. The Government has carefully considered the case for an amendment to be made to provide a wider duty on civil servants to Parliament alongside the duty to serve the government of the day.

202. The Government set out its views on the relationship between the civil service and Parliament in its Response to the Public Administration Select Committee's Report on Politics and Administration: Ministers and Civil Servants. The Government agreed with the Select Committee's view that the relationship should be structured to ensure the ultimate accountability of the government to the electorate. This line of accountability is set out in the *Civil Service Code*.

203. The *Civil Service Code* makes clear that civil servants are expected to carry out their role with a commitment to the Civil Service core values and to always act in a way that is professional and that deserves and retains the confidence of all those with whom they have dealings - including Parliament. Guidance in *Departmental Evidence and Response to Select Committees* (the Osmotherly Rules) makes clear that when officials represent Ministers before Select Committees, they should be as forthcoming and helpful as they can in providing information relevant to Committee inquiries and that where a select committee wishes to take evidence from a particular named official the presumption will be that Ministers will agree to meet such a request. The Government believes that this demonstrates its commitment for civil servants to be honest and as helpful and open as possible with Parliament while at the same time not undermining the principle of ministerial accountability.

Exceptions from appointment on merit (clause 34)

204. **Recommendation: 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)**

205. In its report to the Joint Committee, the Public Administration Select Committee argues that that the Royal Household is not normally considered to be within the civil service and therefore outside the scope of the draft Bill. The Government agrees with the Public Administration Select Committee that appointments to the Royal Household do not fall within the definition of the civil service so do not require the use of this exception.

206. The Government has undertaken further investigation of appointments made directly by Her Majesty to the civil service which continue to require an exception to the principle of recruitment on merit following fair and open competition. In failing to find any, we have removed this exception from the proposals, therefore further limiting the number of exceptions to the fundamental recruitment principle of the civil service.

207. **Recommendation: 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)**

208. This exception has only ever been used very sparingly. The Government agrees with the Committee that this exception should continue to be used on an exceptional basis, and that any such appointment should require the direct approval of the Prime Minister.

209. **Recommendation: 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)**

210. The Government echoes the Committee's comments on the Commissioners' review of the exceptions and their own recruitment guidance. We would like to thank the Commissioners for their valued contributions in developing the legislative proposals and welcome the introduction of the Recruitment Principles, which came into force from 1 April 2009. The Principles are focused and accessible, and underline the Commissioners' role as guardians of the principle of appointment on merit on the basis of fair and open competition.

Special advisers

211. **Recommendation: 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)**

212. The Government welcomes the Committee's words with regard to the role special advisers play in Government. We share the view that transparency about accountability, roles and responsibilities of special advisers is extremely important, which are set out clearly in the *Code of Conduct for Special Advisers*.

213. **Recommendation: 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)**

214. The Government welcomes the Committee's conclusion that special advisers should not be paid from "short money" which would have the effect of removing them from established lines of accountability and the clear and transparent terms and conditions of employment set out in the *Code of Conduct for Special Advisers* and the *Civil Service Code.*

215. We also welcome the Committee's recommendation that specific reference to restriction in respect of special advisers' activities do not need to be on the face of the Bill. We believe that this is best handled in the *Code of Conduct for Special Advisers*. In specifying that the sole purpose of appointing special advisers is to assist the Minister, the Government believes that it is clear that special advisers cannot exercise executive powers.

216. The Government notes the Committee's recommendation that a procedure for limiting the numbers of special advisers should be included in the appropriate Code. The *Ministerial Code* already makes clear that, with the exception of the Prime Minister, Cabinet Ministers and Ministers attending Cabinet may each appoint up to two special advisers, and that all appointments require the Prime Minister's approval. We believe this provides the appropriate mechanism to regulate the number of special adviser appointments and therefore meets the Committee's recommendation. The Prime Minister also publishes an annual statement to Parliament on the numbers and costs of special advisers, reflecting the Government's commitment to transparency in relation to these appointments. This commitment is also set out in the *Ministerial Code.*

217. **Recommendation: 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)**

218. The Government agrees that the nature of the role of special advisers means that they are able to represent Government policy in some contexts in a way that the permanent civil service cannot, and that in such circumstances it should always be clear that they are acting as special advisers not permanent civil servants.

219. **Recommendation: We have recommended in paragraph 296 that the Code of Conduct for Special Advisers be amended to make explicit the functions that special advisers may not perform. As with the other codes, we are not persuaded by arguments for a formal Parliamentary approval mechanism. The most appropriate form of Parliamentary scrutiny of the code is that undertaken by select committees, particularly the Public Administration Select Committee. (Paragraph 300)**

220. We reiterate our support for the Committee's view that, as with the other codes, the most appropriate form of Parliamentary scrutiny of the Code is undertaken by select committees.

Parliamentary scrutiny of machinery of government changes

221. **Recommendation: The power to restructure the machinery of government should remain with the Prime Minister. We agree there should be better Parliamentary scrutiny of such changes but this is a matter for the appropriate select committees rather than through legislation. We encourage departmental select committees to take a more pro-active role in this area, and to summon Secretary of State at an early opportunity after their appointment to enable Members to examine their objectives and priorities. (Paragraph 303)**

222. The Government has set out its response to the Public Administration Select Committee's Report on Machinery Of Government Changes after careful consideration of the recommendations of Public Administration Select Committee, the principles set out in the *Governance of Britain* White Paper and in light of the views of this Committee. The Government believes it has made significant steps forward in improving transparency of the machinery of government process, and the ability of Parliament effectively to scrutinise these changes. All significant changes are announced to Parliament by a Written Ministerial Statement which is now accompanied by detailed background material placed in the Libraries of both Houses. We hope that this provides a starting point for any Select Committees who wish to examine changes.

Business appointment rules for former civil servants

223. **Recommendation: 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. (Paragraph 305)**

224. The Government does not consider that it is appropriate to incorporate a set of principles governing business appointments for former civil servants in the proposals. The existing *Rules on the Acceptance of Outside Appointments by Crown Servants* (the *Business Appointment Rules*) already cover the rules which apply in respect of civil servants and business appointments. Adherence to the *Rules* forms part of the terms and conditions of service for all civil servants. In common with the detailed rules governing other aspects of civil servants' terms and conditions, the *Business Appointment Rules* are set out in the *Civil Service Management Code.* The Government is currently working on revisions to update and clarify the *Rules.* The revised version will be incorporated into the *Civil Service Management Code*.

War Powers

The Government's proposals

225. **Recommendation: 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. (Paragraph 318)**

226. Whilst the Government does not rule out legislation in future we are pleased that the committee supports the draft resolution as a well balanced and effective way of proceeding. The Committee recognises that armed conflicts are likely to vary widely and that the executive should retain discretionary powers over such issues as the information provided to Parliament, the timing of a vote and a judgement as to whether exceptional circumstances apply. The Government notes the Committee supports its belief that the Prime Minister is in the best position to make an informed decision on such factors.

227. **Recommendation: We share the widespread concern amongst witnesses about the difficulty of effectively defining 'a conflict decision'. We therefore recommend that the Government, in consultation with key stakeholders, take more time to come up with an effective definition of 'a conflict decision' before bringing any proposals forward. In particular, we suggest that the Government investigate the possibility of identifying those deployments that should be excluded from the definitions. (Paragraph 321)**

228. In the draft resolution a "conflict decision" is defined as a decision of Her Majesty's Government to authorise the use of force by UK forces if the use of force would (a), be outside the UK and (b), be regulated by the law of armed conflict. "Armed conflict" is defined with reference to the law of armed conflict.

229. The government has given a great deal of consideration to the approach taken in the proposed resolution. The issues are complex. Armed conflicts vary widely in their scope and nature and the parameters of 'armed conflict' are not always easily delineated. As a matter of law it is the existence of an armed conflict, within the meaning of that term in international law, that triggers the application of international humanitarian law (also known as the law of armed conflict). So if the Government is proposing to commit UK forces to a situation it considers to be regulated by the law of armed conflict, it will have already concluded that the situation is one of armed conflict, and the new parliamentary procedures will apply (subject to the exceptions). The Government still believes that this approach is the most clear-cut and practical and has the advantage of tying the concept to the same sense it has in international humanitarian law.

230. We gave consideration to alternatives, both listing the sort of operations that might be excluded and to attempting to define "armed conflict" (even though it has meaning in international law, while remaining undefined). Neither approach appeared satisfactory, and seemed likely to be cumbersome and confusing. The approach chosen means that the Government cannot commit UK forces to operations where it believes the force to be used is regulated by the law of armed conflict without complying with the applicable requirements of the resolution.

231. The Committee has suggested that we investigate the possibility of identifying those deployments that should be excluded from the definition. As with our previous considerations as to whether we could list categories of operations that fell within our intended definition, the nature of the operation, its context and progress are likely to vary widely, making this approach unwieldy. The Governments believes that listing varieties of operations that fall outside the definition is unlikely to provide a more workable guide to the decisions that would be subject to Parliamentary scrutiny.

Areas of executive discretion

232. **Recommendation: In respect of the war powers proposals, we agree that it is appropriate that the Executive should retain discretionary powers over such issues as the information provided to Parliament, the timing of a vote, and a judgment as to whether the exceptional circumstances procedure should apply. We also recognise that the Prime Minister is in the best position to make an informed decision on such factors. We also agree with the Government that a retrospective approval process for conflict decisions is not desirable. (Paragraph 332)**

233. We are strongly of the opinion that the Government should, wherever possible, ensure Parliament has the opportunity to debate whether we should engage in a proposed conflict via the approval process. However, there will be situations where this is not possible, either because the deployment is too urgent or the release of information about it would have security implications. In these cases the Government believe that the potential dangers of either a retrospective approval process or a detailed debate on the merits of a conflict already underway outweighs the benefits in terms of democratic accountability. It may call into question the credibility of the UK's use of force, damage international relations and threaten the security and morale of the UK armed forces. It is unlikely we would be entering into an urgent operation unless it was a response to a grave and immediate threat. The usual methods of parliamentary scrutiny and ministerial accountability will, of course, continue to be available in relation to those operations which are announced to Parliament after commencement, without advance approval.

234. The Prime Minister is in a good position to decide what evidence is relevant to the situation in question and the best treatment for relevant yet sensitive information. For similar reasons flexibility is of the utmost importance when deciding the timing of the vote.

235. **Recommendation: We agree with the Government that deployments involving members of the special forces, and other forces assisting them, should be excepted from the requirement for Parliamentary approval. (Paragraph 335)**

236. As stated above, we believe the Government should, wherever possible, ensure Parliament has the opportunity to debate whether we should engage in a proposed conflict via the approval process, but there will be exceptions. The Government envisages that these types of exceptional operations will be rare. Operations that are likely to fall under the security consideration are generally small scale and of short duration.

Parliamentary oversight

237. **Recommendation: We note that in due course, the House of Commons Modernisation Committee will bring forward proposals on whether Members of the House of Commons should be able to request a recall of Parliament. However, we still think it appropriate, for the avoidance of doubt, for the Government to give an undertaking that it will always arrange for a recall of Parliament in order to allow for Parliamentary approval of a deployment. (Paragraph 338)**

238. The Government will undertake to recall Parliament should the war powers procedure need to be initiated as long as it is practicable to do so. A flexible process for recalling the Houses of Parliament already exists under the standing orders. The Government has shown a readiness to use this power to recall Parliament for recent significant events such as the Iraq conflict, Afghanistan and the attacks on the World Trade Centre. The Modernisation Select Committee is currently considering the Governance of Britain proposals that the recall process should be widened so that recalls could be precipitated by members of Parliament more widely.

239. **Recommendation: We recommend that the Government take steps to ensure that ongoing deployments are subject to effective Parliamentary scrutiny. (Paragraph 341)**

240. The Government is very aware of the need to keep Parliament informed of the progress of a conflict through adjournment debates and statements, as appropriate. However the Government maintains that there are considerable dangers in anything that might require Parliament to be involved in detailed scrutiny of the merits of an operation already underway or to pass judgement on operational decisions taken during the course of a conflict. It is also mindful of the possible implications of a parliamentary vote that was not supportive of an engagement that is already in progress and from which it is impossible to withdraw. It may call into question the credibility of the UK's use of force, damage international relations and threaten the security and morale of the UK armed forces.

241. **Recommendation: We agree with the Government's proposal that the House of Lords should hold a debate to inform the deliberations of the House of Commons, but not have a vote, at least so long as the current composition of the Lords is retained. However we emphasize that the procedural arrangements of the House of Lords are a matter solely for that House. We therefore recommend that a procedure for the holding of such debates in the Lords be developed in parallel with the proposed House of Commons resolution. (Paragraph 344)**

242. The Government agrees that the processes in the House of Lords, which are envisaged as a debate and non-binding vote on a proposed motion, should be developed in parallel with the proposed House of Commons resolution.

243. **Recommendation: We believe that the Government's proposals for Parliamentary scrutiny of deployment decisions, in tandem with our recommendations, will provide a sufficient degree of Parliamentary scrutiny, and that therefore no additional mechanisms such as a new Parliamentary committee are required.**

244. **We conclude that, subject to our comments above, the Government's proposal for a detailed war powers resolution is the best way to proceed. (Paragraphs 346-347)**

245. The Government is grateful to the Joint Committee for its considerations on war powers.

Constitutional Renewal?

Reform of prerogative powers

246. **Recommendation: We commend the Government for undertaking the cross-departmental review of prerogative powers. Like the Public Administration Select Committee, we trust that the results of the review will be published as soon as possible. This is an important element of constitutional reform. Ideally, reform of the prerogative should be approached in a coherent manner, not in a piecemeal fashion. (Paragraph 354)**

247. We have completed our survey of prerogative powers and will publish the results shortly. The Government intends to explore some of these issues when it reports fully on the survey of prerogative powers.

Justiciability

248. **Recommendation: The difference of opinion between witnesses underlines an uncertainty about the potential involvement of the courts in statutory provisions. As part of its current review of prerogative powers, the Government must seek to bring some clarity to this debate and should recognise that any move towards statutory solutions would inevitably risk greater involvement of the courts. (Paragraph 357)**

249. There has been considerable debate about justiciability in the passage of the Parliamentary Standards Bill. In particular, questions were raised about Parliamentary privilege, and the potential for conflict between the courts and Parliament. The Justice Committee published a report on the Parliamentary Standards Bill on 30 June, referring in particular to evidence submitted by the Clerk of the House of Commons and a Government memorandum in response to that evidence.

250. The Government thinks it is right that, where possible, prerogative powers should be set down in statute. We note that while some witnesses who gave evidence to the Joint Committee were concerned about the potential for interference from the courts when prerogative powers are defined in statute, others were not concerned about the potential for conflict. The Government is confident that the courts and Parliament will continue to respect their roles in our constitutional settlement, and do not believe that there is a significant risk of greater involvement of the courts. In particular, the Government does not consider that exercises of statutory powers are necessarily more likely to be reviewed by the courts than exercises of prerogative powers and that it depends on the nature of powers being exercised.

Clause 43

251. **Recommendation: We agree with the House of Lords Delegated Powers and Regulatory Reform Committee that the power in clause 43 (to make consequential provision) should be limited to the amendment of Acts passed before or in the same session as the Bill. (Paragraph 363)**

252. While the Government believe it is customary for such clauses making consequential provision to be interpreted as limited to the amendment of Acts passed before or in the same session as the Bill in question, we are content to clarify this in the relevant clause.

A coherent Draft Bill?

253. **Recommendation: 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.**

254. **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 Service Act. They deserve the level of Parliamentary scrutiny that a separate bill would provide. We agree, however, that it is more important that the civil service clauses become law than that they do so in a separate Act.**

255. **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.**

256. **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.**

257. **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 Bill.**

258. **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. (Paragraphs 376-381)**

259. The Government agrees with the Joint Committee that the Draft Bill needed further work before being introduced. We are grateful for the consideration given to the Draft Bill by the Joint Committee in pre-legislative scrutiny, and have spent valuable time amending and supplementing the provisions in the Bill in light of their recommendations.

260. The Government does not agree, however, that the principles of the Draft Bill were difficult to discern. The Bill looked to modernise the constitution by looking to effect changes in the relationship between the citizen, Parliament, and the executive. A fundamental principle of the Government’s approach to constitutional modernisation has been a rebalancing of power, and each of the proposals involved a modification and reduction in the power held by the executive.

261. The form of the Bill on introduction is somewhat different, reflecting changed circumstances since the publication of the Draft Bill. Nevertheless, the Bill we are introducing forms part of the Government's long term programme of constitutional reform, and as such the principles behind the Bill remain essentially the same as the principles behind the Draft Bill: it aims to rebuild trust in our democratic and constitutional settlement by ensuring openness, transparency, and accountability.

Long title

262. **Recommendation: 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)**

263. The Government believes that the long title of the Bill is sufficient to set out the intended scope of the Bill, and does not agree that it should be extended to enable Parliament to consider wider issues of constitutional reform. This Bill sets out a substantial set of proposals for Parliament to consider, and the Government believes that other proposals would most appropriately be dealt with in other Bills.

Short title: constitutional renewal?

264. **Recommendation: 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)**

265. The proposals to be taken forward in the Bill have changed over time. As introduced, we agree with the Joint Committee that "Constitutional Renewal Bill" is no longer appropriate, and have changed the short title to mirror more closely the content and aims of the Bill.

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