Constitutional Reform Bill[*Lords*]: the Government's proposals

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Presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor By Command of Her Majesty
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Introduction

1. The Government is grateful to the Constitutional Affairs Select Committee (CASC) for its constructive and helpful report on the Constitutional Reform (CR) Bill. The work of CASC has been an important part of the detailed examination of the provisions in the Bill throughout the legislative process.

2. Specifically, this Government response is in answer to the conclusions and recommendations in the second of the two reports produced by CASC, published on 28 January 2005. The Government welcomes the positive response of the Committee to these important constitutional reforms and outlines at paragraph 6 the key areas where the Committee has offered support for the provisions in the Bill.

3. The Government has also given careful consideration to the recommendations made by the Committee and, where appropriate, provides a more detailed response below to the points raised in the report.

4. Since the publication of the report, the Bill has completed all of the legislative stages in the House of Commons and will now be brought before the House of Lords to consider those amendments made in the Commons. Consequently, the Committee's recommendation on diversity has already been addressed and an amendment has been accepted. Paragraphs 20 to 22 provide details of the amendment moved during Committee on 1 March that deals with CASC concerns regarding diversity in judicial appointments.

The Committee's Report

5. In summary, the Select Committee's report acknowledges that many of the issues raised in their first report, published in February 2004, have been addressed as the Bill has progressed through the House of Lords. The Committee have welcomed the retention of the title of the Lord Chancellor, which was formally announced by the Government at Commons Second Reading. The Committee have also noted that the creation of the new Judicial Appointments Commission and discipline procedures will "create greater transparency in the process of selecting judges"[1]. The report recognises that these improvements, in conjunction with the Concordat, result in a "more effective vehicle"[2] in achieving a Supreme Court outside the legislature and maintaining the independence of the judiciary.

6. The Government is pleased to note that the Committee have offered support for a number of the developments and improvements in the Bill, since it was introduced to the House of Lords last year:

   - the Committee have welcomed the Concordat as a "document of constitutional importance"[3] and recognised that many of its principles have been reflected in the Bill (paragraphs 1 and 2 of the report's conclusions and recommendations);

   - the Government agrees that there has been a proper examination of the CR Bill through the work of CASC, the House of Lords Select Committee and throughout the legislative process (paragraph 3 of the report's conclusions and recommendations);

   - we welcome the Committee's view that there is no compelling argument for insisting that the Lord Chancellor must be a member of the Upper House (paragraph 5 of the report's conclusions and recommendations);

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[1] Constitutional Affairs Select Committee, *Constitutional Reform Bill [Lords]: the Government's proposals, (2005,* p.28)

[2] *ibid*, p.28

[3] *ibid*, p.29

- there is agreement between the Government and the Committee that the issue of Speakership should be a matter entirely for the House of Lords. The Committee also suggests that it would be reasonable that the holder of the reformed office of Lord Chancellor, who is responsible for a large Government department, should not have that role (paragraph 7 of the report's conclusions and recommendations). Clause 15 and Schedule 5 to the Bill facilitate the separation of the Lord Chancellorship from the Speakership of the House of Lords, by replacing statutory references to the Lord Chancellor, in what are clearly Speaker functions, with references to the Speaker of the House of Lords;

- in relation to the jurisdiction of the new Supreme Court, the Committee are content with the proposals (paragraphs 9 to 12 of the report's conclusions and recommendations). The Government recognises the importance of ensuring the legal systems of England and Wales, Scotland and Northern Ireland are kept separate and distinct and the provisions in the Bill will give the necessary protection;

- the Government welcomes the Committee's support for the new provisions for the Court's administration (paragraph 17 of the conclusions and recommendations) and the amendment which places responsibility on the Chief Executive to lay the Annual Report of the Supreme Court in Parliament (paragraph 27 of the report's conclusions and recommendations);

- the preferred option of adapting Middlesex Guildhall to meet the requirements of the new Supreme Court has met with the approval of the Committee who consider it to "have the potential to be an excellent base for the new court of final appeal"[4]; and

- in relation to the proposals for judicial appointments and discipline, the Government notes that the Committee accept the amendment to remove the Lord Chancellor's power to define merit and that their concerns regarding confidentiality have been dealt with.

[4] *ibid,* p.31

7. In addition, the report also highlights a number of points of detail that the Committee feels should be given further consideration by the Government. The section below deals with these specific concerns raised.

Qualifications for the office

It may be an advantage for the holder of the post of Lord Chancellor to be a senior lawyer

8. We agree with the Committee that there *may* be an advantage for the Lord Chancellor to be a senior lawyer, but we do not see that it is necessary for this to be a statutory requirement. The nature of the office envisaged in the Concordat is clearly ministerial and there is no explicit or implicit requirement that he should be a lawyer. The key qualities the office-holder should possess are political courage and sound judgement. Legal qualifications will not guarantee that the office-holder has these qualities, nor that they are appropriately deployed. The Attorney General will continue to provide advice to the Government on legal issues.

Amendments to the Bill

We agree that the provisions to allow amendment of the primary legislation by statutory instrument are undesirable, and we hope and expect that the Government will bring forward amendments in the House of Commons to remedy this point.

9. Clause 16 of the Bill provides the power by order to transfer, modify or abolish a function of the Lord Chancellor. The intention is to give effect to the reforms of the office of Lord Chancellor provided for in the Bill, in relation to functions of the Lord Chancellor that are not dealt with in the Bill. The power will be used principally to apply Concordat principles to Lord Chancellor functions in primary legislation enacted since the introduction of the Bill, and in secondary legislation, and to amend prerogative instruments and charters of private institutions where they have requested abolition or modification of Lord Chancellor functions in relation to them.

10. Clause 16 replaced a clause (clause 98 of the Bill as printed at Introduction in the House of Lords on 24 February 2004) which had the same purpose but which was predicated on abolition rather than reform of the office of Lord Chancellor and which was therefore defective following the decision to amend the Bill in the Lords to retain the office. In considering clause 98, the Chair of

the Delegated Powers and Regulatory Reform Committee wrote to Lord Falconer recommending that the power to amend public and general acts should be exercised only with the affirmative resolution procedure. As set out in Annex 7 of its Tenth Report for the 2003-04 Session[5], the Government in response said it would bring amendments to that effect, and indeed this provision forms part of clause 116.

11. In commenting on clause 16, the Constitutional Affairs Committee quoted from the Fifth Report of the House of Lords Delegated Powers and Regulatory Reform Committee, which noted that '*the power, though limited as respects the functions which it may affect ("existing functions"), is not limited as to the time of its exercise; it could be used in the future for purposes other than those arising out of the current redistribution of the Lord Chancellor's functions. It appears therefore to go wider than may be necessary to address the difficulties described in the memorandum'* [6]*.*

12. The Government has set out the limited circumstances in which it will use the power. Clause 16 itself expressly applies only to legislation passed up to the Session in which the Constitutional Reform Bill receives Royal Assent. The power may also need to be used for example where a function, perhaps in relation to a tribunal, is transferred from another Minister to the Lord Chancellor and would better be carried out in a shared way through consultation or concurrence in accordance with the Concordat. The mechanism to effect transfers between Ministers does not permit the function itself to be amended in this way, even where the Lord Chancellor and Lord Chief Justice agree that it would be right to do so. This power provides for that situation.

13. Although the intention is to use the power to give full effect to the Concordat in recent primary public general Acts and in relevant secondary legislation, it is also intended to deal with functions in private or local Acts and non-statutory functions including those in charters or other prerogative instruments, some of which may only need to be exercised extremely rarely. Such functions may have been missed, or inadvertently overlooked, in the work supporting the Bill.

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[5] Delegated Powers and Regulatory Reform Committee, *10th Report of Session 2003-2004* (March, 2004)

[6] Constitutional Affairs Select Committee, *Constitutional Reform Bill [Lords]: the Government's proposals, (2005,* p.13, paragraph 35)

For these reasons, it does not seem wise to place a time limit on the use of the power, which would undermine this purpose.

14. The Delegated Powers and Regulatory Reform Committee also noted that the negative procedure would apply to the abolition of functions conferred by other instruments (including by statutory instrument subject to affirmative procedure). In the light of the Committee's comments, the Government brought forward and moved an amendment on 1 March, to ensure that the affirmative resolution procedure will also apply to orders effecting the abolition of functions conferred by other instruments themselves subject to affirmative resolution.

Selection and appointment of members of the court

The Lord Chancellor told us that, "It is envisaged that one or more of the commissions in the three jurisdictions will be asked to supply secretarial support on an ad hoc basis when a vacancy is to be filled". We found this to be an insufficient answer in February 2004, and twelve months later the picture is no clearer.

15. This issue has been given further consideration since February 2004 although the detail will be worked through after the Bill has been enacted. It is currently envisaged that the Supreme Court staff will provide administrative and secretarial support for the Supreme Court Selection Commission as and when necessary. The Selection Commission will meet infrequently due to the small number of vacancies that will arise and it would not be an appropriate use of resources to have a permanent secretariat for the Commission. It is envisaged that over a period of time standard procedures will be established and developed, ensuring 'continuity of practice, and a well developed recruitment policy'[7]. Ultimately the Government believes it should be up to the Selection Commission itself to develop the mechanics of the appointment and recruitment process.

We recommend that the Bill be amended to allow the selection commission, if it so chooses, to decide whether to provide the Minister with a choice of more than one name.

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[7] *ibid,* pp. 16, paragraph 46

16. The Government notes the concerns of the Select Committee but believes that only one candidate should be put forward by the Selection Commission. The Government is confident that the Selection Commission will be able to identify the best candidate, even in situations where there is more than one person who is singularly well qualified. The Selection Commission will have considerable expertise, consisting of the President and Deputy President of the Supreme Court and one member from each of the territorial appointing commissions. It will also be required to consult the senior judiciary in each of the jurisdictions and the heads of the Devolved Administrations before submitting a selection to the Lord Chancellor. The pool of eligible candidates will therefore be scrutinised in detail by the Selection Commission. The Government sees no reason why the Lord Chancellor would be better placed to make a selection from a shortlist than the Selection Commission in the event that there is more than one outstanding candidate.

17. In any event the Government also deems it important that ministerial discretion is circumscribed as far as possible and does not believe it would be appropriate for the Lord Chancellor to choose from a shortlist. Nevertheless the Lord Chancellor will receive a list of the other candidates considered by the Selection Commission and will have the power to ask the Commission to reconsider its selection if there is not enough evidence that the person is suitable for the office concerned or is the best candidate on merit. The Lord Chancellor may reject the selection if in his opinion the person selected is not suitable for office. The Government believes that the appointment process therefore strikes the right balance between circumscribing ministerial discretion whilst giving the "Executive branch of Government a real involvement in the choice." [8]

In our first report, we said that vacancies in the new Court should be publicised and open to application in line with most other public service appointments, although it would still be necessary for some element of active searching for candidates to take place. We regret that there is no provision for advertising appointments included in the Bill.

18. The Government is of the opinion that the pool of candidates for appointment to the Supreme Court will be too small to warrant open application. The candidates will be distinguished judges whose expertise and experience are

[8] *ibid,* pp. 18, paragraph 49

well known. There would be no merit in asking candidates to compete through an open application system and indeed this might stop some Judges from applying. Moreover, open applications may be unduly time consuming.

19. Nevertheless, there is nothing in the Bill which precludes the selection commission from adopting open applications as and when it considers it necessary to do so.

Diversity

We believe that the Bill should place a duty on the Judicial Appointments Commission of England and Wales to encourage diversity in the range of persons available for selection. There is a precedent for this in the duties placed on the Northern Ireland Judicial Appointments Commission.

20. The Government has considered carefully the recommendation for a statutory duty on diversity. This is not straightforward. The principle that judges should be selected solely on merit is paramount, and the duty would have to be framed in a way which did not detract from it. The duty would also have to give the Commission a clear focus in its important work on diversity, but be sufficiently flexible (when read with any guidance on the topic issued by the Government under the relevant Bill provisions) to reflect developing issues and priorities in the years to come.

21. Mr Vaz and four other members of CASC put down an amendment which would create a statutory diversity duty. It provided for a new clause to the Bill as follows:

> "1)The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.
>
> 2)This section is subject to section 57."

22. The Government took the view that this clause achieved the necessary focus, and avoided the problems which could have been created. It also followed very closely the terms of the CASC recommendation. The Government therefore welcomed the amendment, and accepted it into the Bill.

Relations between the Judiciary and Parliament and a Parliamentary committee for judiciary-related matters

We regard the provisions of Clause 6 as a useful mechanism for senior judges to be able to communicate directly to Parliament.

In general we agree with the House of Lords Select Committee on the importance of a continuing Committee with responsibility for judicial matters. We think that this Committee serves this function. It would be appropriate for both Houses to have their own Committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit. We do not see the necessity for inserting a provision to the effect in the Bill.

23. We welcome the support the Committee has given to the mechanism in the Bill for the Chief Justices to make written representations to Parliament. We agree that the Committee serves an important function in scrutinising judicial-related matters and agree that no further provision is required on this issue. It is a matter for the Committee if it considers that there would be benefits of sitting jointly with other committees to consider particular issues, but the Government can see that this could be useful on occasions.

Conclusion

The Government wishes to thank the Committee for the thorough way in which it has reported on these important reform proposals during the passage of the Constitutional Reform Bill through Parliament.

In responding to the second CASC report, we note with thanks that the Committee welcomes much of what is in the Bill, including changes we have made since the Committee's first report. We have also sought to address concerns that the Committee have raised in relation to the Bill and have accepted the recommendation that there should be a duty on the Judicial Appointments Commission to take diversity into account when making selections. We believe that the Bill, which has been improved by the robust scrutiny in both Houses, will deliver new constitutional arrangements fit for a modern age.

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