Ministry of JUSTICE

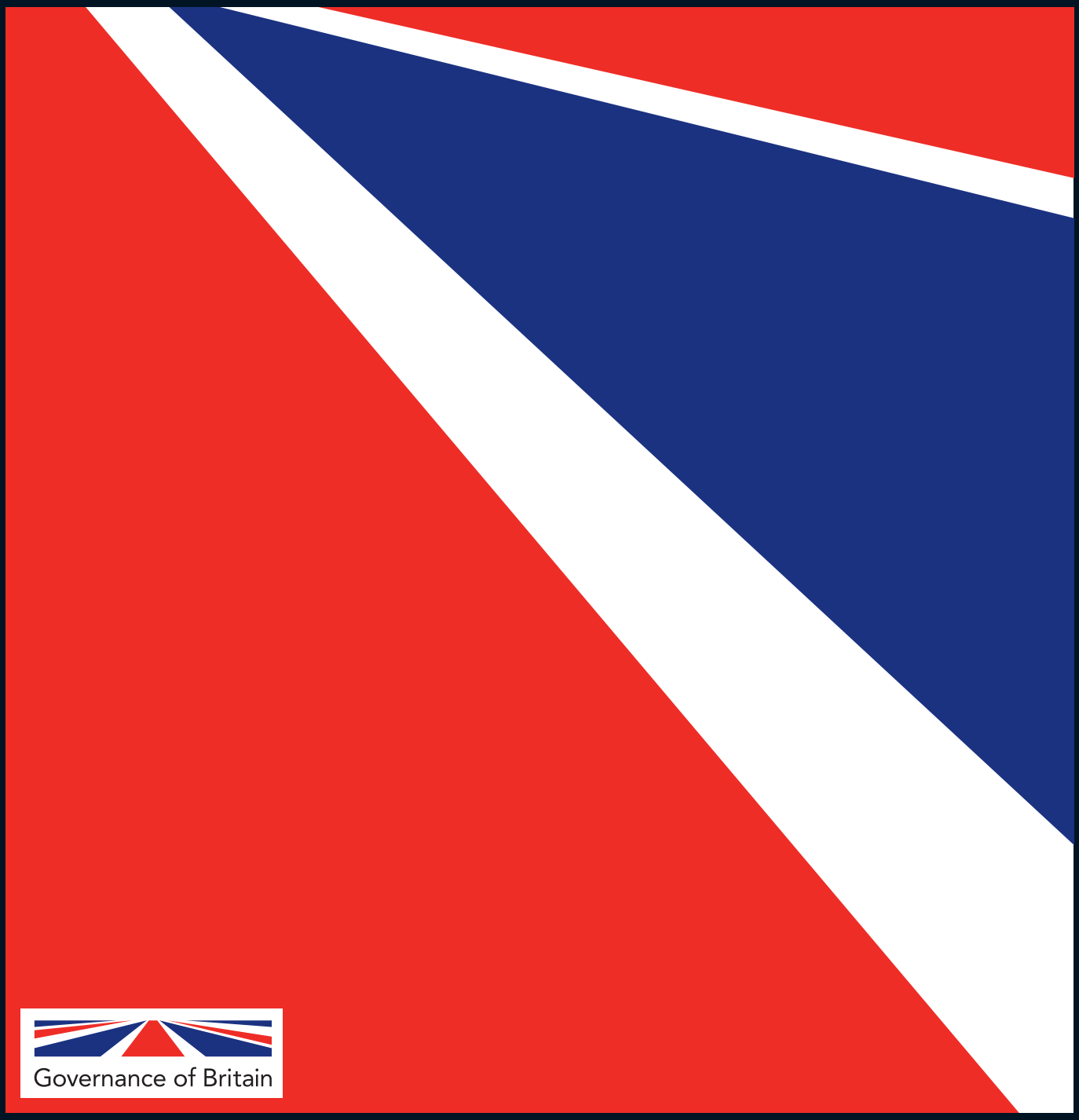
MINISTRY OF DEFENCE

Foreign & Commonwealth Office

The Governance of Britain

War powers and treaties: Limiting Executive powers

Consultation Paper CP26/07. Published on 25 October 2007. This consultation ends 17/01/2008.



Governance of Britain

The Governance of Britain

War powers and treaties: limiting Executive powers

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

October 2007

CM 7239

£18.55

Contents

Foreword



This consultation paper marks a significant step in the process we set out in last July's Green Paper *The Governance of Britain*. In that document, the Prime Minister set out a vision of a shared national purpose, creating a strong bond between people and government. He spoke of the need to forge a new relationship between government and the citizen, and to begin the process towards a new constitutional settlement, which entrusts Parliament and the people with more power.

One of the key themes of the Green Paper was how we should hold power accountable. One of the ways it looked at doing this was by limiting the power of the executive to act in areas where it had derived its powers from the ancient prerogatives of the Crown rather than their being granted by Parliament.

The two issues with which this consultation paper deals lie at the heart of those ancient prerogative powers. The power to enter into international obligations (treaties) and the power to engage the country in war have for centuries lain at the heart of government. The defence and security of the realm are two of the most fundamental duties of government.

It is therefore noteworthy that on these issues, which are so vital to the well-being of our nation and its people, the powers which are exercised by Ministers are not conferred by Parliament, and there is no codified Parliamentary procedure which prescribes how Parliament should have a say in how they are exercised.

The purpose of this consultation is to consider ways in which Parliament should be involved in the use of this power. In all states, the conduct of both diplomacy and armed conflict is a principal responsibility of the executive. Any changes we introduce must not prejudice any Government's ability to take swift action to protect our national security and other national interests, or undermine operational security and effectiveness. But we believe that there is significant scope for giving Parliament the opportunity to have a much greater say. And through Parliament – their elected representatives – our citizens should be able to feel that they have a greater role to play in taking the decisions that have such capacity to influence their lives.

In his Commons' statement on 3 July 2007, the Prime Minister said "in twelve important areas of our national life the Prime Minister and the Executive should surrender or limit their powers [including] the power of the Executive to declare war [and] the power to ratify international treaties without decision by Parliament...to make for a more open 21st-century British democracy which better serves the British people." This will build on the checks and balances that have, over the centuries, been introduced into the exercise of these powers.

Jack Straw David Miliband Des Brown

Executive Summary

1. The power to commit the country to international obligations through the conclusion of treaties, and the power to send armed forces into conflict situations, are two of the most important powers a government can wield. But there is presently no legal requirement for the people's representatives in the House of Commons in Parliament, which sustains the Government and which is the supreme body in our constitution, to have any particular role in either decision. In practice, no government these days would seek to commit troops to a substantial overseas deployment without giving Parliament the opportunity to debate it. But the terms of that debate are very much set by the Government. In particular, it has been rare in the past for Parliament to have a substantive vote on a proposed deployment before the troops are committed.

2. The position on treaties is different. There are mechanisms that may give Parliament a voice. When any treaty requires changes to the UK's domestic law before the UK can comply with it, the debate on the legislative provisions gives Parliament the power to decide. There is a long-standing convention that many treaties have to be laid before Parliament for a minimum length of time before ratification so that Parliament has the opportunity to demand a vote if it wishes. In considering ways of putting this convention onto a statutory footing, we need to strike a balance between the right of Parliament to consider and where it thinks it appropriate decide on treaty ratification on the one hand, and what will be both practical and workable for Parliament on the other.

War powers

3. In his statement to the House of Commons on 3 July 2007, the Prime Minister gave a clear commitment that "the Government will now consult on a resolution to guarantee that on the grave issue of peace and war it is ultimately this House of Commons that will make the decision." In seeking to give Parliament the final say in decisions to commit UK troops to armed conflict overseas, it is nevertheless essential that we do not undermine the ability of the executive to carry out its proper functions. The responsibility to execute such operations with minimum loss of British lives has to remain with the executive.

4. There are a number of important issues which need to be taken into account in determining what will be the best way to enhance Parliament's role. Key considerations are:

   - The need to ensure that the UK can continue to be able to fulfil its international obligations;

- The need to ensure that we do not undermine our reputation as a helpful and willing participant in multinational operations;
- The need to respect the views and information of any coalition partners;
- The need to ensure that any mechanism does not undermine the operational flexibility and freedom of the commanders in the field. The mechanism must provide sufficient flexibility for deployments which need to be made without prior Parliamentary approval for reasons of urgency or secrecy. Commanders should not be fearful that Parliament was trying to 'second guess' their decisions;
- The need not to impact on the morale of the armed forces. One objective of a more structured role for Parliament is to show the troops that Parliament, and through them the nation, is fully behind them and supports them in the difficult and dangerous task they are undertaking. The procedures put into place must not undermine that objective;
- The need to ensure that if, for whatever reason, the Government is not able (or indeed, in an exceptional case, willing) to respect the mechanism that is put into place, there are no consequences for individual soldiers, for example finding themselves accused of having acted illegally through taking part in a deployment which Parliament has not approved.

5. Against this background, the paper looks at the key questions which need to be answered in drawing up a mechanism for seeking the approval of Parliament, in particular the House of Commons.

- What should fall within the scope of the new mechanism? If linked to armed conflict how should the term 'armed conflict' be defined? Is it necessary to have a definition at all? Would it be possible to provide a detailed list of 'armed conflict situations', or alternatively a list of situations which would not be covered by the definition for the purposes of the Parliamentary approval mechanism? There is certainly a case for ensuring that the provisions do not have to apply to every deployment, however small or uncontroversial. Would a better approach be to take some general and existing definition such as those in the Geneva Conventions? On balance, the Government thinks the approach of a general definition with some exclusions is the best one.
- Is it necessary to define armed forces? If so, what should fall within or outside that definition? There is a definition in the Armed Forces Act 2006; is this the best one to use? What should be the position of either the reserve forces or the special forces? On balance, the Government favours including the reserve forces.
- Should any procedure allow for deployments to occur without the prior approval of Parliament for exceptional (urgent or secret) operations? Under what circumstances should it be possible for the Government to

engage troops in a conflict which falls within the definition agreed without prior Parliamentary approval? Two immediate circumstances which are discussed in the paper are where there is an emergency situation, and where it is necessary to keep the operation secret. The Government favours a broad definition of both terms; by their very nature, they are unlikely to be easily predictable in advance.

- What should be the consequences of a decision by the Government to deploy forces without Parliamentary approval (for reasons of urgency, national security etc)? Should the Government be obliged to seek retrospective approval, or should it just inform Parliament? What should the consequences be if an approval was sought for a deployment retrospectively and denied? There might be significant difficulties in such a situation if Parliament were ever to withhold its approval. The paper therefore canvasses the option that the Government, in those circumstances, should simply be required to inform Parliament when such deployments have taken place.
- Should the recall of Parliament be required if under an emergency procedure a deployment has taken place? How long a period should be allowed to elapse before Parliament is recalled? Should there be a special procedure for when Parliament is dissolved? It is obviously always open to the Government to seek a recall of Parliament if it is simply adjourned or prorogued. The situation is more difficult when Parliament is dissolved. Should the Government in those circumstances be required to seek Parliamentary approval as soon as the new Parliament is assembled, or should it be sufficient that Parliament is then informed of what has taken place (bearing in mind that there may be a new government after the election)?
- What information should be provided to Parliament? Should it go beyond the objectives, locations and an indication of the legal basis for the operation? Who should decide what information should be disclosed? How might requirements to disclose information be adapted to the particular circumstances of different deployments? A course has to be steered between giving Parliament as much information as it requires to make a decision and not compromising or endangering the operation itself by revealing information which might be of use to opponents. The Government favours, on balance, limiting the requirement to an indication of the objectives and location of a deployment and the legal basis for the operation, but that the Prime Minister maintain some discretion over the level of information released.
- At what point during the preparations for deployment should Parliament's approval be sought? Should the exact timing be left to the discretion of the Prime Minister? Should there be a Parliamentary role in deciding the best timing? Should Parliament be asked to approve an operation well in advance of the troops being committed, or should approval be sought

only when it is possible to provide the maximum amount of relevant information? Or should this be left to the Prime Minister to decide according to the circumstances. The Government favours the latter.

- How is legal protection best afforded to Service Personnel deployed under the different possible mechanisms? The Government will wish to ensure the highest degree of protection.
- How should Parliamentary support be maintained throughout a deployment? How frequently should the Government be required to report to Parliament on the continued conduct of the deployment? Is there a case for asking the Government to seek a renewal of Parliament's approval at regular intervals? There would be significant difficulties in the last if, at any time, Parliament were to decide not to renew its approval, given the logistical difficulties of any disengagement in the middle of a conflict, and the impact on the UK's international obligations. For these reasons, the Government does not favour specifically requiring Parliament to renew its approval at regular intervals, but it is prepared to look at whether the Government should be required to make a formal report to Parliament at regular intervals. The other mechanisms by which Parliament regularly holds the government to account would also continue to be available.
- The UK has a bicameral Parliament. This raises the issue of the role of the House of Lords. Should the role of the House of Lords be to inform the debates of the House of Commons but not to take a vote? If it too were given the formal right to approve a deployment, there would be problems if the two Houses were to disagree on the issue. It is the Government's view that it is entirely appropriate that the matter should be aired by the House of Lords, where possible *before* the House of Commons decided whether or not to approve a deployment so that the Lords' opinion could be properly taken into account. The decision, however, should be for the Commons alone.
- Is there a need for a new Parliamentary committee? How would a new regime governing decisions about deployments affect other parts of the system, eg, the Defence and Foreign Affairs Select Committees and the Intelligence and Security Committee? What role might these committees play? For example could they receive in confidence information which could never be sensibly revealed in open debate, which would enable them to guide the House in its response to a request from the Government for approval of a deployment?

6. The final question asked in the consultation is whether any mechanism for obtaining Parliamentary approval should take the form of a Parliamentary convention, perhaps embodied in a resolution of the House of Commons, or whether it should be made statutory.

7. A Parliamentary convention in the form of a resolution has the advantages of being more flexible and adaptable. The interpretation of the resolution would lie clearly in the hands of Parliament rather than the courts. It could be framed in more general terms than is possible with statute. It is therefore less likely to interfere with the operational freedoms and responsibilities of commanders in the field.

8. Legislation might be seen as providing a stronger incentive for the government of the day to comply with an approval requirement as the need to obtain approval could only be resolved by further primary legislation. Legislation would also allow Parliament to make clear that failure to comply with the procedure was not intended to make the conflict unlawful nor expose any individuals to civil or criminal liability. It might be possible to combine the respective advantages of convention and legislation in a "hybrid" approach in the form of a short Act which requires the approval of Parliament or the House of Commons to deploying armed forces into armed conflict abroad, and provides very clear legal protection for individuals, while leaving the detailed Resolution arrangements to procedures that would be determined later.

9. Annexed to the discussion of the issues are some draft illustrative provisions.

Ratification of Treaties

10. The UK becomes a party each year to many treaties. The present Parliamentary mechanism by which those treaties that are subject to ratification are scrutinised is known as the 'Ponsonby Rule'. The Rule is a Parliamentary convention rather than a statutory requirement or set out in Parliament's Standing Orders or resolutions. However, the Government believes that Parliament's role should be strengthened, therefore, the Prime Minister proposed "to put on to a statutory footing Parliament's right to ratify new international treaties."

11. The key features of the 'Ponsonby Rule' are the publication of a treaty as a Command Paper and the laying of the Command Paper before both Houses for at least 21 sitting days. Coupled with this is a Government undertaking to provide time for a debate should one be requested. The Government does not ratify any treaty that is subject to the Rule until it has been published as a Command Paper and laid before both Houses of Parliament and 21 sitting days have elapsed, or Parliament has been consulted under one of the alternative procedures.

12. This paper sets out the origin and status of the 'Ponsonby Rule', together with its subsequent evolution and key developments and reform proposals over the past decade. Where alternative procedures have been established, or specific exceptions made to the Rule, these are also explained.

13. This consultation invites responses to eight questions on the ways in which the Ponsonby Rule could be replaced by formal arrangements:

- Is there any reason why the arrangements for treaties requiring the laying of treaties before Parliament for 21 sitting days before ratification (known as the 'Ponsonby Rule') should not be placed in statute?
- How should alternative procedures and flexibility be provided for? If the new arrangements are put onto a statutory footing, the legislation will need to incorporate some of the current flexibility. However, specifying the various individual procedures in legislation might be too restrictive, and it may be better to develop a standard alternative procedure in statutory provisions to allow the Secretary of State discretion on the need for flexibility.
- According to established practice, some categories of treaties are not subject to the Ponsonby Rule. For example, bilateral double taxation treaties are published to Parliament in a different way, and the legislative process provides the opportunity for debate. Should exceptions of this kind be retained? If so, how should they be accommodated within statutory provisions?
- If the key features of the Ponsonby Rule were to be put on a statutory footing as proposed, are any changes required to the Parliamentary procedures in either House for triggering a debate on a treaty?
- Should there be provision for extending the 21 sitting-day period if, during those 21 days Parliament indicates that it wishes further time to scrutinise or debate the treaty? If so, how should such a request be made? Alternatively, should there be a longer minimum period for scrutiny without formal provision for extension? A Government undertaking in 2000 agreed that where a select committee wished to conduct an inquiry on a treaty it would respond positively to requests for extensions of time provided that circumstances permit and the case was justified. Since 2000, there have been few requests. A longer minimum period for scrutiny could be provided for, perhaps based on the negative procedure for Statutory Instruments, but without any formal provision for further extension – although it would of course be open to Government and Parliament to agree on further extensions in individual cases.
- If there is a vote, should its outcome not be legally binding? At present, a vote could, in theory, be taken following a debate under the Ponsonby Rule in either House.

- If legislation were to provide that a vote against ratification is binding, what provision should be made for Government to present a new proposal to ratify the same treaty at a later date? For instance, are there circumstances (akin to the re-presentation of a Bill in the following Session) where there should be provision for Government to present a new proposal to ratify the same treaty at a later date? If so, how should this be achieved?
- Is the present practice of laying an Explanatory Memorandum along with each treaty satisfactory?

14. The Annex to the paper contains possible draft statutory provisions to illustrate options referred to.

Introduction

15. The Prime Minister on 3 July 2007 said that "Change with a new settlement is in my view essential to our country's future. For we will meet the new challenges of security, of economic change and of communities under pressure-and forge a stronger shared national purpose-only by building a new relationship between citizens and Government that ensures that Government are a better servant of the people." The Government's proposals for the constitutional renewal that would underpin this change were set out in the Green Paper entitled, *The Governance of Britain*. These proposals aim "to forge a new relationship between government and citizen, and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power." A fundamental underlying principle of these proposals was the importance of giving Parliament the powers it needed to provide stronger scrutiny and control of the actions of Government.

16. The Government believes that in general the executive prerogative powers should be brought under stronger Parliamentary scrutiny and control. This will build on the checks and balances which have, over the centuries, been introduced into the exercise of these powers. For example, conventions have limited the way that the Government can exercise these powers. The courts can scrutinise the exercise of many prerogative powers through the mechanism of judicial review (although they have, in the past, determined that matters of 'high policy' are not ones in which they should interfere). Ultimately Ministers are also accountable to Parliament for all their actions, including those taken under the prerogative. But the Government believes that the time has come to consider making this Parliamentary accountability more explicit. That way, the actions of government will be more clearly subject to the mandate of the people's representatives.

17. This Command Paper deals with two of the most important of the powers which the Government exercises under the prerogative: the power to commit armed forces to armed conflict abroad, and the power to commit the nation to international obligations through the ratification of treaties.

18. The power to send men and women abroad into a situation of armed conflict is one of the most important decisions a government can ever take. It is significant and fundamental to our democracy. Parliament, especially the House of Commons, must have an assured role in the decision-taking process. Similarly, the power to commit the country to international obligations which might have far-reaching consequences is also one where Parliament must be confident that it can represent the views of the people properly.

19. The existing arrangements for the exercise of each of these powers are different. In the case of the power to commit armed forces to armed conflict abroad, there are no formal arrangements for Parliamentary approval. Parliament, and particularly the House of Commons, can, in principle, exercise control through its ability to vote, or withhold, supply – that is the money required to support the deployment of the armed forces. In practice, no Government has sought to commit armed forces to a substantial overseas engagement without giving Parliament some opportunity to debate it. As the table at paragraph 31 shows, there have been a wide range of mechanisms used to give Parliament that opportunity. It has, however, been rare for the House of Commons to be able to have a substantive vote on the principle of engagement in armed conflict, particularly before the armed forces are engaged. In this paper we seek views on how such a mechanism might be introduced and, in particular, on whether any mechanism should be purely Parliamentary, or whether a statutory provision would now be more appropriate.

20. As set out in the Green Paper *The Governance of Britain*, we propose:

- That on an issue of such fundamental importance to the nation as the committing of armed forces to armed conflict abroad, the Government should seek the approval of the people's elected representatives in the House of Commons. Wherever possible, the views of the House of Lords would be sought before the House of Commons was asked to vote.
- To determine, broadly, whether to take forward a new Parliamentary convention as favoured by the Lords Select Committee on the Constitution, in its report – *Waging War: Parliament's role and responsibility*[1] or to propose the development of a legislative framework similar to that suggested by the Public Administration Select Committee in its report *Taming the Prerogative*.[2]
- If there were public consensus on a Parliamentary convention, then such a convention could be formalised by a resolution of the House of Commons with the same status as Standing Orders of the House.
- Any proposal must not compromise our national security or, by extension, the operational effectiveness of our armed forces. It must take account of the need to provide for the necessary flexibility in deployments and operational security to protect our armed forces. We must further ensure that their morale is not compromised and that our ability to work with allies is not hindered.

[1] House of Lords Select Committee on the Constitution, Waging War: Parliament's role and responsibility, HL paper 236, London, the Stationary Office Ltd. 27 July 2006.

[2] House of Commons Public Administration Select Committee, Taming the Prerogative: Strengthening ministerial Accountability to Parliament, fourth Report of the Session 2003-04, HC 422, London, The Stationary Office Limited, 16 March 2004.

21. The position in the case of treaties is rather different. Treaties are not self-executing in UK law; that is, they are not automatically incorporated into UK law on entry into force. Any treaty which requires a change in the law before the UK can accept the obligations it imposes already requires legislation to amend the relevant UK laws. Parliament therefore can scrutinise the relevant treaty provisions at that stage. In addition, all treaties which do not come into force on signature, including those which require enabling legislation, are covered by a convention (known as the Ponsonby Rule) that they must be laid before Parliament for a minimum period of 21 sitting days. They are accompanied by an Explanatory Memorandum. Either House of Parliament can request a debate on any Treaty so laid, although such debates are rare and there is no binding mechanism for Parliament to force a debate or which dictates the form of any debate. The Government proposes, in this consultation paper, to consult on appropriate means to put this convention on to a statutory footing.

22. The issues raised in this consultation are reserved to the UK Parliament and any formal change to the arrangements for approving the deployment of armed forces in armed conflict or for the ratification of Treaties will be a matter falling within the competence of the UK Parliament alone.

23. An initial Impact Assessment has been completed and it does not indicate that the proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. Consequently, this paper does not contain an Impact Assessment.

Part One – War Powers

Background

24. These proposals follow on from the debate in the House of Commons on 15 May 2007, on Armed Conflict (Parliamentary Approval). During that debate, the Government supported a resolution stating that "This House welcomes the precedents set by the Government in 2002 and 2003 in seeking and obtaining the approval of the House for its decisions in respect of military action against Iraq; is of the view that it is inconceivable that any Government would in practice depart from this precedent".[3] The Government believes that national security remains the most important responsibility of any government and that it is time for the role of Parliament, and in particular the House of Commons to be made more explicit in approving, or otherwise, decisions by the executive on substantial deployments of armed forces into potential or actual armed conflict. However, this needs to be done in a way which does not compromise the ability of the Government of the day to take necessary steps for the defence of UK interests and does not compromise security and effectiveness of operations including the discretion of military commanders, particularly in emergency situations. At the end of the debate, the House agreed to call "upon the Government, after consultation, to come forward with more detailed proposals for Parliament to consider". This consultation document fulfils the Government's response to that demand.

25. There has been considerable interest in the question of the power to deploy armed forces into armed conflict abroad in recent years. Both the House of Commons Public Administration Select Committee (PASC), in March 2003-2004, and the House of Lords Constitution Committee in July 2005-2006 undertook detailed consideration of the issues. The two Committees agreed that a more formal mechanism was required, but reached different conclusions over whether legislation or a convention was preferable. The PASC recommended a consultation to include proposals for legislation, while the Lords Constitution Committee favoured a convention.

26. In producing this consultation document we have taken the work and recommendations of both Committees into account.

27. There have also been a number of backbench Bills. Clare Short MP's Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill[4] sought to legislate a requirement on the Government to obtain Parliamentary approval, by means of a resolution of both Houses of Parliament, for the armed forces

[3] Hansard 15 May 2007, col 492.
[4] Bill 16 of Session 2005-6

lawfully to participate in conflict or for any formal declaration of war. The Bill was debated in Parliament in October 2005 but did not secure the necessary support at its second reading for a vote. This followed an earlier similar Bill (not debated) promoted by Neil Gerrard MP.

28. Lord Lester of Herne Hill's Constitutional Reform (Prerogative Powers and the Civil Service etc.) Bill,[5] introduced into the House of Lords in January 2006 included the provision that all executive powers were to be exercised under the authority of Parliament. The Bill provided a general authority for most cases, but set out a specific procedure for exercising the power to commit the UK to direct participation in war, international armed conflict or international peacekeeping activities. This would require prior approval to be granted by a resolution of each House of Parliament unless the Prime Minister judged that reasons of urgency required immediate action, in which case he was obliged to bring before Parliament an explanation of his decision as soon as possible. Earlier this year Michael Meacher MP published a Bill[6] requiring the Secretary of State to lay before the House of Commons a mechanism for the House of Commons to give approval for deploying armed forces into armed conflict.

29. In addition, the Government notes the recent report published for the Conservative Party by Kenneth Clarke's Democracy Task Force, *An End to Sofa Government, Better Working of Prime Minister and Cabinet*[7] which also proposed to review the Royal Prerogative powers to enhance the role for Parliament in committing armed forces overseas, and in making and declaring war and other areas in which the Executive's Royal Prerogative powers are exercised.

History of Parliamentary involvement in deployments abroad

30. Although there is presently no formal process for involving Parliament in decisions by the Government to engage UK armed forces in armed conflict overseas, it has always been Government's practice, unless requirements of secrecy or security dictate otherwise, to keep Parliament regularly informed on the existence and the process of overseas engagements. The House of Commons Library's Parliamentary Information List SN/PC/3254 lists over 200 Statements or debates in the House on defence related matters since December 1982. Of these, 89 were Statements. There have also been 18 Westminster Hall debates between May 2000 and May 2007.

31. The second Iraq war was the first occasion since Korea in July 1950 where the House of Commons was invited to hold a vote on a substantive motion before

[5] HL Bill 62 of Session 2005-6
[6] Waging War (Parliament's Role and Responsibility) Bill, Bill 34 of Session 2006-7
[7] Conservative Democracy Task Force Publication, *An End to Sofa Government: Better working of Prime Minister and Cabinet*, 2007 http://www.conservatives.com/pdf/DTF_Sofa_Government.pdf

armed forces were engaged. Other examples of House of Commons discussion of substantial armed interventions include:

Conflict	Consultation/debate immediately prior to hostilities	Start of conflict	First consultation/debate after commencement of hostilities
World War II	Prime Minister's announcement to the House 3 September	3 Sept 1939	
Korea	Prime Minister's statement 28 June 1950	June 1950	Substantive motion 5 July 1950
Falklands		2 Apr 1982	3 Apr 1982 Adjournment debate (Parliament recalled)
Gulf War		17 Jan 1991	PM Statement 17 Jan 21 January 1991 debate on substantive motion
Kosovo	23 March 1999 Prime Minister's statement	24 March 1999	DPM Statement 24 March 1999 Adjournment debate 25 March 1999
Sierra Leone	8 May 2000 Foreign Secretary statement		15 May 2000 Defence Secretary statement
Afghanistan	4 Oct 2001 PM Statement and adjournment debate	7 Oct 2001	8 Oct 2001 PM statement and adjournment debate
Iraq	18 Mar 2003 debate and vote on substantive motion	20 Mar 2003	20 Mar 2003 Defence Secretary statement

32. Other countries deal with the question of how to ensure that there is assent to the deployment of their armed forces abroad in a variety of ways (see Annex B). Appendix 4 of the House of Lords Constitution Committee report also sets out a number of examples. The approach in the different jurisdictions can vary enormously as each will have their own unique history, constitution, political environment and defence capabilities. The German model, for example, is very prescriptive, and requires Parliamentary approval for all military deployments. The German army is constitutionally a Parliamentary army. There are provisions for a simplified procedure in cases of deployment of low intensity and importance, although this is rarely invoked. By contrast, in the US greater discretion is held by the President, though the War Powers Resolution gives Congress a measure of control over the President as Commander-in-Chief of the US forces.

The current constitutional position

33. The constitutional position of the UK armed forces is that their government and command are vested in Her Majesty. Direct control of the armed forces under the Sovereign is divided between the Government and the Defence Council. Parliamentary control of the armed forces is based primarily on the need for annual renewal by Parliament of the Acts which govern enlistment and discipline in the armed forces. Acts of Parliament also affect the use of armed forces within the United Kingdom.

34. For overseas operations, the political decision to deploy the armed forces rests with the Prime Minister or Cabinet through their exercise of the Royal Prerogative. It is the Defence Council which has the power of command over the members of the armed forces and the power to make appointments within the armed forces.[8] The Defence Council is also responsible for such matters relating to the administration of the armed forces as the Secretary of State directs.

35. In theory the prerogative powers could allow the government to send armed forces into armed conflict abroad without any Parliamentary discussion or debate, or without Parliamentary consent. In practice it is inconceivable that any government could make such an important decision without the support of the House of Commons as the executive is dependent on the support of Parliament for its survival and it is fully accountable to Parliament. There are also well-tested mechanisms under which Parliament can hold the Government to account such as select committees, Parliamentary questions and debates in both Houses, and ultimately the Commons has the power of censure – the vote of no confidence. Moreover, in principle, the House of Commons' power to vote or withhold supply provides a sanction which could make it impossible for the Government to proceed for long in the face of determined Parliamentary opposition. Given that its importance in decision-making in this area is well recognised, it is unsatisfactory that there exists no explicit prescribed role for Parliament, and particularly the House of Commons, in making decisions to deploy the armed forces abroad. This Government feels that it is time to make Parliament's role more explicit.

36. Parliamentary debate has focused on two main options for making Parliament's role more explicit in the decision to deploy the armed forces:

- Establishing a new convention that would determine the role Parliament should play in making decisions to deploy the forces outside of the UK; or
- Legislation to create a statutory constraint on the exercise of the prerogative powers by the executive.

[8] The Defence Council is composed of the Defence Ministers, the most senior commanders and the most senior MOD officials.

37. In July 2006, the House of Lords Select Committee on the Constitution considered a third option, the establishment of a Joint Parliamentary Committee to oversee the armed forces. The Lords Committee concluded against this idea. The Government agrees, and that option is not pursued further in this paper. All the options canvassed assume that whatever the process, the outcome would be a vote in the Commons alone, on a motion to approve a proposal by the Government concerning UK involvement in armed conflict abroad. A vote is the normal way in which a House of Parliament signifies its views about issues put to it, and the Government sees no need to depart from that practice.

Operational flexibility

38. It is absolutely essential that the consideration of any proposals should address their impact on the armed forces in the field. There are two aspects to this. First, there is the operational flexibility and freedom of the commanders. There is no intention that any of the proposals discussed in this paper should interfere in any way with the operational decisions of commanders in the field. Rather, the proposals are aimed at ensuring that Parliament is properly consulted about the principle of a commitment of armed forces to armed conflict abroad. They are intended to strengthen the position of commanders, not undermine them, by making explicit the consent of the people's elected representatives. The Governance of Britain Green Paper makes clear that the mechanism must provide sufficient flexibility for deployments which need to be made without prior Parliamentary approval for reasons of urgency or necessary operational secrecy. But it is equally important to ensure that the arrangements do not inhibit the strategic decisions of those actually commanding the operations. The Government's motion on 15 May similarly recognised "the imperative to take full account of the paramount need not to compromise the security of British forces nor the operational discretion of those in command".

Morale

39. Equally important is the impact on the morale of the armed forces themselves. Morale is an essential component of fighting power and any new mechanism must not compromise this. By providing a mechanism for explicit Parliamentary approval of relevant deployment decisions, the intention is to show the armed forces that Parliament, and through them the nation, is fully behind them and supports them in the dangerous and difficult task that they are being asked to undertake. Decisions on the final way forward will need to take this into account under two particular aspects. First, it is essential to make very clear that there is no question that any proposals create any new legal vulnerability for individuals. The issue and how to deal with it is discussed in detail in paragraphs 76 to 77. Second, morale would be adversely impacted if the Armed Forces feel that there is uncertainty in the decision to deploy.

International considerations

40. Before turning to consider the specific issues which would need to be addressed in formulating a Parliamentary mechanism, there are a number of more general background issues which also need to be considered. Most recent occasions when the UK's armed forces have been committed to armed conflict abroad have been as part of a coalition with other states or as part of the UK's commitment to multi-national organisations such as the UN, EU and NATO. The impact on the UK's ability to play a full part in such operations is an issue which must be borne in mind in assessing the details of any proposed change to existing policy.

41. The British Armed Forces have an excellent reputation within the international community for their capacity to lead and work effectively with coalition partners. The current processes provide flexibility in timing of commitments and so provides UK influence over planning and decision making. This allows our forces to be regarded as a reliable and effective ally. Evidence suggests that Parliamentary approval mechanisms in other countries do slow down decision making. A key objective of a new UK mechanism should be to minimise this effect.

42. The purpose of this consultation is to seek views on what mechanism should be introduced to improve Parliamentary scrutiny and control of decisions by the Government to deploy the armed forces into armed conflict abroad. In order to do this, the paper addresses a number of issues which are common to these models and which would need to be satisfactorily resolved in any chosen option. The paper then provides a number of illustrative examples, aimed at showing how the different issues might be handled under a number of different approaches.

The Royal Prerogative to deploy the armed forces abroad: Issues for consideration

43. This section looks at the various issues which would need to be considered in deciding on the best approach to formalising Parliament's role in approving deployments of armed forces into armed conflict overseas.

Definition of 'armed conflict'

44. Technically the United Kingdom has not formally declared 'war' on any state since 1942. The Law of Armed Conflict (also often called International Humanitarian Law) which regulates the conduct of armed conflict, applies to any armed conflict between states, however the participants choose to describe it. So a formal declaration of war is not a condition precedent for

the application of international humanitarian law. The Government does not propose that any of the canvassed options should be predicated in any way on a formal declaration of war.

45. If however, Parliament's role is to be made more explicit, then a clear understanding will be needed about the circumstances triggering the need in which the approval of Parliament (and particularly the House of Commons) is to be required. If Parliament's approval is to be required where armed forces are deployed into actual or potential armed conflict, then it will be essential to have an understanding of what the meaning of the term 'armed conflict' is.

46. It might be possible in the abstract to list the sort of operations in which armed forces may have to use lethal force. With such an approach, a wide range of deployments would fall within the scope of a new mechanism including for example routine sea patrols. This may include situations outside those governed by international humanitarian law. This approach would go beyond the spirit of the Government's proposals and create excessive and burdensome bureaucracy.

47. Alternatively, we could attempt to confine the need for Parliamentary authority to those deployments which include a clear expectation of engagement in offensive combat operations. This may be a very simplistic approach given that expectation and intent may quickly change. Furthermore, that could leave significant and dangerous peacekeeping operations, for example, out of the scope.

48. The most clear-cut and practical approach would be for the term 'armed conflict' to have the same sense that it has in international humanitarian law. Since international humanitarian law is generally considered to regulate the conduct of armed conflict, whether international or non-international, Parliament's role would thereby be confined to situations that the Government believed to be regulated by international humanitarian law. Clare Short's Bill placed reliance on the applicability of the Geneva Conventions to a particular situation. It used the formulation: "any use of force which gives rise or may give rise to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional protocols of 1977 apply".[9] The undefined nature of 'armed conflict' in international humanitarian law could nevertheless raise difficulties. For example, there may be difficult questions about when violence has reached the threshold where there can be said to be a state of 'armed conflict' between the participants.

49. In his evidence to the PASC inquiry, Professor Rodney Brazier said that it would be possible to dispense with the definition altogether "and leave the interpretation of the phrase 'armed conflict' to common sense".[10] In June 2003,

[9] Private Members Bill by Clare Short, Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill, Bill 16 2005-6.

[10] Appendix 1 to the PASC Report *Taming the Prerogative*, para 11.

the Preparatory Commission for the International Criminal Court (ICC) adopted their Elements of Crimes. These Elements provide authoritative guidance elaborating the definitions of crimes within the jurisdiction under the ICC Statute. It is perhaps significant that even though it is a necessary element of the various war crimes contained in Article 8 of the ICC Statute that the criminal conduct took place in the context of, and was associated with, an armed conflict, the Commission provided no definition of 'international armed conflict' or 'an armed conflict not of an international character'. The US War Powers Resolution refers only to 'hostilities'.

50. The Government proposes that for the purpose of a mechanism, the meaning of 'armed conflict' as adopted by international humanitarian law is used. Draft B at Annex A provides an example of this.

Q1: What should fall within the scope of the new mechanism? If linked to armed conflict how should the term 'armed conflict' be defined?

Definition of 'armed forces'

51. Is it necessary to define the term 'armed forces', or is a reference to the activity enough? For example, Lord Lester's Bill refers to an intention to use executive powers "for the purpose of committing the United Kingdom to participation in any war, international armed conflict or international peace-keeping activity". This avoids the need to define the types of military personnel to be covered. Conversely, Professor Rodney Brazier's Bill attached to the PASC report, and Clare Short's Bill, both provide a definition of armed forces, although it is not the same in each case. Clare Short's definition would include the reserve forces, but Professor Brazier's would not. It is unlikely that the reserve forces would ever be engaged in an operation in which regular forces were not also engaged, so the difference may be immaterial.

Q2: Is it necessary to define armed forces? If so, what should fall within or outside that definition?

Exceptional circumstances

52. In order to maintain the operational security and effectiveness of the armed forces it may be necessary to allow for deployments into armed conflict to occur without the prior agreement of Parliament. There will be circumstances in which securing prior Parliamentary approval may be unrealistic in the necessary time frames or doing so may otherwise compromise the objectives of the proposed deployment and could endanger the position of service personnel (and others). Moreover, there may be instances, for example special forces operations, where the Government would wish to keep the deployment of armed forces in armed conflict a secret when the operation is ongoing and

even after the event. The Government believes that the effectiveness and security of our armed forces must be maintained and therefore an exceptional circumstances procedure should be introduced to accommodate this need to act in the public interest.

53. There are two broad categories where this may apply:

- Where there is not time to seek Parliamentary consent; or
- Where there is a need for covert or secret operations.

54. The two categories may overlap, for example in rescue missions. Further, even when the operation itself is not secret, some details may need to be kept secret so as not to compromise the effectiveness of the operation, future operations and/or to protect the lives of service personnel.

55. For any mechanism, Parliament and especially the House of Commons will need a clear understanding of when prior consultation may not be sought and an appreciation that in certain cases there could be no timeous retrospective information. Given the wide range of potential circumstances which might require urgency or secrecy in the initial stages, the Government proposes that, for practical and operational reasons, the balance of argument favours a loose definition, rather than a definitive list. This is the approach used in the illustrative examples at Annex A.

Q3: Should any new procedure allow for deployments to occur without the prior approval of Parliament for exceptional (urgent or secret) operations?

Process of seeking Parliamentary approval where armed forces have already been engaged and the consequences when approval is not obtained

56. As there are situations in which the armed forces will have to act without the approval of Parliament, and particularly the House of Commons, then it may be an option to introduce a mechanism to secure retrospective approval but this raises a number of questions:

- Should Parliament or the House of Commons be required retrospectively to approve every emergency deployment?
- How long after deploying armed forces should the Government have before it would be required to seek retrospective Parliamentary approval?
- What should be the consequence on an operation if Parliament or the House of Commons were to withhold such approval;
- What should be the consequences for the Government if the House of Commons withholds such approval?

57. If the House of Commons is asked for but withholds its approval when retrospective agreement is sought, then there may be an implicit expectation that the armed forces will be withdrawn. Alternatively, there might be circumstances in which armed forces could remain in the theatre as part of a coalition but under new orders not to use force other than in self-defence and unable any longer to participate in, or offer support to the offensive operations of others. However, this may be neither advisable nor possible. It might involve breach of our international obligations or significantly damage our international relations (see also paragraphs 40 to 42). It is unlikely to be something that can be achieved instantly or quickly, without the danger to the lives of our armed forces and it could make a complex security situation more volatile. If a retrospective approval was sought and denied, it would be necessary for the Government to maintain flexibility and discretion in removing forces.

58. It is essential to make clear that any failure to secure retrospective approval from Parliament gives rise to no arguable legal vulnerability for individuals which they would not otherwise have. It should also be noted that, as recognised in paragraph 52 above, there may be circumstances where the Government would wish to keep the deployment of armed forces in armed conflict a secret, even after the event. A further consideration would be the impact on the morale of the armed forces if Parliamentary approval was denied after operations had begun.

59. Given these difficulties, another option, which the Government proposes, would be to introduce a procedure under which the Prime Minister would be obliged to inform Parliament when he had committed armed forces under exceptional circumstances. However, there would be no requirement for any further Parliamentary procedure. This is the approach adopted by Lord Lester's Bill. This would avoid the difficult consequences of a possible failure by Parliament to give retrospective approval. In this case, the circumstances when the Prime Minister could invoke this power would have to be very clearly defined to allay any concerns that it would be open to abuse as a way of circumventing the need for Parliamentary approval. However, any decision to take this route would of course be open to Parliamentary scrutiny in the usual way.

60. Given the importance of a decision to engage armed forces in armed conflict abroad, there would be serious questions raised about the position of the Government if the House of Commons refused to endorse a decision by the Government. However, this question also arises in the circumstances where the Government seeks approval before deploying forces.

Q4: What should be the consequences of a decision by the Government to deploy forces without Parliamentary approval (for reasons of urgency, national security etc)? Should the Government be obliged to seek retrospective approval, or should it just inform Parliament? What should the consequences be if an approval was sought for a deployment retrospectively and denied?

What should happen if Parliament is not sitting at the time of a planned deployment?

61. One of the reasons why the Government might decide to deploy the armed forces without prior approval is that Parliament is not sitting. This is because the time that would be taken to get Parliament recalled might give too much warning of the Government's intentions or delay the operation in a way which is unacceptable to national security or operational effectiveness. Where it might be possible, for example, to get Parliamentary approval in advance of a deployment that was intended to take place in two or three days' time without compromising the security of the armed forces, the additional time needed to arrange for the recall of Parliament would mean that there was effectively 6 or 7 days' notice of intention.

62. If there is a requirement that the Government should seek retrospective approval within a certain number of days of deploying armed forces in an urgent situation, while Parliament is sitting, should there be a requirement to have a vote within the same number of days if Parliament is not sitting? Alternatively, should the requirement be to arrange for the recall of Parliament within the same time scale? Or is there a case for a longer period of grace; after all, in some situations, which may be of very short duration, the deployment could be at an end by the time Parliament could meet to debate it.

63. The Government proposed in *The Governance of Britain* that it would suggest to the House of Commons that the Standing Orders of the House should be amended to allow the recall of the House to take place when a majority of members requested this, rather than only at the request of the Government. If this becomes the desired way forward, this would allow the Commons to recall the House of Commons to discuss a decision by the Government to deploy the armed forces. Whatever arrangements are set out in the provisions relating to deployment of armed forces into armed conflict, therefore, the House of Commons could override them if the requisite number of MPs decided to demand the recall of the House, even if the Government did not feel it was necessary, or appropriate. If this change in procedures is introduced, the Government does not feel it is necessary to specify that Parliament must be recalled to debate a deployment which has already taken place. This can be left to the discretion of the Government or to the desire of MPs for a recall.

64. In many circumstances, it will be possible for Government to recall Parliament to discuss the engagement of armed forces before that engagement took place and the normal procedures would be followed.

65. If Parliament has been dissolved, the situation is of course more complicated. There are two options: to deem that consent has been given or treat the deployment as one that simply has to be notified to Parliament; or to require approval to be given within a specified number of days of a new Parliament having been formed. The illustrative examples at Annex A show how either option might work.

Q5: Should the recall of Parliament be required if under an emergency procedure a deployment has taken place? How long a period should be allowed to elapse before Parliament is recalled? Should there be a special procedure for when Parliament is dissolved?

Information to be supplied to Parliament

66. If Parliament, whether both Houses or the House of Commons alone, is to provide approval for decisions to participate in armed conflict abroad, it will want sufficient knowledge of the issues to enable it to make an informed decision. Parliament's needs would have to be balanced against the need for flexibility; and the need to maintain the security of the armed forces. Many of those who took part in the Parliamentary debates in both Houses in May followed the House of Lords Constitution Committee in saying that the information should include the *objectives, legal basis, likely duration and in general terms the size of the deployment*.

67. It will be essential that the information supplied should not put the armed forces in jeopardy or compromise the effectiveness of operations. Information provided to Parliament is in the public domain and if it is sensitive, could compromise the security of the armed forces or the effectiveness of an operation. Parliament and Government would have to decide how to best handle the information in a world where information technology enables news to be accessed and received almost anywhere in the world. Information on the area of operations, specific numbers involved, capabilities to be deployed, alliance commitments, intelligence or diplomatic reporting may reveal information that could be of use to an adversary. There are particularly difficult issues surrounding the use of intelligence information, where additionally the Government is committed to acting in accordance with the recommendations of the Butler Review of Intelligence on Weapons of Mass Destruction. The duration or cost of any major operation will also be difficult accurately to predict and that information may itself be of value to an adversary. It is important to remember that the majority of our deployments take place in a multi-national context, and much of the information we may wish to pass to

Parliament may have come originally from allies and coalition partners who will have their own concerns about inappropriate disclosure. There may be an operational need for the UK to make an early commitment of its capabilities (perhaps before all the relevant information is available) in order to encourage other coalition partners to commit themselves.

68. The Government therefore proposes that the information supplied to Parliament generally should be confined to the operational mandate, which depending on the situation should include such indication of:

- The size of the deployment;
- The area of operations; and
- The legal basis for the operation

as the Prime Minister considers appropriate in all the circumstances.

69. One possible way forward which would allow Parliament greater access to some information would be for Parliament and the Government to agree the way in which sensitive information is then presented to Parliament. Government and Parliament for example, could agree to establish a joint committee of both Houses that was capable of handling and taking a view on such information it received from the Government. (This is a different and more limited proposal from that considered by the Lords Constitution Committee of setting up a joint committee to assume strategic oversight of the UK's international and defence interests and policies.) Alternatively, such a committee could decide what Parliament should see if there is relevant non-sensitive material that could be disclosed. When considering this issue it should be noted that, in his statement to the House of Commons on 3 July 2007 the Prime Minister said that: "the Prime Minister and the Executive should surrender or limit their powers [including]… the power to restrict parliamentary oversight of our intelligence services". The role of Parliamentary committees is discussed in more detail in paragraphs 86 to 88.

70. The Government welcomes further discussion and debate on the specific issue of a) the level of information to be provided and b) and how sensitive information should be handled in Parliament.

71. One key question which has been raised in previous discussions is what access Parliament should have to the legal advice provided by the Attorney General. The Government is already consulting on this question through the Attorney General's consultation paper on *The Governance of Britain, A Consultation on the Role of the Attorney General*.[11] Consultees wishing to respond to this question may also wish to consider pages 15-21 and Questions 1, 2 and 3 of the Attorney General's consultation document.

[11] The Governance of Britain, A Consultation on the Role of the Attorney General, available at http://www.attorneygeneral.gov.uk/, page 16, published by Command of Her Majesty on 25 July 2007

Q6: What information should be provided to Parliament? Should it go beyond the objectives, locations and an indication of the legal basis for the operation? Who should decide what information should be disclosed? How might requirements to disclose information be adapted to the particular circumstances of different deployments?

At what stage should Parliament's approval be sought?

72. One of the key issues which has arisen in discussion of this question is that of the timing of any Parliamentary debate and vote. Paragraphs 66 to 71 have already discussed the question of what information Parliament should reasonably look for in making its decisions. The deployment of armed forces will only ever occur as a last resort when all other levers of power have failed. The diplomatic process and associated international debates can last several months during which time a military solution may come under open consideration. For example, in the run up to the deployment of armed forces to Iraq, there were four debates and votes in the House of Commons as the discussions in the United Nations continued and the situation deteriorated.[12] At what point, therefore, should the Government seek Parliamentary endorsement for its proposed actions?

73. The key issue that needs to be addressed is how to make sure that the picture presented to Parliament is accurate and up-to-date at the moment of engagement. Does the Government seek early endorsement on the principle of engagement, where the information it can give may be partial but the impact on international relations great? And what if, on the information that can be presented at that time, Parliament, and in particular the House of Commons, does not feel able to endorse the principle? Should the Government be able to continue to prepare and negotiate, in the expectation that it can return to Parliament when it has more and clearer information?

74. If there is early agreement in principle, should the Government also be required to seek confirmation that Parliament, and in particular the House of Commons, still endorses action at the point at which the armed forces are to be deployed to the armed conflict? This was the approach adopted by Canada over participation in the 1990-91 Gulf conflict. Or would it be better to avoid these difficulties by accepting that the decisive debate and vote need take place only when the armed forces are about to be actively deployed? Considerable expense might already have been incurred by that time. However, it would avoid setting up a situation in which Parliament had to be frequently consulted where deployment was only one of a number of possibilities, perhaps not an imminent or even likely one. The Government believes that there is a strong case for leaving the decision on this matter to the discretion on the

[12] 24 September 2002, Hansard cols 26-154; 25 November 2002, Hansard cols 47-129; 26 February 2003, Hansard cols 265-363; 18 March 2003, Hansard cols 760-902

Government. There may be deployments where it is possible, and appropriate, to engage Parliament well before the deployment takes place. In other cases, it may be necessary for the preparations to progress significantly further before it is sensible to seek Parliament's approval.

75. Alternatively, as with the question of what information should be released, should there be a mechanism whereby the Government discusses and agrees with the Defence and Foreign Affairs Select Committees, or the Speaker, or the Opposition parties on Privy Council terms, the best point to seek the approval of the House?

Q7: At what point during the preparations for deployment should Parliament's approval be sought? Should the exact timing be left to the discretion of the Prime Minister? Should there be a Parliamentary role in deciding the best timing?

Protection for armed forces

76. The Government is particularly concerned to ensure that there can be no question of Service personnel becoming legally vulnerable for their deployment in an armed conflict by reason only of the fact that the conflict lacks any requisite approval from Parliament. That is important for two main reasons. First, it is obviously right that individuals should not become legally vulnerable where in good faith and otherwise lawfully they have acted on the instructions of the Executive which would otherwise be lawful. Secondly, it is important for the morale and discipline of the Armed Forces that they should not have to be troubled by personal concerns about Parliamentary approval. In order to achieve this aim, the Government must consider what measures would be needed to protect members of the armed forces against any legal exposure in these circumstances.

77. No greater protection may be needed than provision that makes clear that the executive's decision to proceed without approval is not unlawful, therefore that the actions of individuals in consequence of any such decision and deployment in an associated armed conflict would not be unlawful because the decision lacked approval. This would not make lawful any conduct which would otherwise be unlawful, would have no bearing on the legality of the conflict under international law and would not affect an individuals' liability for any criminal offence such as a war crime which might be committed in a conflict. This question is also discussed further at paragraphs 93 to 95.

Should the Government be required to report regularly to Parliament on the process of a deployment?

78. The call at the moment is for Parliament and particularly the House of Commons to have a say in any decision to commit armed forces to armed conflict. The question then arises as to whether there should be a requirement for the Government formally to report on progress at regular intervals, or even to seek continuing Parliamentary approval during the course of the operation. There are four possible options :

- Either the requirement could be for the Government to seek a renewed vote at stated intervals (every three or six months, for example) throughout the duration of the conflict; or
- Alternatively, the requirement could be for the Government to seek a renewed vote if the nature of the deployment changed significantly; or
- To maintain the status quo ie with regular updates provided to Parliament during the course of the operations at the discretion of the Government through statements in the House; or
- To make it a requirement through the new mechanism that the Government should report to the House regularly and if or when the deployment changes significantly.

79. There would, of course, be problems with either of the first two options. In the second case, there might be disputes with the Government as to whether the nature of the deployment had changed sufficiently to require a new vote. Only the Government will have access to all the information needed to make that decision, but the nature of modern warfare and modern communications is such that many in Parliament might feel that they did know sufficiently well when the course of the conflict was not following that mapped out when they gave their approval. There would also be the danger of the Government having continually to defend its position against those who were fundamentally opposed to the deployment in the first place, who could use the opportunity to raise the accusation that things had changed to draw attention to their opposition. Such a provision might therefore introduce uncertainty into the UK's commitment to the conflict, and raise difficult issues of morale among the armed forces, who would risk seeing their work continually called into question. That concern is particularly relevant under the first option. It might also cause difficulties with our coalition partners and allies.

80. The other difficulty with both options under which Parliament, and particularly the House of Commons, might take a vote on continuing engagement is what would happen if renewal was not granted. This has already been touched on in paragraph 57 in the context of a decision not to endorse an engagement undertaken prior to Parliamentary approval. However, the difficulties outlined there might be significantly worse when the armed forces might have been

engaged in the conflict for months or even years. There would need to be a means of ensuring that actions taken by the armed forces during the period of withdrawal continued to benefit from the normal rules covering such engagement, and in particular that there could be no question of the actions of individual members of the armed forces becoming liable to prosecution. As in the previous paragraph, there would also be a serious impact on the morale of the armed forces in knowing that they were continuing to take part in a conflict which no longer had the endorsement of Parliament.

81. Even without an explicit mechanism, Parliament would continue to use the powers that it has to bring the Government to account for its actions. It does so through regular debates, Parliamentary Questions and the work of select committees and ultimately the House of Commons has the power of censure – the vote of no confidence.

82. For all these reasons, the Government is minded to propose that Parliament's involvement should be limited to approving the initial engagement. The illustrative options at Annex A do, however, provide a form of words for regular reports to Parliament. An alternative would be that without setting out a specific procedure (eg every 6 months), an understanding could be developed for the House of Commons that the Government would regularly consult the relevant committees, or the Speaker, or the Opposition parties, as to whether a renewed debate or even a vote was necessary.

Q8: How should Parliamentary support be maintained throughout a deployment?

Role of the House of Lords

83. The United Kingdom has a bicameral Parliament, which operates on two fundamental principles. First, it is clear that the elected House of Commons has primacy in relation to the unelected House of Lords. The Commons primacy derives from the election of its members as the representatives of the people and from which the Government is formed. MPs, as the representatives of their constituents, would be asked to decide whether their constituents should risk their lives in any war. Second, the role of the House of Lords is to provide a complement to the work of Commons in scrutinising the Government and holding it to account. Its role in relation to the engagement of armed forces must be consistent with those two overriding principles. The Government is committed to continuing to have a second chamber and is working on proposals for reform of its composition. Any such reform may affect this relationship, though there is consensus that any reform should broadly maintain a similar role for the second chamber.

84. The most superficially straightforward procedure would be one in which both Chambers debate and vote on the issues. There is of course the possibility that both the House of Lords and the House of Commons would arrive at the same conclusion, but what would happen if they disagreed and then who would decide which Chamber was right? Should the House of Lords really have a veto in any such process? In principle it would of course be possible to provide that the assent of both Houses should be required. But this would not fully reflect the principles described in paragraph 83 above.

85. Accordingly, one option would be that the House of Lords should hold a debate on a 'take note motion' before the House of Commons votes on a substantive motion. The House of Commons could therefore have the benefit of the House of Lords deliberations before it when it came to its own decision. However, there would be only one substantive vote and therefore no danger of conflicting decisions being taken. Every effort would be made for the Lords to hold a debate before the Commons held its own debate and vote, though provision would have to be made for a situation in which it was impossible to schedule a Lords debate ahead of the Commons debate and vote. See examples in Annex A.

Q9: Should the role of the House of Lords be to inform the debates of the House of Commons but not to take a vote?

Parliamentary committees

86. If Parliament is to have a greater role in approving decisions to deploy the armed forces into armed conflict abroad, then it may be necessary to review the present arrangements for specific Parliamentary committees. Elsewhere in this consultation we have outlined some of the options for handling legal and sensitive information on which the Government bases its decisions to deploy the armed forces. One possibility would be to establish a joint committee of both Houses or a select committee of the House of Commons, who would then be tasked to take a view on the information provided to Parliament about a specific deployment decision and about the timing or necessity for various Parliamentary debates. The committee may be involved in hearing the Government's evidence for a deployment decision. This could be one way of dealing with the need for Parliament to have a forum to examine the evidence.

87. Any proposal for a new committee would of course have to take account of current structures, so as not to duplicate or over complicate their responsibilities. There are currently two separate House of Commons select committees which are set up to deal with Defence and Foreign Affairs issues. The Committees are respectively, responsible for examining the expenditure, administration, and policy of the Ministry of Defence and the Foreign Office and their associated public bodies. There is also a statutory committee of parliamentarians, the Intelligence and Security Committee, established under

the Intelligence Services Act 1994 to examine the policy, administration and expenditure of the Security Service, Secret Intelligence Service (SIS), and the Government Communications Headquarters (GCHQ).

88. As set out in *The Governance of Britain* Green Paper, the Government proposes to consult on how the statutory basis of the Intelligence and Security Committee should be amended in order to bring the way in which it is appointed, operates and reports, as far as possible, in line with that of select committees.

Q10: Is there a need for a new committee? How would a new regime governing decisions about deployments affect other parts of the system eg the Defence and Foreign Affairs Select Committees and the Intelligence and Security Committee? What role might these committees play?

Should the new arrangements be contained in a freestanding convention, or in a resolution of the House, or in legislation?

89. The House of Lords Constitution Committee came out firmly against the idea of legislation. In their view, the statutory option was the 'least persuasive' of those they considered. They said that "we have not been persuaded that the difficulties of putting the deployment power on a statutory basis could easily be overcome, and consider that the problems of the uncertainty generated outweigh any constitutional merits".[13] The majority of those who spoke in the debate in the House of Lords on the Report on 1 May, and those who spoke in the debate in the House of Commons on 15 May, followed their lead in preferring a formal, but non-statutory, approach. There was a widespread view, however, that a set process by which the Government would need to seek Parliamentary approval for any deployment would lead to a better articulation of the aims and objectives of the deployment, and therefore to improved Parliamentary and public understanding and support. Such confirmation of widespread political backing should bolster confidence on the part of senior officers, and morale among the armed forces.

90. Conventions can take a number of forms. Some of the most fundamental of the UK's constitutional conventions are not formally set down anywhere outside the textbooks, for example that which says that a Prime Minister defeated on a motion of confidence must resign. In the *Governance of Britain*, the Government said that it would propose that the House of Commons develop a Parliamentary convention that could be formalised by a resolution.[14] This is

[13] Constitution Committee report para 104.
[14] *The Governance of Britain* CM7170, paragraph 29.

one of the more formal ways of establishing a convention. Nonetheless, there clearly is a difference between a resolution, however prescriptive, and legislation.

91. The advantages of a resolution are that:

- It can be created with less formality and more easily amended;
- Failure to comply with it is not automatically unlawful;
- Its interpretation (including the meaning of any exceptions) is primarily a matter for Parliament rather than the courts through judicial review; and
- It may be less likely to inspire speculative legal proceedings against individuals.

92. As opposed to that, there are the disadvantages that a resolution:

- Might appear to provide a weaker assurance of compliance by the government of the day;
- Does not formally constrain the exercise of the prerogative; and
- Would be silent as to its legal effect on the decisions to commit to armed conflict and would not ensure the complete protection of the armed forces from any possible consequential legal liability.

93. Generally speaking, decisions on deployments of the armed forces have been protected from judicial review as matters of "high policy" which are properly the concern of the executive. Any mechanism must not pose practical problems for deployment and for individual service personnel, nor detract from the underlying principle that such decisions are political decisions for Parliament, not legal decisions for the courts.

94. If it is possible to meet those requirements in legislation then that could offer a mechanism to make clear that decisions to commit to armed conflict without approval are not unlawful and could provide that the existence or absence of a requisite resolution should not give rise to any cause of action, or have any effect on the determination of any legal proceedings.

95. This may also serve to remove any argument that individual members of the armed forces are somehow legally vulnerable only because of the absence of a requisite Parliamentary approval (as described earlier in paragraphs 76 to 77). The risk of any such individual liability is seen as remote, if it exists at all. But if it would provide comfort to members of the Armed Forces to know their personal legal position was unaffected by the new arrangements, there may be good reason to provide that reassurance. The protection would not make lawful any conduct which would otherwise be unlawful, and would have no effect on the individuals' existing potential liability for criminal offences such as war crimes.

Illustrative options

96. Annex A shows four illustrative sets of options for setting out a more formal way of regularising Parliament's involvement in decisions on the deployment of armed forces in armed conflict overseas. These are not fully considered and definitive proposals, and in many cases, there are alternative options contained within the drafts. Their purpose is to show how the particular issues discussed in the paper might be dealt with under the various possible forms of mechanism available. For the sake of completeness a range of options have been included to stimulate debate but these do not necessarily reflect current Government thinking. The four options are:

- A detailed House of Commons resolution;
- Full legislative provision;
- A 'general' House of Commons resolution; and
- A 'hybrid' option, which has the basic requirement for Parliamentary approval in legislation but leaves the detail of the circumstances in which approval is required to resolution and provides for legal immunity for those engaged in armed conflict if the approval is not obtained.

97. There are common features to all the options.

- All require the Government to seek authorisation from the House of Commons before participating in armed conflict overseas, or before committing armed forces to a situation where there is a real likelihood that they might become engaged in armed conflict. This picks up the issues discussed in paragraphs 72 to 75 and Question 7 about the stage in preparations at which Parliament's approval should be sought. The drafts make it clear that Parliamentary approval should be sought before a final decision is taken to commit the armed forces. That apart, they do not seek to specify any particular timing, leaving it to the judgement of the Prime Minister what Parliament can be told and when would be the most appropriate time to seek Parliamentary authority. They do not suggest that there should be a role for Parliament in determining the point at which Parliament would expect authorisation to be sought.
- All the options provide a definition of 'armed forces'. This question is discussed in paragraph 51 and Question 2. The definition proposed is tied to those of 'regular forces' and 'reserve forces' in section 374 of the Armed Forces Act 2006. It has the advantage of using a definition which will be well understood by those involved in making decisions about the commitment of forces overseas.
- All but option C define 'armed conflict' by reference to its meaning in the Geneva Conventions and Protocols, thereby attracting the international

law understanding of the term. This question is discussed in paragraphs 44 to 50 and Question 1.

The detailed House of Commons resolution option

98. Paragraph 2 deals with the issues discussed in paragraphs 66 to 71 and Question 6; paragraphs 78 to 82 and Question 8; and paragraphs 86 to 88 and Question 10. It provides that it is for the Prime Minister to determine what approval he is seeking from Parliament and what information he thinks it is appropriate to supply when doing so. In accordance with paragraph 68, it proposes that the information to be supplied should fall under the general categories of objectives, locations and legal matters. It also provides that if an approval is to be given, it is given in the terms proposed by the Prime Minister.

99. Sub-paragraphs (5) and (6) deal with the issues discussed in paragraphs 78 to 82 and Question 8 and whether the Prime Minister should have to continue to report to Parliament on the progress of a campaign once it has been approved. They propose that the Prime Minister should be asked to report to Parliament at regular intervals. They do not, however, provide for Parliament to be asked to confirm its approval at the time of each of those reports.

100. Option 1 under Paragraph 2 provides simply for approval to be given by the House of Commons. Options 2 and 3 under Paragraph 2 provide for a role for the House of Lords, as discussed in paragraphs 86 to 88 and Question 10. Option 2 provides, as discussed in paragraph 88, for an arrangement where the House of Commons asks the House of Lords' opinion on the proposed deployment. This option, set out in sub-paragraph (5), can take effect even if the House of Lords has in fact voted not to approve the proposed deployment. Option 3 provides for a certain minimum period of time after the Prime Minister has sought the House of Commons approval before the House decides on that issue, during which the House of Lords would be able to express its view.

101. A resolution of the House of Commons cannot provide that a decision of the House of Lords in relation to a deployment should be ignored. If, for example, the House of Commons were to say that deployment in a conflict was approved if that House approved it, regardless of what the House of Lords itself said, this could not of itself prevent the House of Lords itself passing a resolution saying that its approval of a deployment was required in all cases. There would then be a danger of the two Houses coming to different conclusions, with no formal means of determining between them which took precedence. This would not meet the objective that providing for explicit Parliamentary authorisation for deployments would assist in demonstrating to both the commanders and the armed forces generally that there was general support for their operations.

102. Paragraph 3 deals with the issues discussed in paragraphs 52 to 55 and Question 3. It provides that where a deployment can be classified as an emergency, or there are operational reasons why it should remain secret or covert, then there is no requirement for the Prime Minister to seek Parliament's prior approval of any deployment. It leaves it to the Prime Minister to judge whether the conditions for not seeking prior approval have been fulfilled, but proposes that he should, if possible, consult the Chairman of the most appropriate committee before doing so. Paragraphs 86 to 88 discuss the role of Parliamentary committees more generally, while paragraph 69 specifically looks at whether there is scope for allowing committees to see more sensitive material than it would be appropriate to disclose in open debate.

103. The drafts provide for two alternatives for what should happen if the Prime Minister has judged that it is necessary to commit armed forces into armed conflict without seeking Parliament's approval. The first requires him to inform the chairmen of the relevant committees as soon as feasible and then lay before Parliament a report which explains why he considered it necessary to proceed without Parliamentary approval and such information about objectives, locations and legal matters as he thinks appropriate. The draft provides for a time limit within which this report must be laid when action has been taken in an emergency. It allows for the time limit to be ignored where the operation has been undertaken in a secret or covert manner. The first option follows paragraph 59 in not requiring anything other than informing Parliament; the Prime Minister is not required to seek retrospective approval.

104. The second alternative provides for the Prime Minister to inform the Chairmen of relevant select committees as soon as feasible, and also to initiate the process of seeking Parliamentary approval. Again, there are exceptions from these provisions for secret or covert operations. It does not seek to tackle directly the issues raised in paragraph 60, since this is about the process of seeking approval, and not about the consequences if that approval is not forthcoming.

105. Paragraph 4 provides for the exemption of special forces operations.

106. Paragraph 5 discusses what should happen when it is necessary to commit armed forces to armed conflict overseas when Parliament is dissolved, as discussed in paragraph 61 to 65, and Question 5. As with deployments which take place prior to approval for emergency or security reasons, the drafts provide two options: either the Prime Minister must simply inform the new Parliament at the first available opportunity, or he must seek Parliament's approval at the first available opportunity. Depending on which options are chosen for this paragraph and paragraph 3, it may be necessary to consider some further provision dealing with the interaction between this paragraph and paragraph 3 (eg. where operations are both secret and occur when Parliament is dissolved).

107. A resolution cannot provide for the legal effect of non-compliance with its terms or confer any protection from legal proceedings. Proceedings in Parliament are exempted from the jurisdiction of the courts by Article IX of the Bill of Rights. But although a legal guarantee cannot be conferred by a convention, the legal risk to individuals is almost certainly more apparent than real.

The legislative option

108. It might be possible to reflect in legislation the principles behind the provisions of the detailed resolution at Option A. It is, however, the Government's view that this option has considerable risks and difficulties inherent in it, precisely because it provides for a statutory-only approval. However, for the sake of completeness, how this might work is spelt out in Option B. The issues raised in relation to the resolution option apply in the same way. In addition, Clause 6 deals with the position of service personnel and others who have entered into an armed conflict in good faith. It picks up the issues discussed in paragraphs 76 to 77, and paragraphs 93 to 95. It provides that a conflict decision is not unlawful simply because the procedures set out in the clauses have not been followed. It also provides that anything done or not done by a member of the armed forces or any other person (which will include civilian support staff and Ministers) in consequence of the decision is not unlawful just because Parliament has not approved the decision. The second alternative provides that expenditure on a deployment which has not been approved in accordance with the requirements in the clauses has not been authorised.

A general resolution

109. Option C is a more general form of resolution. This option does not have a definition of 'armed conflict'. It sets out the general requirement for the House of Commons to approve any decision to involve armed forces in armed conflict. It provides for what should happen if, for reasons of emergency security, it is not possible for the Government to seek advance approval. It also requires the Prime Minister, in those circumstances, to inform the House as soon as possible giving the details of the decision and why prior approval was not possible. Paragraph 5 of the draft makes it clear that it is the Prime Minister's responsibility to keep to a minimum the risks to the effectiveness of operations, the safety or security or the armed forces or other national interests.

The 'hybrid' option

110. Option D is a possible solution which contains elements of both the legislative and resolution options. It provides that the House of Commons must approve any decision to engage armed forces in armed conflict abroad. It sets out the definition of armed forces, and armed conflict, as in the other options. It provides for the House to allow for retrospective approval but does not mandate it; otherwise, it leaves all the detailed arrangements to be determined by the House itself. The only other part of the full legislative option which is reserved to legislation rather than the internal provisions of the House of Commons is provision that a decision to order the deployment of the armed forces in armed conflict is not unlawful because it is made without a required approval, and provision giving protection to individuals who act in consequence of such a decision, whether by deployment in conflict or otherwise.

Q11: Bearing in mind all the considerations set out in the 'Issues for consideration' section of this paper, as well as the points discussed in this section, is it better to proceed simply by way of a free-standing convention, or a resolution of the House of Commons or of both Houses, or should the new arrangements have a legislative backing? If so, should that be on the lines of the hybrid option or of the full legislative option?

Annex A – Draft options giving Parliament a formal role in the decision to send armed forces into conflict abroad

Option A – Detailed House of Commons' Resolution

That an humble Address be presented to Her Majesty praying that decisions of Her Majesty's Government relating to the participation of Her forces in armed conflict, or to the participation of Her forces in activities that may lead to their participation in armed conflict, be made subject to the following provisions.

OR

That, in the case of a decision that is made without an approval required by the provisions below, authorised expenditure shall be taken to have been exceeded by expenditure on the following:

(a) if the decision is within paragraph 1(2)(a) below, the participation in armed conflict that is the subject of the decision, or

(b) if the decision is within paragraph 1(2)(b) below, any participation in armed conflict to which the activities that are the subject of the decision lead.

1. Approval required

(1) A conflict decision should not be made without the approval of this House.

(2) A conflict decision is a decision of Her Majesty's Government:-

(a) to order the participation of armed forces in armed conflict, or

(b) to order the participation of armed forces in activities if, at the time the decision is made, there is a real likelihood of those activities leading to the participation of armed forces in armed conflict.

(3) For this purpose the armed conflict must be outside the United Kingdom.

(4) Approval for a conflict decision has been given if the decision is covered by an approval given in the way set out in paragraph 2 below.

(5) In these provisions 'armed forces' means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006.

(6) [In these provisions 'armed conflict' has the same meaning as in the conventions and protocols set out in the Schedules to the Geneva Conventions Act 1957.]

2. Process for approvals

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) [After an approval is given, the Prime Minister should, at intervals of no more than [ ] months, lay before this House a report.]

(6) [The report should set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

OR

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) This House may send a message to the Lords asking for its opinion on whether this House should resolve to approve those terms.

(6) If a message is sent, no approval will be given less than [ ] sitting days after the day on which the Lords receives the message.

(7) 'Sitting day' means a day on which the Lords sits.

(8) [After an approval is given, the Prime Minister should, at intervals of no more than [ ] months, lay before this House a report.]

(9) [The report should set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

OR

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) The approval will not be given less than [ ] days after the day on which the Prime Minister lays the report.

(6) [After an approval is given, the Prime Minister should, at intervals of no more than [ ] months, lay before this House a report.]

(7) [The report should set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

3. Exceptions to requirement for approval: emergencies and security issues

(1) Approval is not required for a conflict decision if the emergency condition or the security condition is met.

OR

Approval for a conflict decision may be given after the decision has been made if the emergency condition or the security condition is met.

(2) The emergency condition is that:-

(a) the conflict decision is necessary for dealing with an emergency, and

(b) for that reason, there is not sufficient time for an approval covering the decision to be given before the decision is made.

(3) The security condition is that:-

(a) the public disclosure of information about the conflict decision could prejudice [one or both] of the matters mentioned in sub-paragraph (4) below, and

(b) for that reason, it is not appropriate for an approval covering the decision to be sought before the decision is made.

(4) The matters are:

(a) the effectiveness of activities resulting from the decision;

(b) the [security/safety] of any of the following persons:-

(i) members of the armed forces;

(ii) members of other forces co-operating with the armed forces.

(5) It is for the Prime Minister to determine if the emergency condition or the security condition is met.

(6) In coming to a determination, the Prime Minister should, if feasible, consult the chair of any committee that the Prime Minister thinks appropriate.

(7) Sub-paragraphs (8) to (11) below apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister should, as soon as feasible, inform the chair of any committee that the Prime Minister thinks appropriate of the determination.

(9) The Prime Minister should lay before this House a report:-

(a) giving reasons why the Prime Minister made the determination about the emergency condition or the security condition, and

(b) setting out, in relation to the conflict decision in question, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(10) The report should be laid within [ ] days after the day on which the conflict decision is made.

(11) But, in a case involving the security condition, the report does not have to be laid so long as the Prime Minister is satisfied that:-

(a) the circumstances set out in sub-paragraph (3)(a) above continue to exist, and

(b) for that reason, it is not appropriate to lay the report.

OR

(7) Sub-paragraphs (8) to (13) below apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister should, as soon as feasible, inform the chair of any committee that the Prime Minister thinks appropriate of the determination.

(9) The Prime Minister should, within [ ] days after the day on which the conflict decision is made, start the process for an approval covering the decision.

(10) But, in a case involving the security condition, the start of the process can be delayed so long as the Prime Minister is satisfied that:-

(a) the circumstances set out in sub-paragraph (3)(a) above continue to exist, and

(b) for that reason, it is not appropriate to start the process.

(11) The report mentioned in paragraph 2(3) above should include reasons why the Prime Minister made the determination about the emergency condition or the security condition.

(12) The conflict decision is not approved unless an approval covering it is given within [ ] days after the day on which the process for the approval starts.

(1)3 Approval for the conflict decision is not required, if, after one year starting with the day on which the decision is made, the process for the approval has still not been started as a result of sub-paragraph (10) above.

4. Exceptions to requirement for approval: special forces

(1) Approval is not required for a conflict decision if the order in question would cover one or both of the following only:

(a) members of special forces;

(b) other members of the armed forces for the purpose only of their assisting (directly or indirectly) activities of special forces.

(2) 'Special forces' means any forces the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director.

5. Exceptions to requirement for approval: Parliament dissolved

(1) Approval is not required for a conflict decision if the decision is made at a time when Parliament is dissolved.

(2) The Prime Minister should lay before the new House of Commons a report setting out, in relation to the conflict decision, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(3) The Prime Minister should lay the report:

(a) within [ ] days after the day of the first meeting of the new Parliament, or

(b) if that time frame is not feasible, as soon as it is feasible to lay the report.

OR

(1) Approval for a conflict decision may be given after the decision is made if it has been made at a time when Parliament is dissolved.

(2) The Prime Minister should, within [ ] days after the day of the first meeting of the new Parliament, start the process for an approval covering the decision.

(3) The decision is not approved unless an approval covering it is given within [ ] days after the day on which the process starts.

Option B – Legislative Option

War Powers

CONTENTS

PART 1

PARLIAMENTARY APPROVAL FOR ARMED CONFLICT OUTSIDE THE UNITED KINGDOM

1 Parliamentary approval required

(1) The approval of [the House of Commons OR Parliament] is required for any conflict decision.

(2) A conflict decision is a decision of Her Majesty's Government-

(a) to order the participation of armed forces in armed conflict, or

(b) to order the participation of armed forces in activities if, at the time the decision is made, there is a real likelihood of those activities leading to the participation of armed forces in armed conflict.

(3) For this purpose the armed conflict must be outside the United Kingdom.

(4) The approval must have been given before the conflict decision is made.

(5) Approval for a conflict decision has been given if the decision is covered by an approval given in the way set out in section 2.

(6) In this Part 'armed forces' means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006 (c.52).

(7) [In this Part 'armed conflict' has the same meaning as in the conventions and protocols set out in the Schedules to the Geneva Conventions Act 1957 (c. 52).]

2 Parliamentary process for approvals

(1) This section is about the process by which the House of Commons gives approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before the House a report setting out

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) The House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) [After an approval is given, the Prime Minister must, at intervals of no more than [ ] months, lay before the House a report.]

(6) [The report must set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

OR

(1) This section is about the process by which Parliament gives approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before each House a report setting out

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) The approval is given if each House resolves to approve the terms set out in the Prime Minister's report.

(5) The approval is also given if

(a) the House of Commons sends a message to the House of Lords asking for its opinion on whether the House of Commons should resolve to approve the terms set out in the Prime Minister's report, and

(b) not less than [ ] sitting days after the day on which the House of Lords receives the message, the House of Commons resolves to approve those terms.

(6) 'Sitting day' means a day on which the House of Lords sits.

(7) [After an approval is given, the Prime Minister must, at intervals of no more than [ ] months, lay before each House a report.]

(8) [The report must set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

OR

(1) This section is about the process by which Parliament gives approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before each House a report setting out

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) The approval is given if each House resolves to approve the terms set out in the Prime Minister's report.

(5) But if the approval is not so given within the period of [ ] days after the day on which the process for approval starts, the approval is given if, after the end of that period, the House of Commons resolves to approve the terms set out in the Prime Minister's report.

(6) [After an approval is given, the Prime Minister must, at intervals of no more than [ ] months, lay before each House a report.]

(7) [The report must set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

3 Exceptions to requirement for approval: emergencies and security issues

(1) Approval is not required for a conflict decision if the emergency condition or the security condition is met.

OR

Approval for a conflict decision is not required to have been given before the decision is made if the emergency condition or the security condition is met.

(2) The emergency condition is that-

(a) the conflict decision is necessary for dealing with an emergency, and

(b) for that reason, there is not sufficient time for an approval covering the decision to be given before the decision is made.

(3) The security condition is that-

(a) the public disclosure of information about the conflict decision could prejudice [one or both] of the matters mentioned in subsection (4), and

(b) for that reason, it is not appropriate for an approval covering the decision to be sought before the decision is made.

(4) The matters are-

(a) the effectiveness of activities resulting from the decision;

(b) the [security/safety] of any of the following persons-

(i) members of the armed forces;

(ii) members of other forces co-operating with the armed forces.

(5) It is for the Prime Minister to determine if the emergency condition or the security condition is met.

(6) In coming to a determination, the Prime Minister must, if feasible, consult the chair of any committee that the Prime Minister thinks appropriate.

(7) Subsections (8) to (11) apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister must, as soon as feasible, inform the chair of any committee that the Prime Minister thinks appropriate of the determination.

(9) The Prime Minister must lay before [the House of Commons OR Parliament] a report

(a) giving reasons why the Prime Minister made the determination about the emergency condition or the security condition, and

(b) setting out, in relation to the conflict decision in question, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(10) The report must be laid within [ ] days after the day on which the conflict decision is made.

(11) But, in a case involving the security condition, the report does not have to be laid so long as the Prime Minister is satisfied that-

(a) the circumstances set out in subsection (3)(a) continue to exist, and

(b) for that reason, it is not appropriate to lay the report.

OR

(7) Subsections (8) to (13) apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister must, as soon as feasible, inform the chair of any committee that the Prime Minister thinks appropriate of the determination.

(9) The Prime Minister must, within [ ] days after the day on which the conflict decision is made, start the process for an approval covering the decision.

(10) But, in a case involving the security condition, the start of the process can be delayed so long as the Prime Minister is satisfied that-

(a) the circumstances set out in subsection (3)(a) continue to exist, and

(b) for that reason, it is not appropriate to start the process.

(11) The report mentioned in section 2(3) must include reasons why the Prime Minister made the determination about the emergency condition or the security condition.

(12) The conflict decision is not approved unless an approval covering it is given within [ ] days after the day on which the process for the approval starts.

(13) Approval for the conflict decision is not required if, after one year starting with the day on which the decision is made, the process for the approval has still not been started as a result of subsection (10).

4 Exceptions to requirement for approval: special forces

(1) Approval is not required for a conflict decision if the order in question would cover one or both of the following only-

(a) members of special forces;

(b) other members of the armed forces for the purpose only of their assisting (directly or indirectly) activities of special forces.

(2) 'Special forces' means any forces the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director.

5 Exceptions to requirement for approval: Parliament dissolved

(1) Approval is not required for a conflict decision if the decision is made at a time when Parliament is dissolved.

(2) The Prime Minister must lay before [the new House of Commons **OR** the new Parliament] a report setting out, in relation to the conflict decision, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(3) The Prime Minister must lay the report

(a) within [ ] days after the day of the first meeting of the new Parliament, or

(b) if that time frame is not feasible, as soon as it is feasible to lay the report.

OR

(1) Approval for a conflict decision is not required to have been given before the decision is made if it is made at a time when Parliament is dissolved.

(2) The Prime Minister must, within [ ] days after the day of the first meeting of the new Parliament, start the process for an approval covering the decision.

(3) The decision is not approved unless an approval covering it is given within [ ] days after the day on which the process starts.

6 Effect of Part

(1) [This Part needs to be read with the requirement of the Bill of Rights 1688 that the freedom of speech and debates or proceedings in Parliament is not to be impeached or questioned in any court or place out of Parliament.]

(2) A conflict decision is not unlawful because it is not approved as required by this Part.

(3) Further, [in particular,] none of the following is unlawful because the conflict decision is not so approved-

(a) any act or omission of a member of the armed forces or any other person in consequence of the decision or otherwise in the course of, or in connection with-

(i) the armed conflict to which the decision applies, or

(ii) the other activities to which the decision applies or any armed conflict to which those activities lead;

(iii) [any act or omission of a Minister of the Crown leading to the decision.]

OR

(1) Subsection (2) applies in relation to a conflict decision that is not approved as required by this Part.

(2) Authorisation for expenditure is taken to have been exceeded by expenditure on the following-

(a) if the conflict decision is within section 1(2)(a), the participation in armed conflict that is the subject of the decision, or

(b) if the conflict decision is within section 1(2)(b), any participation in armed conflict to which the activities that are the subject of the decision lead.

(3) That is the only effect of this Part.

(4) Accordingly, a conflict decision is not unlawful because it is not approved as required by this Part.

(5) Further, [in particular,] none of the following is unlawful because the conflict decision is not so approved-

(a) any act or omission of a member of the armed forces or any other person in consequence of the decision or otherwise in the course of, or in connection with-

(i) the armed conflict to which the decision applies, or

(ii) the other activities to which the decision applies or any armed conflict to which those activities lead, and

(b) any act or omission of a Minister of the Crown leading to the decision.]

Option C – General Resolution

That an humble Address be presented to Her Majesty praying that Her Majesty's Government, in making decisions relating to the involvement of Her forces in armed conflict, will have regard to the principles set out below if the armed conflict is outside the United Kingdom.

1. The following decisions should not be made without the approval of this House:-

   (a) a decision to involve armed forces in armed conflict;

   (b) a decision to involve armed forces in any activities if, at the time the decision is made, there is a real likelihood of the activities leading to the involvement of armed forces in armed conflict.

2. For this purpose "armed forces" means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006.

3. However, there may be cases in which it is not feasible or otherwise appropriate for approval to be sought before a decision is made, for example:

   (a) cases involving emergencies;

   (b) cases in which the public disclosure of information about the decision could prejudice the effectiveness of operations, the safety or security of armed forces or other national interests.

4. The chair of any relevant committee should, if feasible, be consulted in cases in which approval might not be sought.

5. If approval for a decision is not sought for the reasons mentioned in paragraph 3 above, or for any other reason, the Prime Minister should, as soon as feasible:

   (a) inform the chair of any relevant committee;

   (b) make a statement to this House giving details of the decision and reasons why approval for the decision was not sought.

6. Paragraph 5 above is subject to the Prime Minister's responsibility to keep to a minimum the risks to the effectiveness of operations, the safety or security of armed forces or other national interests that may arise from the public disclosure of information.

7. The paragraphs above do not apply to decisions which would cover one or both of the following only:-

   (a) members of special forces;

   (b) other members of the armed forces for the purpose only of their assisting (directly or indirectly) activities of special forces.

Option D – Hybrid Option

Legislation

War Powers

CONTENTS

PART 1

PARLIAMENTARY APPROVAL FOR ARMED CONFLICT OUTSIDE THE UNITED KINGDOM

1 Approval of House of Commons required

(1) The approval of the House of Commons is required for any conflict decision.

(2) A conflict decision is a decision of Her Majesty's Government-

(a) to order the participation of armed forces in armed conflict, or

(b) to order the participation of armed forces in activities if, at the time the decision is made, there is a real likelihood of those activities leading to the participation of armed forces in armed conflict.

(3) For this purpose the armed conflict must be outside the United Kingdom.

(4) The approval must have been given before the conflict decision is made.

(5) Approval for a conflict decision has been given if the decision is covered by an approval given in accordance with the procedures of the House of Commons that are applicable from time to time.

(6) Those procedures may provide for approvals of conflict decisions to be given retrospectively.

(7) In this Part "armed forces" means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006 (c.52).

(8) [In this Part "armed conflict" has the same meaning as in the conventions and protocols set out in the Schedules to the Geneva Conventions Act 1957 (c.52).]

2 Effect of Part

(1) [This Part needs to be read with the requirement of the Bill of Rights 1688 that the freedom of speech and debates or proceedings in Parliament is not to be impeached or questioned in any court or place out of Parliament.]

(2) A conflict decision is not unlawful because it is not approved as required by this Part.

(3) Further, [in particular,] none of the following is unlawful because the conflict decision is not so approved-

(a) any act or omission of a member of the armed forces or any other person in consequence of the decision or otherwise in the course of, or in connection with-

(i) the armed conflict to which the decision applies, or

(ii) the other activities to which the decision applies or any armed conflict to which those activities lead, and

(b) [any act or omission of a Minister of the Crown leading to the decision.]

OR

(1) Subsection (2) applies in relation to a conflict decision that is not approved as required by this Part.

(2) Authorisation for expenditure is taken to have been exceeded by expenditure on the following-

(a) if the conflict decision is within section 1(2)(a), the participation in armed conflict that is the subject of the decision, or

(b) if the conflict decision is within section 1(2)(b), any participation in armed conflict to which the activities that are the subject of the decision lead.

(3) That is the only effect of this Part.

(4) Accordingly, a conflict decision is not unlawful because it is not approved as required by this Part.

(5) Further, [in particular,] none of the following is unlawful because the conflict decision is not so approved-

(a) any act or omission of a member of the armed forces or any other person in consequence of the decision or otherwise in the course of, or in connection with-

(i) the armed conflict to which the decision applies, or

(ii) the other activities to which the decision applies or any armed conflict to which those activities lead, and

(b) [any act or omission of a Minister of the Crown leading to the decision.]

Resolution

[Resolved] That paragraphs 1 to 4 below shall apply for the purposes of Part [ ] of the [ ] Act 2008 and that the supplementary provision in paragraph 5 below shall apply.

1. Process for approvals

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions [(apart from the approvals given by paragraphs 2 to 4 below)].

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

OR

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions [(apart from the approvals given by paragraphs 2 to 4 below)].

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) This House may send a message to the Lords asking for its opinion on whether this House should resolve to approve those terms.

(6) If a message is sent, no approval will be given less than [ ] sitting days after the day on which the Lords receives the message.

(7) 'Sitting day' means a day on which the Lords sits.

OR

(1) This paragraph is about the process by which this House will give approvals covering conflict decisions [(apart from the approvals given by paragraphs 2 to 4 below)].

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) The approval will not be given less than [ ] days after the day on which the Prime Minister lays the report.

2. Emergencies and security issues

(1) Approval is given for any conflict decision in relation to which the emergency condition or the security condition is met.

(2) The emergency condition is that:-

(a) the conflict decision is necessary for dealing with an emergency, and

(b) for that reason, there is not sufficient time for an approval covering the decision to be given before the decision is made.

(3) The security condition is that:-

(a) the public disclosure of information about the conflict decision could prejudice [one or both] of the matters mentioned in sub-paragraph (4) below, and

(b) for that reason, it is not appropriate for an approval covering the decision to be sought before the decision is made.

(4) The matters are:

(a) the effectiveness of activities resulting from the decision;

(b) the [security/safety] of any of the following persons:-

(i) members of the armed forces;

(ii) members of other forces co-operating with the armed forces.

(5) It is for the Prime Minister to determine if the emergency condition or the security condition is met.

(6) In coming to a determination, the Prime Minister should, if feasible, consult the chair of any committee that the Prime Minister thinks appropriate.

OR

(1) Approval for a conflict decision may be given retrospectively if the emergency condition or the security condition is met.

(2) The emergency condition is that:-

(a) the conflict decision is necessary for dealing with an emergency, and

(b) for that reason, there is not sufficient time for an approval covering the decision to be given before the decision is made.

(3) The security condition is that:-

(a) the public disclosure of information about the conflict decision could prejudice [one or both] of the matters mentioned in sub-paragraph (4) below, and

(b) for that reason, it is not appropriate for an approval covering the decision to be sought before the decision is made.

(4) The matters are:-

(a) the effectiveness of activities resulting from the decision;

(b) the [security/safety] of any of the following persons:-

(i) members of the armed forces;

(ii) members of other forces co-operating with the armed forces.

(5) It is for the Prime Minister to determine if the emergency condition or the security condition is met.

(6) In coming to a determination, the Prime Minister should, if feasible, consult the chair of any committee that the Prime Minister thinks appropriate.

(7) Sub-paragraphs (8) to (12) below apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister should, within [ ] days after the day on which the conflict decision is made, start the process in paragraph 1 above for an approval covering the decision.

(9) But, in a case involving the security condition, the start of the process can be delayed so long as the Prime Minister is satisfied that:-

(a) the circumstances set out in sub-paragraph (3)(a) above continue to exist, and

(b) for that reason, it is not appropriate to start the process.

(10) The report mentioned in paragraph 1(3) above should include reasons why the Prime Minister made the determination about the emergency condition or the security condition.

(11) The conflict decision is not approved unless an approval covering it is given within [ ] days after the day on which the process for the approval starts.

(12) But approval for the decision is given, if, after one year starting with the day on which the decision is made, the process for the approval has still not been started as a result of sub-paragraph 2(9) above.

3. Special forces

(1) Approval is given for any conflict decision if the order in question would cover one or both of the following only:

(a) members of special forces;

(b) other members of the armed forces for the purpose only of their assisting (directly or indirectly) activities of special forces.

(2) 'Special forces' means any forces the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director.

4. Decisions made when Parliament dissolved

Approval is given for any conflict decision made at a time when Parliament is dissolved.

OR

(1) Approval for a conflict decision may be given retrospectively if it is made at a time when Parliament is dissolved.

(2) The Prime Minister should, within [ ] days after the day of the first meeting of the new Parliament, start the process in paragraph 1 above for an approval covering the decision.

(3) The decision is not approved unless an approval covering it is given within [ ] days after the day on which the process starts.

5. Provision about keeping the House informed

(1) [After an approval is given under paragraph 1 above, the Prime Minister should, at intervals of no more than [ ] months, lay before this House a report.]

(2) [The report should set out, in relation to any conflict decision made in reliance on the approval, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.]

(3) If the Prime Minister determines under paragraph 2 above that the emergency condition or the security condition is met, the Prime Minister should, as soon as feasible, inform the chair of any committee that he thinks appropriate.

SUB-PARAGRAPHS (4) TO (7) ARE RELEVANT ONLY IF FIRST OPTION IN PARAGRAPH 2 IS CHOSEN

(4) Sub-paragraphs (5) to (7) below apply if a conflict decision is made in reliance on the approval given by paragraph 2 above.

(5) The Prime Minister should lay before this House a report:-

(a) giving reasons why the Prime Minister made the determination about the emergency condition or the security condition, and

(b) setting out, in relation to the conflict decision, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(6) The report should be laid within [ ] days after the day on which the conflict decision is made.

(7) But, in a case involving the security condition, the report does not have to be laid so long as the Prime Minister is satisfied that:

(a) the circumstances set out in paragraph 2(3)(a) above continue to exist, and

(b) for that reason, it is not appropriate to lay the report.

SUB-PARAGRAPHS (8) AND (9) ARE RELEVANT ONLY IF FIRST OPTION IN PARAGRAPH 4 IS CHOSEN

(8) If a conflict decision is made in reliance on the approval given by paragraph 4 above, the Prime Minister should lay before the new House of Commons a report setting out, in relation to the decision, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(9) The Prime Minister should lay the report:-

(a) within [ ] days after the day of the first meeting of the new Parliament, or

(b) if that time frame is not feasible, as soon as it is feasible to lay the report.

Annex B – Other countries' ways of securing Parliamentary involvement

Australia

Under the constitution, control of the armed forces and the power to declare war are prerogative powers exercised on the advice of the Prime Minister. As in the UK, it is open to Parliament to debate issues relating to these issues; the House of Representatives did so, for example, on 18 March 2003 in relation to Iraq. The motion was a 'take note' motion rather than a substantive vote, and the debate took place after the Prime Minister had already announced the commitment of Australian forces to the US-led coalition. As in the UK, there has been increasing interest in Private Member's Bills attempting to give Parliament a more formal role.

Canada

Power to commit armed forces to active service is vested in the Executive (the Governor-General advised by the Prime Minister). The power can be exercised in the defence of Canada, or in fulfilment of international obligations. There have been Parliamentary debates on deployments, but these are not on government motions seeking authorisation for the deployment. In 1990, the House of Commons approved the deployment of ships and armed forces to the Gulf, but added a rider seeking a further resolution in the event of an outbreak of hostilities, which was presented and approved in January 1991.

France

Unless a formal declaration of war is involved, the Head of State (with the consent of the Head of Government in a period of cohabitation) has the final word in the deployment of forces overseas, whether these are carried out in pursuance of international obligations or following a national decision. Since 2005, a proportion of the finance for such operations is voted in the initial budget, which gives Parliament more say than the previous arrangements, where all credits were endorsed after the event.

Germany

The German model requires Parliamentary approval for all deployments, but also provides for a simplified procedure in cases of deployment of low intensity and importance. In these cases, the Government has to apply, via the chairman of

the Parliament, to the chairmen of political groupings within Parliament and the Chairmen of the Foreign Affairs and the Defence Standing Committees as well as all MPs. Parliament is only consulted if a political grouping or 5% of Parliament's members make such a request within seven days after having been informed. Otherwise, consent is deemed to have been given.

A deployment is defined as of low intensity and importance if the number of soldiers is small, the deployment on the basis of the circumstances is of low importance and if it is not participation in a war. This is taken to include a reconnaissance mission bearing arms only for self-defence, where only individual soldiers are concerned within the framework of personnel exchanges with allied armies, and where individual soldiers are deployed in the framework of a UN, NATO, or EU mission or that of another organisation fulfilling a UN mandate.

Italy

Under the Constitution, it is the Government which has responsibility for international policy and military action. It is obliged to consult Parliament over the deployment of armed forces, but is not required to seek its approval. There is no specific procedure for consulting Parliament. The most common way is for the Government to make a communication to Parliament or one of its committees, and for this to be followed by a debate and adoption of a resolution by a simple majority. Parliament also has the opportunity to influence matters through its authorisation of the expenses for the participation in military operations, which is normally sought through means of a Bill.

The Italian Parliament is competent to declare war.

Netherlands

Declaration of war normally requires the prior approval of Parliament, the two Chambers meeting in joint session.

The Government has supreme authority over the armed forces. It is obliged to inform the States General in advance if armed forces are to be deployed or made available to maintain or promote 'the international legal order'. If the situation is too urgent for this, the information must be provided as soon as possible afterwards. The information which the government has to provide is set out in a 2001 "Review Protocol". There is no formal obligation to secure Parliamentary approval for a deployment, but in practice the Government does not commit armed forces without such approval.

Spain

Power to declare war is vested in the Executive. The decision to engage Spanish armed forces in the NATO operations in Iraq was taken by the Prime Minister without seeking the approval of the Parliament.

Since July 2004, all missions abroad, including peace keeping, have been subject to a Parliamentary procedure for approval.

USA

Constitutionally, war powers are divided. Congress has the power to declare war and to raise and support the armed forces. The President, though, is the Commander-in-Chief and as such has the power to repel attacks against the US. In practice, the President historically had the ability to commit US armed forces to extended overseas conflicts without consulting Parliament (eg in both Korean and Vietnam, in both of which war was not formally declared). The 1973 War Powers Act requires regular consultation with Congress in contemplating military action; written notification within 48 hours of such action, with its "estimated scope or duration" and congressional consent through either a declaration of war or specific statutory authorisation. If such approval is not granted within 60 days, the President is supposed to withdraw the forces within a further 30 days. Congress can, and does, grant broad powers to the President to conduct operations during the course of particular campaigns without further reference.

Part Two – Ratification of Treaties

Introduction and Background

111. Every year the United Kingdom becomes party to many international treaties, which result in binding obligations for the UK under international law across a wide range of domestic and foreign policy issues. These are published as Command Papers. Those published since January 1997 may be viewed on the website of the Foreign and Commonwealth Office at www.fco.gov.uk/treaty

112. On 3 July the Prime Minister made a statement to Parliament on Constitutional Reform in which he proposed "to put on to a statutory footing Parliament's right to ratify new international treaties." Accompanying this statement, the Government published a Green Paper *The Governance of Britain*[15] which sets out important and wide-ranging proposals for constitutional reform. In the Green Paper, the Government said that "the procedure for allowing Parliament to scrutinise treaties should be formalised" and that "Parliament may wish to hold a debate and vote on some treaties". To that end the Government is consulting on how best to meet these commitments. A copy of the Green Paper can be found at www.justice.gov.uk/publications/governanceofbritain.htm

113. This consultation document describes the nature of the treaties that are subject to this process, and explains the current arrangements embodied in the procedure known as the Ponsonby Rule. It sets out options for putting onto a statutory basis the existing arrangements for Parliament's scrutiny of treaties, and invites comment on them.

What is a treaty?

114. For the purposes of the 'Ponsonby Rule', the Government is guided by the definition of the term 'treaty' set out in the 1969 Vienna Convention on the Law of Treaties. It covers international agreements concluded in written form by the UK and other States and which create rights and obligations under international law. The instruments to which the Rule applies may be called 'treaty', or may have other titles such as 'convention', 'agreement', 'protocol', 'exchange of notes' or 'final act'. The Rule also applies to treaties between the UK and international organisations such as the United Nations.

115. On ratifying a treaty the UK usually binds its entire metropolitan territory, which consists of England, Scotland, Wales and Northern Ireland, including the devolved administrations. However, where appropriate, the UK Government

[15] Cm 7170, pp19-20

consults with the devolved administrations before ratifying a treaty which touches upon devolved matters.

116. Instruments that do not create rights and obligations governed by international law are not treaties, are not relevant to the 'Ponsonby Rule' and accordingly do not come within the scope of this consultation. Instruments of this type include non-binding arrangements, understandings and declarations.

What is ratification of a treaty?

117. Ratification of a treaty is an international act whereby a State establishes on the international plane its consent to be bound by a treaty, and is usually preceded by signature of the treaty. National Parliaments do not 'ratify' treaties in this sense, although the term is also used by some States to refer to their domestic constitutional processes applicable to treaties. For the United Kingdom, the act of ratification generally has two parts: signature of the ratification document by the Foreign Secretary (or on certain occasions by the Prime Minister or HM The Queen), and the physical deposit of that document with the Depositary (the administering State or Organisation) of the treaty concerned. The date of ratification is determined by the terms of the particular treaty and international treaty law and practice; it is normally the date of deposit of the ratification document.

118. The 'Ponsonby Rule' is also applied where the Government proposes to become party to a treaty by accession, approval, acceptance or notification of the completion of domestic procedures. All of these terms refer to a document similar in effect to a ratification instrument which a State has to deposit in order to establish on the international plane its consent to be bound by a treaty.[16] The name of the instrument and the manner in which it has to be deposited with the Depositary, or, in the case of a bilateral treaty, with the other Government, depend on the terms of the treaty concerned.

Treaties and domestic law

119. In the UK, international treaty rights and obligations are not automatically incorporated into national law upon ratification. They are given effect in national law where necessary either by primary or secondary legislation. The Government practice is not to ratify a treaty until all the necessary domestic legislation is in place to enable it to comply with the treaty, since to do otherwise could put the UK in breach of its international obligations. Parliament, including where necessary the devolved legislatures, has the opportunity to

[16]The term 'ratification' is used in this document to include other similar acts such as accession, approval, acceptance and notification of completion of domestic procedures.

debate enabling legislation and may vote on it during the legislative process. This practice applies equally to all EU treaties that require enabling legislation. Most Parliamentary debates on treaties take place during this process rather than under the Ponsonby Rule.[17]

What is the 'Ponsonby Rule'?

120. The Ponsonby Rule requires that before the Government ratifies a treaty that it has previously signed, it must lay that treaty before Parliament for a minimum of 21 sitting days, or, when circumstances require a degree of flexibility, follow one of the established alternative ways of consulting and informing Parliament. Treaties laid before Parliament are commissioned for publication by the Foreign and Commonwealth Office (FCO), and under current arrangements are published by The Stationery Office (TSO) from whom they are available for purchase and on-line. Overall responsibility for treaties rests with the Foreign Secretary, but the policy lead is often with another Government Department.

121. For the purposes of the Ponsonby Rule, 'sitting days' are treated as those days on which Parliament sits (not including weekends or Bank Holidays), but they do not need to be continuous. The Government does not ratify any treaty that is subject to the Ponsonby Rule until the 21 sitting days period has passed (or alternative procedures observed). The Ponsonby Rule does not apply to treaties that enter into force following signature.

Origin and status of the Ponsonby Rule

122. The 'Ponsonby Rule' arose from Parliamentary proceedings relating to the various peace treaties following the First World War. In a debate on the Treaty of Peace (Turkey) Bill[18] on 1 April 1924, Mr Arthur Ponsonby, Parliamentary Under-Secretary of State for Foreign Affairs in the first Labour Government, announced to the House that the Government was introducing a new practice which would provide a basis for consultation with Parliament on treaty matters. Ponsonby stated that it was "the intention of His Majesty's Government to lay on the Table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified and published and circulated in the Treaty Series". This marked a growing awareness by Government of the need to provide a broader measure of democratic accountability to Parliament in relation to the treaty-making process.

[17] For further information on the UK and other states's Parliamentary scrutiny of treaties and domestic constitutional practice relating to treaties, see *National Treaty Law and Practice*, Hollis, Blakeslee and Ederington (eds), published by the American Society of International Law, 2005.

[18] Second Reading, 1 April 1924 (House of Commons debates (1924) 171, Col. 1999-2005)

123. Ponsonby further undertook that "if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question." The Government therefore intended to keep Parliament informed of all agreements "which may in any way bind the nation to specific action in certain circumstances".

124. In December 1924 the new Conservative Government announced that it would not follow the Ponsonby Rule. The Rule was re-instated by the next Labour Government in 1929 and has been applied by all UK Governments since then. It currently has the status of a constitutional convention, and is therefore grounded in consistent practice and long-standing application.

125. The Ponsonby Rule is not embodied in Standing Orders or Resolutions of either House of Parliament, nor in statute. Although Parliament may seek to debate the substance of treaties laid before it, table questions and generally hold the Government to account, there is no legal obligation on the Government to act on the views expressed by Parliament in this process.

Evolution of the Ponsonby Rule

126. Since its introduction, the Ponsonby Rule has evolved, leading to the current procedure:

- *From 1929* it has applied to all treaties which the Government has signed and proposes to ratify;
- *From 1948* it has applied to multilateral treaties to which the Government proposes to accede;
- *From July 1982* it has applied to treaty amendments;
- *From January 1998* it has applied to all treaties which require the United Kingdom to notify its completion of constitutional procedures (usually bilateral treaties).

127. Over the past ten years an average of 30-35 treaties per year have been laid before Parliament. The Ponsonby Rule is applied without regard to the subject-matter involved. It therefore covers some very well-known treaties; for example in the past twenty years the following treaties were laid under the Ponsonby Rule:

- The British/Irish Agreement (The Good Friday Agreement: Belfast, 10 April 1998)
- Convention on the Rights of the Child (New York, 20 November 1989)
- United Nations Framework Convention on Climate Change (Rio de Janeiro, 4-14 June 1992)

- Convention on the Prohibition of the Development, Production, Stockpiling of Chemical Weapons and their Destruction (Paris, 13-15 January 1993)
- Rome Statute of the International Criminal Court (Rome, 17 July, 1998)
- Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto, 11 December 1997)
- Treaty on European Union, together with Protocols, Final Act, Declarations and Decision (Maastricht, 7 February, 1992)
- Treaty of Nice amending the Treaty on European Union (Nice, 26 February 2001)

128. The Rule has also applied to a larger range of treaties on subjects of a routine, technical or specialist nature (such as international road transport, safety of shipping, radiocommunications, postal arrangements, hallmarking, patent licensing, film co-production and civil global satellite navigation systems). The relative level of interest raised by any given treaty is subjective and often hard to predict, a point recognised by Arthur Ponsonby himself when he made his statement to Parliament in 1924.

129. The Ponsonby Rule does not apply in cases where, following ratification, the UK subsequently extends the application of a treaty to one or more UK Overseas Territories and/or the Crown Dependencies. In such cases Parliament would already have been consulted on ratification with respect to the metropolitan territory of the UK; application to an Overseas Territory is a matter for consultation with the Government of the Overseas Territory concerned. It is the practice to provide information on any consultation with the Overseas Territories and/or Crown Dependencies in the Explanatory Memorandum (see paragraph 131).

Exception to the Ponsonby Rule

130. Bilateral double taxation agreements are appended to the Order in Council which implements the agreement in UK domestic law. The draft Order must, by statute,[19] be debated in the Commons. Therefore, it was agreed in 1981 by an announcement given by the Lord Privy Seal in a written answer to a Parliamentary Question that "in order to effect economies in the publication of Command Papers, it has been decided that the texts of bilateral double taxation agreements should no longer be tabled in Parliament as White Papers in the Country Series of Command Papers. They will however continue to be published in the Treaty Series of Command Papers after entry into force."[20] This is now an established practice.

[19] Section 788 of the Income and Corporation Taxes Act 1988 (c.1)(relief from tax under double taxation agreements).
[20] H.C. Deb. (1981) 4, WA 82

Developments related to the Ponsonby Rule

131. The last decade has witnessed increased Parliamentary interest in the question of the accountability of Government to Parliament, with particular focus on the exercise of the Prerogative Powers (including the ratification of treaties).

Lord Lester's 1996 Bill

132. In 1996 Lord Lester of Herne Hill QC had introduced a Bill[21] that would provide formal scrutiny by both Houses of all treaties that the Government proposed to ratify. The Bill was withdrawn following a Government undertaking to provide an *Explanatory Memorandum* for each treaty laid under the Ponsonby Rule. Explanatory Memoranda contain a description of the key features of the treaty concerned, together with an account of the reasons why the Government considers that the UK should become a party and any financial implications for the UK, and were introduced from January 1997 onwards.

The Wakeham Commission and the House of Commons Procedure Committee

133. In January 2000 the Royal Commission on the Reform of the House of Lords (the Wakeham Commission) reported.[22] They embraced the concept of a new Lords select committee to scrutinise treaties falling under the Ponsonby Rule, and recommended that the House of Lords Liaison Committee should consider how to take this forward. In responding to the report the Government saw merit in the proposal, but recognised that setting one up would be a matter for the House. During this period, the House of Commons Procedure Committee had begun an inquiry into treaty scrutiny, as recommended by the Defence Committee. The Lords Liaison Committee decided to await the report of the Commons Procedure Committee before making any recommendation.[23]

134. Having considered the issues and taken contributions from witnesses, the Commons Procedure Committee decided that it would recommend against setting up a Commons sifting committee specifically to deal with treaties. The Committee believed that the appropriate role for the Commons in relation to treaty scrutiny was to draw upon the established expertise of the departmental select committees. It recommended that the Foreign and Commonwealth Office should send every treaty subject to ratification to the relevant select committee along with its Explanatory Memorandum. The Government accepted this recommendation, which is now routine practice.[24]

[21] The Treaties (Parliamentary Approval) Bill [H.L] 1996
[22] Royal Commission on the Reform of the House of Lords: A House for the Future. Cm 4534, January 2000
[23] House of Lords Liaison Committee Third Report Session 1999-2000
[24] House of Commons Procedure Committee's Second Report of Session 1999-2000: Parliamentary Scrutiny of Treaties (HC210)

135. The Government also said in its response: "In accordance with the Ponsonby Rule time for consideration of a treaty by a select committee should normally be within 21 sitting days, but in cases where a committee wished to conduct an inquiry that was likely to take more than 21 days, it is open to a committee to ask for an extension. The Government would aim to respond positively to such requests provided circumstances permit and cases are justified."[25]

136. The Government's response continued to say that: "The Government is happy to undertake normally to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. It agrees that this would be a useful development of the Ponsonby Rule. The form of the debate will remain a matter for the Government, although it will of course take the views of the Committee concerned and of the Liaison Committee into account."

137. Since 2000, there have been few requests for an extension of the 21 day period. Three examples are as follows:

- Following an Early Day Motion on 8 November 2000 requesting the Government not to ratify the Framework Agreement on Measures to Facilitate the Restructuring and Operation of the European Defence Industry until the Defence Committee had reported on its provisions, an extension to the Ponsonby period of approximately two months was agreed;
- Protocol No. 14 to the European Convention on Human Rights was laid before Parliament under the Ponsonby Rule on 15 November 2004. The Chairman of the Joint Committee on Human Rights (JCHR) tabled an Early Day Motion asking that the Protocol not be ratified until the JCHR had reported to Parliament. The Government acceded to this request; accordingly ratification was delayed until 28 January 2005;
- On 20 October 2006 the JCHR asked the Government not to ratify the Council of Europe Convention on the Prevention of Terrorism until it had time to report on it to Parliament. This was agreed in accordance with the undertaking previously given by the Government to the JCHR (see paragraphs 142 to 143 below).

138. There have been no requests for a debate under this procedure since the undertaking was given in 2000. In practice, in the vast majority of cases when Parliament debates a treaty, this takes place beyond 21 days after laying because it occurs during consideration of implementing legislation rather than under the Ponsonby Rule. In such cases, ratification of the treaty would not take place until after enactment of the necessary implementing legislation.

[25] 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).

House of Commons Public Administration Select Committee

139. In March 2004 the Commons Public Administration Select Committee (PASC) reported.[26] The PASC had been considering wider questions of the use of the Royal Prerogative, including the question of treaties, and recommended that the Government should initiate a public consultation exercise on Ministerial prerogative powers. They further said that this exercise should include specific proposals for ensuring full Parliamentary scrutiny of three specific areas – one of which was the conclusion and ratification of treaties.

140. The report was accompanied by a paper by Professor Rodney Brazier which included a draft Bill. This put forward the idea that certain treaties subject to ratification would require a debate in both Houses and their approval by way of a separate Resolution of each House. Professor Brazier sought to distinguish between what he calls "more important treaties" and other "less important" ones. Only the "more important" ones would be subject to the procedure described above – the "less important" ones laying for 21 sitting days and being subject to a negative resolution procedure.

141. In its response on 22 July 2004, the Government stated that: "While the Government remains committed to considering ways of improving the efficient and effective scrutiny of treaties by Parliament, introducing the Committee's provisions might not only delay the ratification process, but could also be a substantial burden on Parliament's time, without materially adding to the scrutiny that Parliament is already at liberty to make."[27]

Joint Committee on Human Rights

142. In 2004, Parliament's Joint Committee on Human Rights (JCHR) presented a report on a human rights treaty (see paragraph 137 above).[28] The Committee expressed a wish for Parliament to be more involved before the ratification of treaties which incur human rights obligations on behalf of the UK, and stated: "We have therefore decided to report to Parliament in future in relation to all human rights treaties, or amendments to such treaties, in respect of which there is a need to ensure that Parliament is fully informed about the background, content and implications of such treaties."[29]

143. In its response,[30] the Government welcomed this decision and agreed that it would facilitate properly informed Parliamentary debate. The Government now

[26] Taming the Prerogative: Strengthening Ministerial Accountability to Parliament. Public Administration Select Committee Fourth Report of Session 2003-04 (HC 422) 16 March 2004
[27] Government Response to the Public Administration Select Committee Fourth Report of the 2003-04 Session, 22 July 2004
[28] Protocol No 14 to the European Convention on Human Rights
[29] Joint Committee on Human Rights: First Report of Session 2004-05. HL Paper 8 HC 106, 8 December 2004
[30] Joint Committee on Human Rights: Government Responses to Reports from the Committee in the last Parliament. Eighth Report of Session 2005-06 HL Paper 104 HC850, 31 January 2006

sends copies of Command Papers where the treaty raises significant human rights issues to the JCHR along with a copy of the accompanying Explanatory Memorandum.

Lord Lester's 2003 and 2006 Bills

144. In December 2003 Lord Lester introduced an Executive Powers and Civil Service Bill [HL]: Schedule 1 of this Bill set conditions for the ratification of treaties, using both affirmative procedures and negative ones combined with a requirement for select committees to report on certain treaties. The Bill was subsequently withdrawn, and on 17 January 2006 Lord Lester introduced a Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill [HL]. This included provisions on treaty scrutiny similar to those in his earlier Bill.

The Conservative Party Democracy Taskforce

145. The Conservative Party in 2006 announced the launch of a "Democracy Taskforce"[31] to examine issues relating to the prerogative, including treaty making. The Taskforce reported in March 2007, stating that it favoured the approach of the Public Administration Select Committee, and Lord Lester's Bill. Those treaties with significant implications – essentially those with financial, legal or territorial implications for the United Kingdom or its citizens – should require Parliamentary approval before ratification.

Keeping Parliament informed

146. The FCO commissions the publication of treaties as Command Papers by TSO, and is responsible for arranging the laying of all treaty Command Papers before both Houses of Parliament. The accompanying Explanatory Memorandum is drafted by the Government Department which has the main policy interest in the treaty, and is signed by its Minister.

147. In accordance with its undertaking given in 2000, the Government sends copies of treaty Command Papers to the Foreign Affairs Select Committee in the House of Commons and to the relevant departmental select committee for the subject-matter concerned.

Alternative procedures

148. Very occasionally alternative procedures for consulting and informing Parliament have been used, mostly in circumstances where it has not been

[31] An End to Sofa Government: Better working of the Prime Minister and Cabinet – Roger Gough

practicable to provide for 21 sitting days before ratification. The following examples illustrate the variety of alternative processes which have been used.

Treaties laid but not published as Command Papers

By making an announcement

149. At a press conference held on 24 August 1998 – during the summer Parliamentary recess – the Foreign Secretary announced that the Agreement between the Government of the United Kingdom and the Government of the Netherlands concerning a Scottish Trial in the Netherlands[32] had been finalised. Copies of the Agreement were laid in both Houses of Parliament. The Agreement was published in the Treaty Series of Command Papers after it came into force.

By consulting leaders of the opposition and other Parliamentary parties – for example when Parliament is in recess

150. In 1950, the Government wished to conclude a Mutual Defence Agreement with the United States Government, and to bring it into force without delay. The Prime Minister was considering dissolving Parliament and it was not practicable to lay the Agreement for 21 sitting days. It was decided to approach the Leader of the Opposition and the Leader of the Liberal Party; to show them the text; and to explain the circumstances and exactly what the UK would receive under the Agreement. The Agreement was signed and accepted on the same day, 27 January 1950. It was subsequently laid before Parliament in the Treaty Series of Command Papers.

By passing a Bill

151. An Exchange of Notes was signed on 21 July 1942 concerning the Status of United States forces in the UK. The agreement was made "subject to the necessary Parliamentary authority" which, in the case of the UK, was speedily given by the United States of America (Visiting Forces) Act 1942 which received Royal Assent on 6 August 1942. The Act set out the Exchange of Notes in a Schedule and functioned as the definitive expression of Parliament's approval of this treaty.

By answering a Parliamentary Question

152. The UK's intention to accede to the Nairobi Convention on Mutual Administrative Assistance for the Prevention of, Investigation and Repression of Customs Offences 1977 was announced in Parliament in response to a Parliamentary Question on 8 February 1983. Copies of the Convention were

[32]The Hague, 18 September 1998

placed in the libraries of both Houses. The UK acceded to the Convention on 18 March 1983 and the text of the Convention was subsequently published in the Treaty Series upon entry into force of the Convention for the UK.[33]

153. However, Parliamentary practice has since evolved and inspired PQs are no longer used, being replaced by Written Ministerial Statements. Furthermore, since 1983 the period within which a Command Paper can be published has considerably reduced as modern publishing techniques become available – but even in the most urgent case it could not usually be achieved in under a week.

Treaties published as Command Papers but not laid for the full 21 sitting day period

By making an announcement

154. The Agreement between the Government of the United Kingdom and the Government of Ireland establishing the Independent Commission for the Location of Victims' Remains (27 April 1999) was laid before Parliament as a Command Paper under the Ponsonby Rule on 5 May 1999. On 10 May 1999 the Minister for Northern Ireland made an announcement during a debate, notifying MPs of the Government's desire to bring the Agreement into force before the 21 sitting days of the Ponsonby Rule had elapsed. The Agreement entered into force on 28 May 1999.

By written Ministerial Statement

155. In a written Ministerial Statement on 9 May 2007[34] the Secretary of State for Northern Ireland notified Members that the Government felt it was appropriate to shorten the 21 sitting day period and bring the Agreement between the Government of the United Kingdom and the Government of Ireland (22 March 2007) into force.

Issues for consideration

156. The Green Paper *The Governance of Britain* said that: "The Government believes that the procedure for allowing Parliament to scrutinise treaties should be formalised. The Government is of the view that Parliament may wish to hold a debate and vote on some treaties and, with a view to its doing so, will therefore consult on an appropriate means to put the Ponsonby Rule on a statutory footing." This paper seeks views on these matters.

[33] Treaty Series 010 (1984): Cmnd 9153
[34] Commons Hansard, 9 May 2007, Column 14 WS

157. The key features of the Ponsonby Rule are the publication of a treaty as a Command Paper and the laying of the Command Paper before both Houses for at least 21 sitting days. The Government does not ratify[35] any treaty that is subject to the Rule until it has been published as a Command Paper and laid before both Houses of Parliament and 21 sitting days have elapsed, or Parliament has been consulted under one of the alternative procedures. Coupled with this is a Government undertaking to provide time for a debate should one be formally requested. Additional features are the practices that allow for flexibility in exceptional circumstances and certain specified exceptions (see paragraphs 130 and 148 to 155 above).

Placing the Ponsonby Rule in statute

158. As indicated in paragraphs 124 to 125 above, the Ponsonby Rule is not embodied in Standing Orders or Resolutions of either House of Parliament, nor in Statute. It currently has the status of a Constitutional Convention and is governed by Parliamentary custom and practice. The Government proposes to codify the Ponsonby Rule by means of statutory provisions. However, an alternative means of codification would be by Resolution of each House to bind the Government politically. Or, given that Parliament's existing powers in relation to the scrutiny of treaties are significant, a further option is to leave the matter to be governed by Parliamentary custom and practice as at present.

159. To assist consideration of this question, some possible draft provisions are set out in Annex C, to illustrate how the key features of the Ponsonby Rule – as it applies in the standard case – might look if put onto a statutory footing (see Clauses 1 and 2).

Q12: Is there any reason why the arrangements for treaties requiring the laying of treaties before Parliament for 21 sitting days before ratification (known as the 'Ponsonby Rule') should not be placed in statute?

Alternative procedures

160. There are occasionally circumstances that necessitate departure from standard Ponsonby Rule procedures, by shortening the 21-day laying period or by using an alternative method to consult and inform Parliament (see alternative procedures explained in paragraphs 148 to 155).

161. The Government is of the view that, if the Ponsonby Rule is to be put onto a statutory footing, the legislation will need to incorporate the flexibility which is a current feature of that Rule.

[35]The term "ratify" is used here to include other similar acts such as accession, approval, acceptance, and notification of completion of domestic procedures. See paragraph 118 above.

162. It might not be appropriate to specify in legislation the details of the various procedures that could be used to consult Parliament, in the unusual cases where publication of the treaty by Command Paper and/or 21 days laying prior to ratification is not practicable. The evolution of such procedures might be inhibited by legislation; for example, some of the procedures cited in paragraphs 148 to 155 above have not been used for many years (eg, the previous practice of inspired PQs has now been replaced by Written Ministerial Statements.)

163. A standard alternative procedure could be developed in statutory provisions so as to allow the Secretary of State a measure of discretion on when flexibility is required, provided that Parliament is given a full explanation and has the opportunity to call the Government to account.

164. Annex C contains an illustrative draft of a possible way of providing such a procedure by statute without limiting the types of Parliamentary process by which the Government could be called to account. It includes provisions to cover the case where there is an urgent need to ratify a treaty during a period in which Parliament is not sitting (see Clause 3).

Q13: How should alternative procedures and flexibility be provided for?

Exceptions to the Ponsonby Rule

165. The Government believes that there remain sound reasons for certain exceptions (see paragraph 130 above), and that, if the Ponsonby Rule is to be put on a statutory footing, these should be accommodated.

166. One option would be to enumerate existing categories of treaty to which the Ponsonby Rule does not apply; in this case a further question would be whether any alternative procedure (such as the one applicable to double taxation treaties) should be specified in the legislation.

167. A second option might be to give Government a power to specify by Statutory Instrument a category or categories of treaties to which the Ponsonby Rule does not apply.

168. Annex C sets out possible statutory provisions containing such a power (see Clause 4).

Q14: According to established practice, some categories of treaties are not subject to the Ponsonby Rule. For example, bilateral double taxation treaties are published to Parliament in a different way, and the legislative process provides the opportunity for debate. Should exceptions of this kind be retained? If so, how should they be accommodated within statutory provisions?

Parliamentary procedures for triggering a debate

169. The original intention behind the Ponsonby Rule was to allow Parliament time to consider, and if required, to debate a treaty, where there was a "formal demand for discussion forwarded through the usual channels from the Opposition or any other party" (see paragraph 123 above).

170. This intention was strengthened by a Government commitment in 2000 also to allow time for a debate in the Commons if a House of Commons select committee so requests in writing to the Leader of the House, and if supported by the Liaison Committee (See paragraphs 133 to 138 above).

171. It is very rare for debates to be requested under the Ponsonby Rule. Since the Government undertaking in 2000, there have been a few requests for extension of the laying period but no requests for debate of a treaty under the Ponsonby Rule.

172. There are a number of other ways in which debates or requests for debates may, under existing procedures of both Houses, be triggered. For example, Early Day Motions, and in the Lords, by a Member tabling a Motion. Any vote following a debate would enable each House to express its view in a variety of ways, depending on the form of the Motion.

Q16: If the key features of the Ponsonby Rule were to be put on a statutory footing as proposed, are any changes required to the Parliamentary procedures in either House for triggering a debate on a treaty?

Extensions to the 21-sitting day period

173. The Government, in its response to the Procedure Committee's report in October 2000 (see paragraphs 133 to 138 above), also gave an undertaking that in cases where a select committee wished to conduct an inquiry (into a treaty that had been laid under the Ponsonby Rule) that was likely to take more than 21 days, it would be open to a committee to ask for an extension. The Government confirmed that it would aim to respond positively to such requests provided circumstances permit and cases are justified.

174. Since 2000, there have been few requests for an extension of time. Three examples are set out in paragraphs 133 to 138 above. The Government acceded to these requests.

175. In none of these cases was a request made for a debate.

176. If a longer minimum laying period were to be provided, this could be based on the negative procedure for Statutory Instruments. Under this procedure,

the Instrument is usually laid for at least 21 days before its entry into force, but Parliament has up to 40 days to request a debate and vote against the Instrument. If there is a vote against the Instrument, it is annulled, even if it has entered into force. For treaties, consideration could be given to increasing the standard laying period to 40 days. But, since the ratification of a treaty cannot be annulled, ratifications would have to be routinely delayed until the expiry of the 40 day period (defined in the same way as for Statutory Instruments subject to the negative resolution procedure). Therefore, if this option were chosen, it is not proposed to make formal provision for further extension of the laying period, but it would of course be open to the Government and Parliament to agree on further extensions in particular cases.

Q16: Should there be provision for extending the 21 sitting-day period if, during those 21 days Parliament indicates that it wishes further time to scrutinise or debate the treaty? If so, how should such a request be made? Alternatively, should there be a longer minimum period for scrutiny without formal provision for extension?

Outcome of a vote

177. Under the current system, it is possible that a vote on a motion relating to a treaty could be called in either House and the Government would have to decide how to proceed in a case where one or other House had passed a resolution calling on it not to ratify, or where different resolutions were passed by each House. However, there are no known examples in recent years of a vote being taken following a debate held under the Ponsonby Rule.

178. If the Ponsonby Rule were put on a statutory footing, consideration would have to be given to whether to specify the effect of a vote against ratification.

179. In the event of a vote calling on the Government not to proceed with ratification of a treaty, possible options could include statutory provisions which provide that:

- a negative vote by either House binds Government not to proceed; or
- a negative vote by the House of Commons binds Government not to proceed, whereas a negative vote by the House of Lords is advisory; or
- a negative vote by either House requires the Government to provide a written explanation to Parliament if it nevertheless wishes to proceed.

180. The Government is committed to a bicameral Parliament, but it is also committed to taking forward reform of the House of Lords. Reform will respect two principles: that the House of Commons should remain the primary chamber; and that the House of Lords should provide a complement, not a rival, to the House of Commons.

181. An alternative approach would be not to specify the effect of a vote in statutory provisions.

182. Possible statutory options are illustrated in Annex C (see Clause 5).

Q17: If there is a vote, should its outcome not be legally binding?

Provision for retabling a treaty when Parliament has previously voted against ratification

183. In the event of a vote against ratification, Government may wish to present to Parliament a revised proposal relating to the same treaty at a later date. In most cases, the text of the treaty would remain the same, but Government might revise its proposal, for example, by reconsidering the manner in which it proposes to give effect to it; or by providing additional explanation of the reasons for ratifying it; or the international context might in the meantime have changed. (It is currently open to Government to retable the same Bill in a different House in the same Session, and in the same House in a following Session.)

184. It is for consideration what action Government would need to take to introduce a new proposal to ratify the same treaty. One of the options in Question 18 above illustrates the possibility of proceeding by written Ministerial explanation to Parliament (see Clause 5(4) second version).

185. An alternative approach would be to require the same Parliamentary procedures as for the original proposal. If so, what should be the trigger for the 21 days laying period to restart? Since the treaty would already have been published, if the 21-day period had to restart, a new trigger could be for example by the Secretary of State laying a statement.

186. Annex C sets out a possible statutory option for providing for this (see Clause 6).

Q18: If legislation were to provide that a vote against ratification is binding, what provision should be made for Government to present a new proposal to ratify the same treaty at a later date?

Explanatory Memoranda

187. An Explanatory Memorandum has accompanied every treaty that has been published as a Command Paper and laid under the Ponsonby Rule since 1997 (see paragraph 132 above).

Q19: Is the present practice of laying an Explanatory Memorandum along with each treaty satisfactory?

Annex C – Draft clauses for placing Parliament's role in the ratification of treaties in statute

Question 12

1 Treaties to be laid before Parliament before ratification

(1) A treaty is not to be ratified unless the following conditions are met.

(2) Condition 1 is that the Secretary of State has laid before Parliament a copy of the treaty.

(3) Condition 2 is that the treaty has been published in a way that the Secretary of State considers appropriate.

(4) Condition 3 is that the period of 21 days, beginning with the date on which condition 1 is met, has expired.

2 Section 1: interpretation

(1) In section 1 the reference to ratification, in relation to a treaty-

(a) is a reference to the act by which Her Majesty's Government or the United Kingdom establishes as a matter of international law its consent to be bound by the treaty, but

(b) does not include signature of a treaty.

(2) In section 1 'day' means a day on which either House of Parliament sits.

Question 13

3 Section 1 not to apply in exceptional cases

(1) Section 1 does not apply to a treaty if the Secretary of State is of the opinion that, exceptionally, the treaty should be ratified without the conditions in that section having been met.

(2) If a treaty is ratified by virtue of subsection (1), the Secretary of State must, either before or as soon as practicable after the treaty is ratified-

(a) lay before Parliament a copy of the treaty,

(b) lay before Parliament a statement indicating that the Secretary of State is of that opinion and explaining why, and

(c) arrange for the treaty to be published in a way that the Secretary of State considers appropriate.

Question 14

4 Section 1 not to apply to certain descriptions of treaties

(1) Section 1 does not apply to any description of treaty specified in an order made by the Secretary of State by statutory instrument.

(2) A statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of either House of Parliament.

Question 17

5 Treaties to be laid before Parliament before ratification

(1) A treaty is not to be ratified unless the following conditions are met.

(2) Condition 1 is that the Secretary of State has laid before Parliament a copy of the treaty.

(3) Condition 2 is that the treaty has been published in a way that the Secretary of State considers appropriate.

(4) Condition 3 is that the period of [21] **OR** [40] days, beginning with the date on which condition 1 is met, has expired without [either House] **OR** [the House of Commons] having resolved that the treaty should not be ratified.

OR

(4) Condition 3 is that-

(a) the period of [21] **OR** [40] days, beginning with the date on which condition 1 is met, has expired without either House having resolved that the treaty should not be ratified, or

(b) if either House resolves, within that period, that the treaty should not be ratified, the Secretary of State has laid before Parliament a statement indicating that the Secretary of State is of the opinion that the treaty should nevertheless be ratified and explaining why.

[This clause is an alternative to clause 1.]

Question 18

6 Treaties to be laid before Parliament before ratification

(1) A treaty is not to be ratified unless the following conditions are met.

(2) Condition 1 is that the Secretary of State has laid before Parliament a copy of the treaty.

(3) Condition 2 is that the treaty has been published in a way that the Secretary of State considers appropriate.

(4) Condition 3 is that the period of [21] **OR** [40] days, beginning with the date on which condition 1 is met, has expired without [either House] **OR** [the House of Commons] having resolved that the treaty should not be ratified.

(5) Subsections (6) and (7) apply to a treaty if

(a) conditions 1 and 2 have been met, but

(b) [either House] OR [the House of Commons] has resolved, within the [21] **OR** [40] day period, that the treaty should not be ratified.

(6) The treaty may nevertheless be ratified if-

(a) the Secretary of State lays before Parliament a statement indicating that the Secretary of State is of the opinion that the treaty should nevertheless be ratified and explaining why, and

(b) the period of [21] **OR** [40] days, beginning with the date on which the statement is laid, expires without [either House] **OR** [the House of Commons] having resolved that the treaty should not be ratified.

(7) A statement may be laid by the Secretary of State under subsection (6) on more than one occasion.

[This clause is a further alternative to clause 1.]

Questionnaire

War powers

Question 1: What should fall within the scope of the new mechanism? If linked to actual or armed conflict how should the term 'armed conflict' be defined?

Question 2: Is it necessary to define armed forces? If so, what should fall within or outside that definition?

Question 3: Should any new procedure allow for deployments to occur without the prior approval of Parliament for exceptional (urgent or secret) operations?

Question 4: What should be the consequences of a decision by the Government to deploy forces without Parliamentary approval (for reasons of urgency, national security etc)? Should the Government be obliged to seek retrospective approval, or should it just inform Parliament? What should the consequences be if an approval was sought for a deployment retrospectively and denied?

Question 5: Should the recall of Parliament be required if under an emergency procedure a deployment has taken place? How long a period should be allowed to elapse before Parliament is recalled? Should there be a special procedure for when Parliament is dissolved?

Question 6: What information should be provided to Parliament? Should it go beyond the objectives, locations an indication of the legal basis for the operation? Who should decide what information should be disclosed? How might requirements to disclose information be adapted to the particular circumstances of different deployments?

Question 7: At what point during the preparations for deployment should Parliament's approval be sought? Should the exact timing be left to the discretion of the Prime Minister? Should there be a Parliamentary role in deciding the best timing?

Question 8: How should Parliamentary support be maintained throughout a deployment?

Question 9: Should the role of the House of Lords be to inform the debates of the House of Commons but not to take a vote?

Question 10: Is there a need for a new committee? How would a new regime governing decisions about deployments affect other parts of the system eg the

Defence and Foreign Affairs Select Committees and the Intelligence and Security Committee? What role might these committees play?

Question 11: Bearing in mind all the considerations set out in the 'Issues for consideration' section of this paper, as well as the points discussed in this section, is it better to proceed simply by way of a free-standing convention, or a resolution of the House of Commons or of both Houses, or should the new arrangements have a legislative backing? If so, should that be on the lines of the hybrid option or of the full legislative option?

Ratification of Treaties

Question 12: Is there any reason why the arrangements for treaties requiring the laying of treaties before Parliament for 21 sitting days before ratification (known as the 'Ponsonby Rule') should not be placed in statute?

Question 13: How should alternative procedures and flexibility be provided for?

Question 14: According to established practice, some categories of treaties are not subject to the Ponsonby Rule. For example, bilateral double taxation treaties are published to Parliament in a different way, and the legislative process provides the opportunity for debate. Should exceptions of this kind be retained? If so, how should they be accommodated within statutory provisions?

Question 15: If the key features of the Ponsonby Rule were to be put on a statutory footing as proposed, are any changes required to the Parliamentary procedures in either House for triggering a debate on a treaty?

Question 16: Should there be provision for extending the 21 sitting-day period if, during those 21 days Parliament indicates that it wishes further time to scrutinise or debate the treaty? If so, how should such a request be made? Alternatively, should there be a longer minimum period for scrutiny without formal provision for extension?

Question 17: If there is a vote, should its outcome not be legally binding?

Question 18: If legislation were to provide that a vote against ratification is binding, what provision should be made for Government to present a new proposal to ratify the same treaty at a later date?

Question 19: Is the present practice of laying an Explanatory Memorandum along with each treaty satisfactory?

Consultation

The consultation is aimed at parliamentarians, members of the armed forces and their families, academics, the general public and the media in the UK.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out below, have been followed.

An initial Impact Assessment has been completed and does not indicate that the proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. Consequently, this paper does not contain an Impact Assessment. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

Copies of the consultation paper are being distributed, including to Parliament, all MPs and peers, the Constitutional Affairs Select Committee and the Lords Committee on the Constitution.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

The consultation will close on 17 January 2008.

Responses on *war powers* should be sent to:

Rocio Ferro

Ministry of Justice
Constitutional Settlement Division
6th Floor
Selborne House
54-60 Victoria Street
London SW1E 6QW

Tel: 020 7210 8814
Fax: 020 7201 8948
Email: rocio.ferro@justice.gsi.gov.uk

Responses on the *ratification of treaties* should be sent to:

Mr P. Barnett,

Head of Treaty Section
Legal Advisers
Foreign and Commonwealth Office
Room G64
Old Admiralty Building
London SW1A 2PA

Tel: 020 7210 1120
Fax: 020 7201 1115
Email: treaty.fco@gtnet.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from these addresses and it is also available online at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from rocio.ferro@justice.gsi.gov.uk.

Publication of response

A paper summarising the responses to this consultation will be published in within 12 weeks of the closing date of this consultation. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The six consultation criteria are as follows:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Laurence Fiddler, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622, or email him at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper.

Printed in the UK for The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID5674369 10/07

Printed on Paper containing 75% recycled fibre content minimum.

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Order through the Parliamentary Hotline Lo-call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone 0870 240 3701

TSO Shops
16 Arthur Street, Belfast BT1 4GD
028 9023 8451 Fax 028 9023 5401
71 Lothian Road, Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Parliamentary Bookshop
12 Bridge Street, Parliament Square,
London SW1A 2JX

TSO@Blackwell and other Accredited Agents

ISBN 978-0-10-172392-3
9 780101 723923