Ministry of JUSTICE

Governance of Britain

The Governance of Britain – Constitutional Renewal

Part 1 of 3

The Governance of Britain – Constitutional Renewal

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

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Contents

Foreword

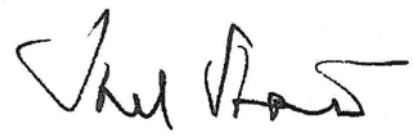
Our constitutional arrangements reflect, and determine, how power is distributed in our country.

Over the past decade a major programme of constitutional reform has diffused power away from the centralised state. Devolution has transferred power away from Westminster to the devolved administrations in Scotland, Wales and Northern Ireland, as well as to London and to local authorities. The Human Rights Act has brought home fundamental rights of the individual against the state, putting them at the heart of our domestic legal culture, and the Freedom of Information Act has established transparency as a mechanism for empowering the individual against the state. The removal of the vast majority of hereditary peers has marked the beginning of a process that will ultimately transform the House of Lords into a wholly or substantially elected second chamber.

But we need to go further. Constitutional arrangements constantly evolve and require renewal. That is why we launched the *Governance of Britain* programme in July 2007 as the next stage of the government's constitutional reforms. It is underpinned by the desire to deliver the fairest possible distribution of power in our society, and by a belief that constitutional change is most successfully achieved where there is a broad consensus for it.

This White Paper and the accompanying Constitutional Renewal Bill are the products of extensive consultation initiated by the *Governance of Britain* Green Paper. Over the past eight months the Government has sought views on Parliament's role in making key national decisions on war and the ratification of treaties, the role of the Attorney General, government's role in judicial appointments, protest around Parliament and the flying of the Union Flag. We are grateful to all of those who responded. The proposals we make today have been informed by their views.

We now invite Parliament and others to consider and comment on the draft Bill, as well as the other proposals in the White Paper. This debate will enhance the quality of the legislation which will follow and contribute towards the next step in an improved constitutional settlement.



The Rt Hon Jack Straw MP
Lord Chancellor and Secretary of State for Justice

Executive Summary

The Government's plans for constitutional renewal are set out in this document. The document discusses the initial proposals that were set out in *The Governance of Britain* Green Paper and why the Government thinks the time has come to reform various aspects of our constitutional settlement. It considers the views of respondents who commented on the proposals contained in the Green Paper and, in light of these consultations, contains the Government's plans for constitutional renewal.

The Government has consulted widely with members of the public, private bodies, firms, academics and government departments. The views of respondents have been gratefully appreciated by the Government and have helpfully contributed to the reforms outlined in this document.

Building on the initial proposals and the consultations, the Government now, in this White Paper, puts forward firm proposals for change. The specific reforms the Government proposes are set out below:

- *Managing Protest around Parliament*: The Government proposes the repeal of sections 132-138 of the Serious Organised Crime and Police Act 2005. Repeal of these sections will remove the requirement to give notice of demonstrations in the designated area around Parliament. It will also remove the offence for such demonstrations to be held without the authorisation of the Metropolitan Police Commissioner;
- *Role of the Attorney General*: The Government proposes to make it clear that the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in certain limited cases). The requirement to obtain the consent of the Attorney General to a prosecution in certain cases will, in general, be transferred to specified prosecutors and the Attorney General's power to halt a trial on indictment by entering a *nolle prosequi* will be abolished. The Government also proposes a requirement that the Attorney General must report to Parliament on an annual basis on the exercise of the functions of the Attorney General;
- *Judicial Appointments*: The Government proposes to reduce the role played by the Lord Chancellor in judicial appointments below the High Court and to remove the need for the Lord Chief Justice to consult or obtain the concurrence of the Lord Chancellor in exercising certain functions. The Government also proposes to remove the Prime Minister from the process for appointing Supreme Court judges;

- *Treaties*: The Government proposes to formalise the procedure for Parliament to scrutinise treaties prior to ratification to ensure a treaty cannot be ratified unless a copy of it is laid before Parliament for a defined period of 21 sitting days;
- *Civil Service*: The Government proposes to place the Civil Service on a statutory footing by enshrining in statute the core values of the Civil Service and placing the Civil Service Commissioners on statutory footing.

The Government also proposes that:

- On War Powers, the Government will propose a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict. The resolution will define a clear role for Parliament in this most important of decisions, while ensuring our national security is not compromised; and
- On flying the Union Flag from public buildings the Government proposes to relax the restrictions that currently only allow the Flag to be flown on 18 designated days.

Introduction

The Governance of Britain Green Paper

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

2. The Government presented four key goals:

   - To invigorate our democracy;
   - To clarify the role of Government, both central and local;
   - To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account; and
   - To work with the British people to achieve a stronger sense of what it means to be British.

3. The Green Paper was a starting point for a national debate on renewing our constitutional arrangements and reinvigorating our democracy. It explored the rights and responsibilities that shape the relationships that the people of this country have with each other, and it considered the relationship people have with the institutions of the state, at a local, regional and national level.

4. The Government proposed ways in which these relationships could be strengthened through rebalancing some aspects of the way power is exercised in our democracy. It proposed that the role of the executive should be modernised through limiting the powers it wields and in making both the executive and Parliament more accountable to the people.

5. The Green Paper set out ways that the Government should surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive.

6. It outlined a number of key areas of reform where the Government would consult with the public in order to develop concrete proposals for change. These included:

   - *Managing Protest around Parliament*: The Government proposed to review the laws on protest around Parliament. The Government commitment to consult the public on this matter stated that any final decision would

be made with a presumption in favour of ensuring that people's right to protest is not subject to unnecessary restrictions;

- *Role of the Attorney General*: The Government proposed to review the role of the Attorney General to ensure that the public's confidence and trust in the office is maintained. Specific proposals for change in the role of the Attorney General were set out and views on these proposals were sought;
- *Judicial Appointments*: The Government put forward proposals to reform the role it plays in the judicial appointments process to ensure greater transparency and to underline the independence of the judiciary;
- *Treaties*: The Government proposed that Parliament should have the power to scrutinise treaties prior to their ratification. The Government committed to consulting on making it a statutory requirement that treaties are laid in both Houses of Parliament before ratification;
- *Civil Service*: The Government proposed placing the Civil Service on a statutory footing by enshrining the principles of the Civil Service – impartiality, integrity, honesty and objectivity – in law;
- *War Powers*: The Government proposed to limit its own executive power to deploy the Armed Forces in conflict situations. It proposed that Parliament should be given a formal role in the deployment of the Armed Forces and sought views on how this role should be embedded;
- *Flag Flying*: The Government committed to consulting on altering the guidance on flying the Union Flag from UK Government buildings that currently limits it to only 18 days a year.

7. The Green Paper also contained proposals on:

- Increasing parliamentary scrutiny of some public appointments and ensuring that appointments are appropriately scrutinised more generally;
- Reviewing the arrangements that govern the operation of the Intelligence and Security Committee in order to bring them in line as far as possible with select committees, while maintaining the necessary arrangements for access to, and safeguarding of, highly classified information on which the nation's security depends; and
- Reviewing the Royal prerogative powers and considering whether, in the longer term, all executive prerogative powers should be codified or put on a statutory basis.

Consultations

8. Since 3 July 2007 the Government has initiated a wide-ranging consultation on key elements of the proposals. Five consultation documents have been issued: on the role of the Attorney General, the executive's role in judicial appointments, the legislative framework governing protest near Parliament, parliamentary control of war powers and the ratification of treaties, and flying the Flag from public buildings.

Working with Parliament

9. The House of Commons Modernisation Committee was asked to conduct four enquiries into elements of the Governance of Britain programme. The Committee has already reported on the publication of the Government's draft legislative agenda. The Committee continues to examine the issue of recall and dissolution of Parliament; how Parliament could best scrutinise the annual objectives and plans of major Government Departments; and regional accountability. The Government is grateful to the Committee for agreeing to take forward these enquiries and looks forward to its conclusions.

Engaging with the public

10. An event in Leicester in December 2007 saw the Justice Secretary, Jack Straw and the Minister of State, Michael Wills talking to the community about how our country is run and listened to people's thoughts on how our democracy can work better. It was the first of a series of similar events that will take place around the country in 2008.

Engaging online

11. *The Governance of Britain* website was launched on 10 December 2007 to provide regular updates on activities and give members of the public the opportunity to participate in discussions, engage with government and contribute to the development of the Governance of Britain programme (http://governance.justice.gov.uk).

The White Paper

12. Building on these events and the consultations, this White Paper takes the route-map first laid out in the Green Paper and develops it further by incorporating the views of the British public, setting out the arguments for the various proposals and stating the Government's response to these consultations.

13. It should be noted that this White Paper does not address all of the issues in *The Governance of Britain* Green Paper. Commitments to establish, for example, a Youth Citizenship Commission, start a national debate on a British Bill of Rights and Responsibilities and a British Statement of Values, and issues of the House of Lords reform are being taken forward separately.

14. We recognise that there are matters within the scope of the draft Constitutional Renewal Bill that would fall within the terms of the Sewel Convention if the Bill were to be introduced before Parliament in its proposed form. Discussions will take place with all three devolved administrations during the course of the consultation process and the Government would seek the consent of the devolved legislatures for any provisions triggering the Convention.

15. The range of reforms put forward here are a significant step towards a renewed constitutional settlement. The draft Constitutional Renewal Bill will be considered, if both Houses agree, for pre-legislative scrutiny by a Joint Committee and the Government looks forward to hearing its views.

Government Policy Proposals

Managing Protest around Parliament

Background: 'The Governance of Britain' Green Paper

16. The right to peaceful protest has long been an important part of our liberties and an essential component of a healthy democracy. It is the Government's role to uphold and reinforce these liberties.

17. *The Governance of Britain* Green Paper committed the Government to consult widely on provisions on protests around Parliament with a view to ensuring that people's right to protest is not subject to unnecessary restrictions and with a presumption in favour of the freedom of expression.

18. It is because of the strong views expressed in reaction to the current provisions covering demonstrations around Parliament, and the perception that they have undermined the right to demonstrate peacefully, that the Government decided the time was right to review them. With this in mind, the Government sought to put consideration of the provisions relating to Parliament Square in the context of the law governing protests in the rest of the country, as set out in the Public Order Act 1986.

19. The Government subsequently published the consultation document *Managing Protest around Parliament* (CM 7235) on 25 October 2007, which sought views on whether there remains a sufficiently strong case for a distinct legislative framework to apply to the policing of demonstrations around Parliament.

20. In response to concerns raised previously by the Metropolitan Police Service about the practicalities of policing marches and assemblies, the consultation document also considered harmonisation of the sorts of conditions that can be applied to marches and assemblies in the Public Order Act 1986.

Summary of consultation responses

21. The Government received 512 responses to the consultation document including responses from Members of Parliament, Peers, campaign groups, the Metropolitan Police, but mostly from members of the public. The Government's analysis of the consultation responses is set out in full in *The Governance of Britain – Analysis of Consultations* (CM 7324 – 3). Key messages arising from the consultation are set out below.

22. The clear view from respondents was that the current provisions covering demonstrations in the vicinity of Parliament which are set out in sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCAP) should be repealed. There was an equally clear view from respondents that there should be no harmonisation of the provisions covering marches and assemblies.

23. The majority of respondents saw no need either on security grounds, or on the grounds that the business of Parliament needs protection, for special provisions for demonstrations around Parliament to continue.

24. Many respondents strongly expressed the view that the current provisions in sections 132 to 138 of the Serious Organised Crime and Police Act, and in particular the requirement to have authority for a demonstration in advance, had restricted spontaneous protest in the area around Parliament. Many members of the public commented on the special nature of the area around Parliament, as a focal point for political protest – and that nowhere was the right to protest and voice one's views more important than at the seat of Parliament itself.

The Way Forward

25. The Government has considered the arguments on how best to balance competing rights in the context of a dynamic security situation and proposes to repeal sections 132-138 of the Serious Organised Crime and Police Act 2005.

26. Given the strength of feeling in responses to the consultation document on potential restrictions on legitimate protest, and in the absence of greater evidence of a policing problem, the Government will not pursue harmonisation of the sorts of conditions that can be placed on marches and assemblies in the Public Order Act 1986.

27. In moving to repeal sections 132-138 of the Serious Organised Crime and Police Act, the Government nonetheless takes seriously the need to ensure that the operation of Parliament is safeguarded. For many years this principle has been given expression in sessional orders which provided the Metropolitan Police with clarity on the House's expectations on the Commissioner.

28. The Government believes that Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order to ensure that Members are able freely and without hindrance to discharge their roles and responsibilities.

29. The Government therefore invites the views of Parliament on whether additional provision is needed for the purpose of keeping passages leading to the House free and open while the House is sitting, or to ensure that, for example, excessive noise is not used to disrupt the workings of Parliament.

30. The Government reiterates the commitment behind our consultation on managing protests around Parliament to ensure that people's right to protest is not subject to unnecessary restrictions.

31. Clauses to reflect these proposals can be found in the draft Constitutional Renewal Bill (CM 7342-2).

Attorney General

Background: The Governance of Britain Green Paper

32. *The Governance of Britain* Green Paper stated that *"The Government is fully committed to enhancing public confidence in the office of the Attorney General"*.

33. The Government subsequently published a consultation document on 26 July 2007 setting out the key issues and inviting the public to submit views on the role of the Attorney General (CM 7192).

34. Two key issues raised in the consultation document were whether the Attorney General should continue to be both the Government's chief legal adviser and a Government Minister, and whether the Attorney General should remain as superintending Minister for the prosecution authorities. Other issues discussed in the consultation document were:

    - at present the legal advice given by the Attorney General is, like other legal advice, privileged and is not generally disclosed. The consultation document discussed whether this should be changed and the legal advice of the Attorney General made public;
    - should the current practice whereby the Attorney General attends, but is not a member of, Cabinet be modified, so as to help demonstrate the independence of the role. One option proposed by the consultation document was that the Attorney General should only attend Cabinet where necessary in the capacity of chief legal adviser to the Government;
    - modernising the Attorney General's oath of office to make it clear that, when exercising public interest functions, the Attorney General's duty is to uphold the rule of law and the public interest, rather than the interest of the government of the day or the party in power; and
    - establishing a parliamentary select committee specifically to scrutinise the exercise of the Attorney General's functions.

Summary of consultation responses

35. The public consultation on the role of the Attorney General closed on 30 November 2007. Fifty-two written responses were received in all. A wide range of people responded to the consultation including from Members of both Houses of Parliament, members of the judiciary, members of the legal profession, academics and non-governmental groups such as JUSTICE. The Attorney General's Office also held a series of meetings and seminars with a number of groups (including representatives of the prosecuting authorities, MPs and members of the House of Lords and academics with an interest in constitutional and legal issues) to discuss the issues raised by the consultation.

36. The Government's analysis of the consultation responses is set out in full in *The Governance of Britain – Analysis of Consultations* (CM7342-3). Key messages arising from the consultation are set out below.

37. In relation to the Attorney General's role as legal adviser, the majority of respondents (27 out of 38 who expressed a clear view on this point) favoured the Attorney General remaining as the chief legal adviser to the Government and continuing to be a Minister. A significant number of these respondents thought that other changes should be made to the role of the Attorney General.

38. There was strong support for the changes proposed in the consultation document to clarify the basis on which the Attorney General's functions are exercised and to provide greater transparency. In particular there was broad support for the proposal to reform the Attorney General's oath of office.

39. A significant majority of respondents (21 out of 25 who responded on this point) considered that the Attorney General should attend Cabinet only where attendance is necessary to provide legal advice or where there was otherwise a specific reason for the Attorney General to attend.

40. The majority of respondents favoured retaining a general presumption against the disclosure of legal advice provided by the Attorney General (19 out of 31 who commented on this issue). There was some interest in creating limited exceptions to that presumption or in establishing other means of ensuring good governance by, for example, ensuring that Parliament was given a proper explanation of the legal basis for key government actions.

41. Among those who wished to see greater disclosure of legal advice, there was no consensus as to the cases in which disclosure would be appropriate or what form disclosure should take. Suggestions of classes of advice which it might be appropriate to disclose on a regular basis included advice which is expressly relied upon by the Government, advice in relation to the use of armed force and advice on the interpretation of existing legislation.

42. Few respondents commented specifically on the role of the Solicitor General. Among those who did comment, there was no consensus as to what changes were needed to that role.

43. Amongst comments received on the Attorney General's functions in relation to the prosecuting authorities, criminal proceedings and criminal justice policy, there was strong support (26 out of 31 respondents who expressed a clear view on this point) for the Attorney General retaining the function of superintending the main prosecution authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office). There was also support for clarifying that role. A large number of respondents also wished to see the role modified although a minority favoured maintaining the status quo.

44. Respondents expressed general support for the proposition that it was legitimate for the Attorney General to have a role in setting the high level policy and objectives of the prosecuting authorities. However, the majority favoured reducing or ending the role that the Attorney General plays in relation to the formulation of criminal justice policy.

45. There was strong support for removing or curtailing the Attorney General's role in relation to individual prosecutions. Accordingly there was support for abolishing or limiting the power of the Attorney General to consent to a prosecution and ending the power to stop a prosecution by way of a *nolle prosequi* (to stop a trial on indictment).

46. Most respondents took the view that it was legitimate for the Attorney General (or other Minister) to have a role where a prosecution has implications for national security or, possibly, international relations (14 out of 16 respondents who expressed a view on this supported the Attorney General or other Minister having a role in such cases). There was no consensus as to what that role should be with some respondents taking the view that the Attorney General should merely give advice in such cases and other respondents expressing the view that the Attorney General should have the final say as to whether such prosecutions should proceed.

47. There was no clear consensus as to what if any change was needed to the other functions of the Attorney General in relation to criminal proceedings, including those functions in relation to unduly lenient sentences and contempt of court.

48. Very few respondents commented on the Attorney General's other functions.

Report of the Constitutional Affairs Committee

49. The Constitutional Affairs Committee (now the Justice Committee) published its report on *The Constitutional Role of the Attorney General* (HC 306) on 17 July 2007. It concluded that there were "inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office". The Committee recommended that "the current duties of the Attorney General be split in two: the purely legal functions should be carried out by an official who is outside party political life; the ministerial duties should be carried out by a minister in the Ministry of Justice".

50. This White Paper sets out the Government's view on the way forward for the role of the Attorney General. However, the Government will also be responding separately to the Justice Committee.

The Way Forward

The Attorney's role as legal adviser

51. The Government has concluded that, in line with the views of the majority of respondents, the Attorney General should remain the Government's chief legal adviser and that the Attorney General should remain a Minister and a member of one of the Houses of Parliament. The Government considers that the merits of this approach are very strong.

- *A lawyer at the heart of government:* The Government considers that having a senior Minister whose role is to provide legal advice to Government is a vital constitutional safeguard. It shows that the Government considers the legality and propriety of our actions to be of such primary importance that we have a lawyer at the "top table".
- *Parliamentary accountability:* The Government agrees with those respondents who emphasised the importance of the Attorney General being a member of, and directly accountable to, Parliament.
- *A strong relationship between lawyer and client:* Obtaining legal advice does not generally involve asking a question to which the answer is "yes" or "no". It involves an interactive dialogue through which the client explains what his aims are and the lawyer provides advice as to whether/how those aims can lawfully be realised. Having a legal adviser who is of ministerial rank and who understands the wider considerations which the Minister seeking advice is taking into account is more likely to result in an open dialogue between client and lawyer and advice which reflects the needs of the client.
- *Ministers are more likely to have confidence in, and to follow, advice from one of their peers:* The Government agrees with those respondents who expressed the view that Ministers are likely to have particular confidence in advice they receive from another Minister. Ministers will know that they are getting advice from a person who understands the wider context in which the advice is being sought, as well as having a firm grasp of the legal issues at stake.
- *Artificiality of seeking to divide law from policy:* The Government does not accept the proposition that questions of law and propriety can or should be divorced from wider considerations of policy. There are many areas where the strength of a legal argument depends on the assessment of the strength of the policy considerations underpinning the proposed course of action (for example, whether a measure which engages a person's Convention rights is proportionate). There is therefore real merit in having a legal adviser who has a genuine understanding of the wider policy context in which the Government is acting.

- *On going scrutiny of the manner in which advice is implemented:* The current system enables the Attorney General to play an on going role in ensuring that his/her advice is properly understood and properly implemented by its recipients via membership of various Cabinet Committees and his/her role in relation to the preparation of legislation. Thus the Attorney is able to provide a level of "aftercare" which no other legal adviser could provide.

52. There will be occasions where obtaining advice from an external source is appropriate, for example where the issue is a technical one and it is appropriate to obtain advice from a lawyer with particular expertise in that area or where a conflict of interest suggests that external advice should be sought. The current system has the flexibility to accommodate that.

53. The Government notes that a number of respondents referred to recent cases where the Attorney has been involved in controversial decisions. Concern was expressed at the Attorney's role in such cases might give rise to the appearance of political bias or a conflict of interest. But no suggestion that any Law Officer in modern times has in fact taken a decision on the basis of political considerations has been substantiated. The Government also notes that the decisions highlighted by respondents would have been controversial whoever had taken them.

54. In exercising the function of providing legal advice to the Government, the Attorney General will continue to be assisted by the Solicitor General and, in certain cases, the Advocate General for Scotland.

Clarifying the role of Attorney General and enhancing transparency

55. The Government agrees that more should be done to clarify the basis on which the Attorney General's functions are exercised and that the manner in which these functions are exercised should be made more transparent. The Government therefore proposes to modernise the oath of the Attorney General (and Solicitor General) to require the Attorney to respect the rule of law. The Government considers that this will re-emphasise one of the strengths of the role of the Attorney General, namely the ability of the Attorney General to act as a champion for the rule of law at the heart of Government. Reform of the oath was strongly supported by those respondents who commented on this issue.

56. The Government does not consider that it is necessary to make this change by way of legislation. The oath of office is not currently specified by statute (unlike the oath of the Lord Chancellor). It can therefore be amended by non-statutory means.

57. The Government accepts that there are some limitations on the extent to which some of the matters for which the Attorney is responsible can be

discussed in Parliament. For example, there will be limits on the extent to which confidential legal advice or the details of on going prosecutions can be debated in Parliament. However the large number of Parliamentary Questions asked of the Law Officers each year, the large volume of correspondence that the Attorney receives from MPs and Peers and the number of requests the Attorney receives (and generally accedes to) to give evidence to parliamentary committees shows that the Attorney's accountability to Parliament is very real.

58. The Government proposes to facilitate further Parliament's ability to hold the Attorney General to account and provide greater transparency in the exercise of the Attorney's functions by requiring the Attorney to produce an annual report on his/her functions and to lay it before Parliament.

59. The Government stands ready to co-operate with Parliament in the creation of improved mechanisms whereby Parliament could hold the Attorney General to account. One option would be the creation of a select committee specifically to scrutinise the work of the Attorney General and the Attorney General's Office. (At present the House of Commons Justice Committee examines aspects of the work of the Law Officers and their departments.) The Government believes, however, that it is for Parliament to decide whether additional measures are needed in this area.

The role of the Solicitor General

60. The proposals outlined above in relation to the reform of the oath of office and the requirement to report to Parliament on an annual basis will apply to the Solicitor General. Otherwise, the Government does not propose any changes to the role of the Solicitor General. The Solicitor General will remain, as now, empowered to exercise any functions of the Attorney General and will continue, in effect, to act as the Attorney's deputy.

Attendance of the Attorney General at Cabinet

61. There was strong support among respondents for the Attorney General to continue to attend Cabinet where legal advice needs to be given although the majority of respondents felt that this approach would not necessitate the attendance of the Attorney General at Cabinet on a regular basis.

62. The Government accepts the premise which underpins the views of these respondents; the justification for the Attorney General attending Cabinet is that he/she is the Government's chief legal adviser and has a role as the upholder of the rule of law. The Attorney's responsibilities in relation to the formulation of criminal justice policy, considered further below, may also necessitate attendance at Cabinet.

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65. The Attorney General may also continue to attend Cabinet on other occasions, on the invitation of the Prime Minister, where he considers that the Attorney General's personal experience will provide a valuable contribution to particular Cabinet discussions.

Disclosure of the Attorney General's advice

66. The Government, in line with the majority of respondents, does not consider that it would be appropriate for the advice of the Attorney General to be published on a routine basis. The Government believes that it is clearly in the public interest, and the interests of good governance, for the Government to be able to seek and receive authoritative legal advice in confidence. The current position, whereby advice is not generally disclosed, is the best way to ensure that Ministers (and their officials) can be completely frank and open with the Attorney General, and that the Attorney can be similarly frank in the advice that is given. The benefits, which would come from regular disclosure (transparency and accountability), would, in the Government's view, be vastly outweighed by the downsides (adverse impact on the openness of communications between client and lawyer).

67. The Government believes that it is necessary to maintain the current position whereby legal advice given by the Attorney General is not generally disclosed. This reflects the views of the majority of respondents. The Government believes that this is the best way to preserve the necessary relationship of trust and confidence between client and legal adviser.

68. The Government fully recognises that Parliament and the public are entitled to an explanation from Government as to why we think a particular course of action is lawful and appropriate. The Government should, and does, explain the legal basis for key decisions to Parliament and the public. Any such explanation must of course be *consistent* with the legal advice received (whether from the Law Officers or any other source) and must not dishonestly represent that advice. But generally this process will not entail disclosing the legal advice itself.

69. It will also remain open to government, in exceptional cases, to waive privilege and disclose its legal advice, as has occasionally happened in the past (for example, in connection with the Scott Inquiry into arms to Iraq and the Factorame litigation in relation to liability in damages of the United Kingdom for breach of Community law).

Functions in relation to the prosecuting authorities

70. A small minority of respondents considered that the Government should have no (or only a very limited) role in relation to the prosecuting authorities. On this approach, no Minister would superintend the prosecuting authorities.

71. The Government is committed to decisions in relation to individual cases being taken by the independent prosecuting authorities themselves. But the prosecuting authorities exercise functions which have a very significant impact on members of the public, including whether a person should be prosecuted for a criminal offence and the level of sentence which should be sought when a person is convicted. The Government considers that Ministers have a legitimate interest in the overall objectives and priorities applied by the prosecuting authorities in taking these decisions. For example, the Government has a legitimate interest in ensuring that the overall approach taken, and priority given, to the prosecution of given categories of offence such as terrorism, rape, fraud and knife crime, reflects the public interest and accords with the rule of law. The Government also has a role in supervising how the prosecuting authorities deploy their resources.

72. The Government also considers that ending the superintendence relationship between the Attorney General and the main prosecuting authorities would expose the Directors of the prosecuting authorities to the risk that they would be drawn into the political area. This could, perversely, expose them to more political pressure, rather than less. This approach would also weaken accountability to Parliament for the operation of the prosecuting authorities.

73. The Constitutional Affairs Select Committee (now the Justice Committee) suggested that the Attorney General's functions in relation to the prosecuting authorities could be transferred to another Minister, possibly in the Ministry of Justice. This option was rejected by the overwhelming majority of respondents who expressed a view on it.

74. The Government has rejected this option. Transferring responsibility for the prosecuting authorities to a mainstream policy department would risk exacerbating any perceived risk of political influence over those authorities and their decisions, and give rise to new risks of conflicts of interests. It would also risk diluting the position of the prosecutors within wider departmental interests. The Government also notes that there was strong resistance to this option from the majority of respondents who expressed a view on this matter.

75. The Government considers that it is right that the prosecuting authorities continue to be superintended by a Minister and that that Minister be the Attorney General. The Attorney General's role as an independent lawyer and guardian of the public interest, with professional and ethical duties and a constitutional role in upholding the rule of law, means that the Attorney is the Minister who is in the best position to ensure that prosecution decisions are fully informed by relevant considerations without being subject to improper pressures.

76. However, the Government is proposing significant changes to the Attorney General's role in relation to the prosecuting authorities.

77. Successive Attorney Generals have exercised their superintendence functions on the basis that they could, if appropriate, give the prosecuting authorities a direction as to how to handle a particular case. However, no recent Attorney has in fact sought to give a direction in relation to an individual case. And in practice, the Attorney General has no role in the vast majority of criminal prosecutions (the CPS alone deals with 1.5 million cases each year).

78. The Government has, however, listened carefully to the large number of respondents who expressed concerns about the extent of the Attorney's role in relation to individual criminal prosecutions. The Government also notes the unease expressed about the lack of clarity as to the relationship between the Attorney and the prosecuting authorities. A relationship which relies on *implied* checks and balances is inevitably less transparent.

79. For these reasons, the Government proposes to legislate to provide that the Attorney General's function of superintending the prosecuting authorities does not entail an ability to give a direction in relation to a particular case. Thus it will not be open to the Attorney, as superintending Minister, to direct a prosecuting authority to prosecute a particular case or not to prosecute a particular case.

80. The Government proposes to legislate in broad terms on this point; the legislation will prevent the Attorney giving a direction "in relation to an individual case". This will ensure that the Attorney has, in general, no power to direct in relation to a particular criminal prosecution or any other matter being handled by the prosecuting authorities (for example, civil proceedings under proceeds of crime legislation).

81. In addition, the Government proposes to require the Attorney General to set out more fully how the relationship between the main prosecuting authorities and the Attorney is to operate, by means of a protocol. The protocol will be prepared by the Attorney General in consultation with the main prosecuting authorities and will be laid before Parliament. The protocol will have statutory force, in that both the Attorney and the Directors of the prosecuting authorities will be obliged to have regard to it.

82. The Government also proposes to enhance further the independent status of the prosecuting authorities by legislating to provide for fixed term appointments for the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions. The legislation will also provide that a Director may only be removed from office by the Attorney General on certain limited grounds. (This was not an option outlined in the consultation document but was proposed by a small number of respondents. At present the term of appointment and grounds for dismissal are determined by the Attorney General.)

83. Under these proposals, the Law Officers would continue to have a say in setting overall prosecution policy and strategy, and the way in which this is delivered by the prosecuting authorities. The expectation is that such issues would be settled through consultation between the Attorney and the individual Directors (as happens now). The proposed protocol will provide the opportunity to clarify how the superintendence relationship is to operate.

Attorney's functions in relation to other prosecuting authorities

84. In addition to superintending the main prosecuting authorities (the CPS, SFO and RCPO), the Attorney General also exercises *non-statutory oversight over the casework of the military prosecuting authorities and the other Government prosecutors (such as BERR, DWP and DEFRA*). That relationship enables the Attorney, for example, to issue guidelines to prosecutors on common issues such as disclosure. Those authorities generally value the relationship with the Attorney. No change to these arrangements is proposed.

Cases which give rise to issues of national security

85. For the reasons given above, the Government does not consider that the Attorney General should generally have a role in individual cases. However, the Government, in line with the majority of respondents, considers that special provision is needed for an exceptional category of case, namely those which have implications for national security. This is an issue on which Ministers (but not necessarily the prosecuting authorities) have significant expertise. And it is Ministers (rather than the prosecuting authorities) who are ultimately responsible for protecting the security of the nation.

86. The Government has given significant thought to form this provision should take, noting that respondents expressed a number of different views on this point.

87. The Government has concluded that the Attorney General should have the power, in exceptional cases, to give a direction to stop a prosecution where this is necessary to safeguard national security. The power would also extend to investigations being conducted by the Serious Fraud Office. There would be a

requirement for the Attorney General to give a report to Parliament about each occasion when such a power was exercised (without disclosing details which would be damaging to the public interest). In considering whether to exercise this power, the Attorney General would be able to consult Ministerial colleagues about the public interest implications in appropriate cases through a "Shawcross exercise".

88. This approach will make it clear who has taken the decision to halt a prosecution in these exceptional cases and so make it clear who should be held to account for that decision.

89. The Government expects the number of cases in which such a direction would be given to be very small. Even in cases which give rise to considerations of national security the Attorney General may consider that it is unnecessary to do more than to discuss the matter with the relevant prosecuting authority.

Functions of the Attorney General in relation to prosecutions

90. The Government has approached the issue of the Attorney General's *powers to consent to prosecutions* in line with the principles outlined above. It has also taken on board the views of respondents, the majority of whom thought most consent powers should be transferred to the prosecuting authorities, and considered the recommendations of the Law Commission in this area.

91. In light of this, the Government proposes the following reforms in relation to the consent regime:

- in relation to offences where there is no pressing need for there to be a requirement to obtain consent (of the Attorney or another person), the requirement to obtain consent should be abolished;
- in relation to a very small range of offences which are particularly likely to give rise to consideration of public policy or public interest (such as most Official Secrets Act offences and war crimes), the obligation to obtain the consent of the Attorney General should be retained; and
- in relation to other offences, the power to consent should be transferred to the Director of Public Prosecutions or other appropriate Director.

92. The draft Bill contains a number of amendments to prosecution consent functions on a provisional basis. However, further work is needed to determine into which of the categories specified above each of the Attorney's current prosecution consent functions falls into.

93. The Government, in line with the approach being taken in relation to the extent of the powers of the Attorney General in relation to individual cases, considers that the Attorney General should cease to have the power to enter a *nolle prosequi* (to stop a trial on indictment).

94. The Government does not propose to transfer the power to enter a *nolle prosequi* to the prosecuting authorities. But consideration will be given as to whether other measures are needed as a consequence of abolishing the power of the Attorney to enter a *nolle prosequi*. Such measures might include expanding the current powers of the prosecuting authorities to discontinue a prosecution.

95. The Government is not proposing any change to the Attorney General's power to *refer unduly lenient sentences to the Court of Appeal*. This function was viewed by some respondents as a form of prosecution appeal which could be exercised by the prosecuting authorities themselves. However, the Government, and a number of respondents, consider that the function should be viewed as one which should be exercised independently of the prosecution, in the public interest.

Attorney's role in relation to formulation of criminal justice policy

96. The Government recognises the importance of the prosecutors having a "voice" in the formulation and implementation of criminal justice policy, and in ensuring that policy decisions and legislation in that area are operationally workable. The Government also agrees with the majority of respondents that that "voice", to be effective, needs to be a Ministerial one. The Government considers that it would be artificial to divorce Ministerial responsibility for the superintendence of the prosecuting authorities from Ministerial responsibility for ensuring the "front-line" experience of the prosecutors informs the development of criminal justice policy.

97. For this reason, the Government does not propose any change to the Attorney General's role, in conjunction with the Home Secretary and Justice Secretary, in relation to the formulation of criminal justice policy.

98. Clauses to reflect these proposals can be found in the draft Constitutional Renewal Bill (CM 7342-2).

Judicial Appointments

Background: 'The Governance of Britain' Green Paper

99. In *The Governance of Britain* Green Paper the Government confirmed its intention to "seek to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive", including "the right to have a say in the appointment of judges". The Government also raised a conceivable role for Parliament and committed to consulting the judiciary, Parliament and the public.

100. The Government subsequently published its consultation document *The Governance of Britain – Judicial Appointments* on 25 October 2007 (CM 7210).

Summary of consultation responses

101. The consultation document posed 16 questions, seeking views on the existing functions of the executive, legislature, and judiciary in relation to judicial appointments, and considered the scope for transferring functions between these institutions in order to achieve a more appropriate balance, better accountability and greater public confidence.

102. The document also set out some fundamental principles which should underpin the making of judicial appointments, considered the extent to which they apply in other jurisdictions, and asked whether the existing principles need to be altered. And it considered the current practice for making judicial appointments, again looking at the arrangements in other jurisdictions and considering whether the existing arrangements could be improved.

103. The consultation period closed on 17 January 2008. Thirty-four responses were received and a full analysis of those responses is set out in the accompanying document '*The Governance of Britain: Analysis of Consultations* (CM 7342-3)'.

104. Of the 34 responses, 10 were received from individual members of the judiciary, four were from judicial groups, eight from legal groups, three from firms of solicitors, three from professional academics, one response was from an individual solicitor, one response was from a non-departmental public body, one was from an MP, one came from a Peer, one response was received from an associated office of the Ministry of Justice, and one came from a legislative body. Respondents' views are summarised below.

105. There was consensus among respondents that the principles[1] identified to guide the judicial appointments process were the right ones, although many felt the current arrangements did not fully embrace these principles.

106. Slightly under half of respondents said that the role of the executive should remain broadly the same, while just over half of respondents favoured maintaining the current role of the judiciary in the appointments process. Most respondents did not consider the legislature should have a role, although most respondents did feel there should be a *check* on selections made by the Judicial Appointments Commission (JAC).

107. The majority of respondents agreed that the Lord Chief Justice should not be required to consult the Lord Chancellor in respect of his decisions on authorisation, nomination, assignment or extensions of service for judicial posts. Furthermore, the majority of respondents also considered that the Lord Chancellor should not be solely responsible for setting the eligibility criteria for certain judicial posts.

108. Opinion on delegation of the Lord Chancellor's functions was divided with around half of respondents taking the view that the Lord Chancellor should not be able to delegate his key judicial appointments related functions to junior ministers or senior officials.

109. Most respondents agreed that medical checks should be carried out earlier in the selection process and that the JAC should be able to carry out some preliminary work ahead of the issuing of a formal Vacancy Notice.

110. The Government has analysed the implications of removing the Lord Chancellor's discretion to reject, or ask for reconsideration of, a selection for judicial appointment from the JAC. In light of the responses received to the consultation, it considers that the complete removal of the Lord Chancellor from the process is likely to result in an accountability gap. This gap increases with the seniority of the appointment being made. The most significant change in risk appears to be around the level of appointments to the High Court. The key considerations which emerge from the analysis are that due to their seniority, there is much more potential for members of the higher judiciary to become involved in cases involving high-profile, complex, sensitive, and contentious issues. They are likely to have to make decisions – often with national implications – which are binding on other courts.

111. There are significantly more appointments made at lower levels of the judiciary. The involvement of the Lord Chancellor in the selection of individuals at these lower levels has greater resource implications for both the Lord Chancellor and his department, and for the JAC than appointments at the highest levels. This

1 An independent judiciary; appointment on merit; equality; openness, transparency; and, an efficient an effective system.

has the potential to add cost, and to draw out the process, if only to a small degree.

112. While it should clearly be avoided, the impact of an error in making a single judicial appointment would increase significantly with the seniority of the appointment being made. This is due to the lower number of judges at the higher levels, the gravity of the decisions they take, and the precedents they will set for the lower courts.

The Way Forward

113. As set out in *The Governance of Britain* Green Paper, the Government believes that the role of the executive in the appointment of judges should be reduced, that the existing arrangements for these appointments should be streamlined and that those who exercise power should be made more accountable. The Government therefore proposes to make changes to the role of the executive in the appointment of judges. These changes are set out below.

114. **Remove the Lord Chancellor from the selection process for judicial appointments below the High Court** – The Government proposes the removal of the Lord Chancellor's discretion to reject, or power to ask the JAC to reconsider, a JAC selection for appointment to a judicial office below the High Court. The Lord Chancellor will retain his current discretion to reject a candidate on medical grounds, and his discretion to withdraw entirely (after consulting the Lord Chief Justice), a request to fill a vacancy, if he considers the selection process was unsatisfactory – for example, where there may have been a procedural error or systemic flaw in the appointments process.

115. **Remove the Prime Minister entirely from making judicial appointments** – The most senior judges (the Law Lords, Lord Chief Justice, Heads of Division, and Court of Appeal judges) are appointed by Her Majesty The Queen on the advice of the Prime Minister. In practice the Prime Minister advises Her Majesty The Queen on a recommendation from the Lord Chancellor, and the Prime Minister's role is essentially a formality.

116. **Set out key principles in legislation** – The Government proposes the inclusion in legislation of a series of key principles, which represent best practice in making judicial appointments. These principles would help to guide all the bodies involved in the appointment process. They would also provide a basis on which to hold them more accountable.

117. **Carry out medical checks at a different stage in the judicial appointments process** – There was general consensus amongst respondents that this aspect of the appointment process should be quicker. The Government agrees and

proposes to amend the Constitutional Reform Act 2005 (CRA) to transfer responsibility for medical checks from the JAC to the Lord Chancellor.

118. **The Lord Chief Justice should no longer be required to consult the Lord Chancellor, or to obtain his concurrence, before deploying, authorising, nominating, or extending the service of judicial office holders** – The Lord Chief Justice is currently required to consult the Lord Chancellor, or in some instances, to obtain his concurrence, in relation to a wide range of deployments, authorisations and nominations of individual judicial office holders to particular roles or offices. In addition, he is required to obtain the Lord Chancellor's concurrence in relation to the extension of service of judicial office holders.

119. In the interests of streamlining the process, we asked in the consultation whether this requirement should continue, other than in circumstances where there were financial implications. There was general agreement that it should be removed. Given the responses to consultation, the Government proposes to remove the requirement on the Lord Chief Justice to consult the Lord Chancellor, (or in some cases to obtain his concurrence), when he is exercising specified functions relating to the authorisation, nomination and extension of service of judicial office-holders, other than those where there are financial implications.

120. **The Judicial Appointments Commission should be allowed to take the preliminary steps in a selection process before a formal Vacancy Notice is received** – The CRA requires the JAC to undertake certain steps having received notification of a vacancy for which a selection is required. Consequently, the JAC only begins the preliminary steps in making a selection after a formal Vacancy Notice has been issued. This can mean avoidable delays in starting selection exercises – for example, when filling a vacancy is likely to lead to a linked series of promotions, for which it would be helpful to prepare quickly.

121. Given the responses to consultation, and the uncertainty which has arisen in previous selection exercises, the Government proposes that it should make clear that preliminary steps can be taken prior to a formal Vacancy Notice being received. The Government is considering whether legislation is required, and, if necessary, will introduce provisions in the Constitutional Renewal Bill on introduction.

New Considerations

122. A number of further issues have emerged during the consultation period, on which the Government invites comment. These are set out below.

123. **Providing additional accountability mechanisms** – The Government is concerned to avoid any *accountability gap* in the event that the Lord Chancellor

is removed from the selection of some judicial appointments. The Lord Chancellor already has a number of powers in relation to the JAC and the appointments process which are set out explicitly in the CRA. Other powers are implicit, or implied. Currently, the Lord Chancellor's explicit, statutory powers in relation to the JAC are:

- a power to require information in certain circumstances;
- a power to require the JAC to cover certain matters in its annual report;
- a power to issue guidance (exercisable following an affirmative order); and
- a power to remove the Chair and commissioners of the JAC (exercisable by Her Majesty The Queen on the recommendation of the Lord Chancellor).

124. The Lord Chancellor is the Minister responsible for the maintenance of the justice system, and, importantly, for maintaining confidence in it. If he is to satisfy himself fully that he is discharging his duties in ensuring the business need is met, he needs to ensure that the overall appointments process is sufficiently robust and that the JAC will operate efficiently and effectively. In addition, if he is to be held accountable for any failure of the JAC, he arguably needs to have the means at his disposal to intervene in the process in order to reduce the risk of failure. He cannot, therefore, be removed entirely from the judicial appointments system, and he needs to retain the usual powers exercisable by a Minister in respect of a non-departmental public body.

125. The possibility of additional powers for the Lord Chancellor, and in particular **a power to set performance targets and to direct the JAC in certain matters** was not raised in our consultation document or in formal responses. However, such powers would be consistent with the Cabinet Office's guidance on non-departmental public bodies[2].

126. These additional powers could provide the Lord Chancellor with a better ability to satisfy himself about how efficiently and effectively the JAC worked. For example, performance targets for operational issues (as opposed to individual selection) could be used to ensure that the JAC made selections within a specified time period, and within an allocated budget. They could also be used to set targets for increasing the proportion of applications for appointment from certain groups such as solicitors, women, or BME applicants. Powers of direction (again applied in respect of the operation of the JAC as opposed to any individual selections) could be used in situations where a disagreement has arisen (such as in relation to eligibility criteria) where, in the interests of ensuring the continued effectiveness of the justice system, the Lord Chancellor decides he must take the final decision, and consequently directs the JAC accordingly.

2 Public Bodies: A Guide for Departments http://www.civilservice.gov.uk/about/public/bodies.asp

127. Even though these are powers to ensure that the system works well, the Government recognises that they may be seen as giving the Lord Chancellor the ability to influence, or to determine who is appointed, and thereby undesirably extending the executive's influence over the JAC's operations. One way to reduce such concerns might be for the powers to be exercisable only following consultation or concurrence with the Lord Chief Justice, or for them to be clearly expressed as limited to the JAC's processes as opposed to individual selections. If Parliament were to grant such powers, they would enable the Lord Chancellor to ensure that the appointments process is compatible with the key principles, with his own duty to ensure there is an efficient and effective system to support the carrying on of the business of the courts[3] and, with other Ministers of the Crown, for upholding the continued independence of the judiciary[4].

128. While in their consultation response the JAC suggested that the Lord Chancellor's existing power to issue guidance should be removed given that the power had not been exercised. Most respondents recognised the important role which the Lord Chancellor performs in ensuring the effectiveness of the appointments system and accounting to Parliament for that. While there is a good case to support their introduction, the Government recognises that the taking of powers for the Lord Chancellor to set performance targets for, and to direct, the JAC raises complex issues.

129. Rather than seek to introduce any change now, the Government raises the question of whether such additional powers would be appropriate and would like to consider the issue further in the light of any views from respondents and from the Joint Committee which will be established to consider the draft Constitutional Renewal Bill.

130. There are two other areas where the Government considers that some clarification in the draft Bill would enable the Lord Chancellor more effectively to discharge his duties in respect of the maintenance of the justice system. Firstly, by clarifying the circumstances in which he may specify any additional requirements for a particular post. And secondly, by clarifying the circumstances in which he may require information to be provided to him by the JAC.

3 Section 1, Courts Act 2003
4 Section 3, Constitutional Reform Act 2005

131. **Delegation of the Lord Chancellor's and the Lord Chief Justice's functions** – Given the responses to consultation and the complexity of the matter, the Government is not proposing to introduce legislation at this stage to provide for the Lord Chancellor to delegate his judicial appointments functions to junior ministers or senior officials. However, it would like to consider the issue further and would welcome views on this. The Government does consider however, that it would be helpful for the draft Bill to clarify where it would be appropriate for the Lord Chief Justice to delegate certain functions to other judicial office holders.

132. **A role for Parliament** – On 23 January 2008 the Prime Minister announced that the Government had written to and would welcome views from the House of Commons Liaison Committee on a list of public appointments that it proposed should be subject to pre-appointment scrutiny by their relevant select committee. Along with a number of other public office holders, this list included any future Chair of the JAC.

133. Respondents to the consultation generally acknowledged the useful role played by the legislature in scrutiny of the overall process. However, a substantial majority opposed any role for the legislature in the selection or making of judicial appointments, and in particular to confirmation hearings for individual appointments to judicial posts. While the Government welcomes the continued and valuable scrutiny performed by the various parliamentary select committees, there could be merit in a meeting of the House of Commons Justice Affairs Committee and the House of Lords Constitution Committee to hold the system to account on an annual basis.

134. **A JAC panel representing potential applicants** – To enhance the opportunity for organisations representing potential candidates for judicial appointments to communicate with the JAC, the Government has included in the draft Bill provisions to require the JAC to establish a panel comprising members of bodies representing potential candidates for judicial appointment, linking representation of this group to the existing and extended duties on the JAC including diversity.

135. **Size and composition of the JAC** – While the Government recognises that this area was not covered in its consultation document, it raises the question of whether the number and types of Commissioners remains appropriate and would like to consider the issue further in the light of any views from the Joint Committee, which will be set up to consider the draft Constitutional Renewal Bill.

136. At present the JAC Board comprises the Chair and 14 Commissioners. The establishment of a JAC panel representing potential candidates arguably brings into question whether the existing size and composition of the JAC Board will remain appropriate. The Government also recognises that the current size and

composition of the JAC Board provides a wide and diverse range of high-level skills and experience. Any change would have to show a clear improvement in decision-making ability, whilst ensuring that the JAC continued to have the full range of abilities needed for its tasks.

137. **The Government proposes the provision of a statutory protection of salary for certain tribunal judges** – The salaries of judicial office holders in the courts are prevented from being reduced by various pieces of primary legislation. This is known as "statutory protection" and has been seen as an important safeguard of judicial independence against executive interference. No equivalent provisions, however, apply to tribunal judges. The Government proposes the removal of this distinction by including provision for salary protection for tribunals judiciary within the draft Constitutional Renewal Bill.

138. **The Government proposes that the Lord Chancellor should be able to remove judicial offices from the list of those requiring a selection by the Judicial Appointments Commission where they are more appropriately filled through deployment of serving judicial office holders** – The proposal, which was not mentioned in the consultation document, but has emerged in discussions with the judiciary and the JAC, is that , when vacancies arise in some judicial posts they should be filled where possible through the deployment of serving judicial office holders rather than by new recruitment. The Government therefore proposes to enable the Lord Chancellor to transfer a number of appointments to the Senior President of Tribunals but with a long-stop provision requiring a JAC selection where the deployment arrangement is not possible.

139. **Re-appointment of JAC Commissioners** – While this is another issue which was not covered in our consultation document, the Government would like to simplify re-appointment procedures (in line with the code of the Office of the Commissioner for Public Appointments (OCPA)) for those Commissioners who do not hold senior judicial office. The Government would like to consider the issue further in the light of any views from respondents and from the Joint Select Committee.

140. **The Government proposes to clarify that confidential information covered by section 139 of the Constitutional Reform Act 2005 (CRA) (broadly, information relating to judicial appointments and discipline) may be disclosed to the police for the purposes of investigating crime** – At present, section 139 of the CRA provides for a very limited number of circumstances in which confidential information relating to judicial appointments and discipline may be disclosed. Section 139 does not expressly permit disclosure of information to the police for the purposes of investigating criminal offences. We wish to make it clear that, in those circumstances, confidential information could be disclosed to the police without the need for a court order.

141. While provisions will not be included in the draft Constitutional Renewal Bill, the Government would welcome views on this proposal. In the meantime, the Government will take forward separate discussions with partners and stakeholders in order to ensure that any legislation is properly prepared and extends the scope of section 139 no wider than is absolutely necessary in order to protect the public interest.

142. Clauses to reflect those proposals (where legislation is proposed) can be found in the draft Constitutional Renewal Bill (CM 7342-2).

Treaties

Background: 'The Governance of Britain' Green Paper

143. Every year the UK becomes party to many international treaties. These result in binding obligations for the UK under international law across a wide range of domestic and foreign policy issues. Treaties which come into force after governments have expressed their consent to be bound through a formal act such as ratification are subject to the Ponsonby Rule'. This rule requires the treaty to be laid before both Houses of Parliament as a Command Paper for a minimum period of 21 sitting days prior to ratification.

144. *The Governance of Britain* Green Paper set out the Government's belief that Parliament should have the right to scrutinise treaties prior to their ratification.

145. In the Green Paper the Government went on to propose that the procedure for allowing Parliament to scrutinise treaties should be formalised and committed to consulting on an appropriate means for putting the Ponsonby Rule on a statutory footing.

146. The Government published the consultation document *War powers and treaties: Limiting Executive powers* on 25 October 2007. The document explained the current procedures for ratifying treaties and set out options for putting the existing arrangements for parliamentary scrutiny of treaties onto a statutory footing. The document contained illustrative draft clauses to show how such provisions may look in legislation and invited comment on these.

147. The consultation document was also debated in the House of Lords on Thursday 31 January 2008 and ten Peers made speeches which touched on the issue of treaties.

Summary of consultation responses

148. The consultation closed on 17 January 2008. There were 11 responses received. Respondents included one MP, three from former Foreign and Commonwealth Office legal advisers, two from Non-Governmental Organisations (NGOs), a few from academic and practising lawyers, one from the Law Society of Scotland and one from an individual.

149. A detailed analysis of the consultation responses and of the House of Lords debate on the consultation can be found in the linked document *The Governance of Britain – Analysis of Consultations* (CM 7342-3). Points made by the respondents are set out below.

150. The respondents showed a reasonable level of support for placing the Ponsonby Rule onto a statutory footing, in other words, to impose a legal obligation on Government to publish and lay a treaty before Parliament for at least 21 sitting days prior to ratification. Four argued that it was not necessary to put the arrangements onto a statutory footing, and that they worked well on the basis of convention. Seven agreed with the Government view that any new legislation would need to allow for alternative procedures to be used in exceptional cases where urgency precluded the normal publication and laying procedures. Some considered that Parliament should decide when these apply, while others would prefer the Government to retain a measure of discretion as at present.

151. There was general acceptance of the case for different treatment for special categories of treaties, for example taxation treaties, which are published to Parliament under a different procedure. Some stressed the importance of parliamentary control, and some specifically supported the option of including in the legislation a power to exempt specified categories of treaty.

152. The consultation posed the question of whether there should be provision for extending the 21-day sitting period, stipulated under the Ponsonby Rule, if Parliament requests further time. Respondents indicated a general desire for flexibility so as to enable Parliament to have additional time to scrutinise particular treaties when necessary. The majority supported – or did not express opposition to – 21 sitting days as the standard laying period and no one expressed support for extending the period to 40 days across the board, although one respondent suggested a minimum laying period of 3 months.

153. On the question of whether changes are required to parliamentary procedures in either House for triggering a debate on a treaty, some respondents preferred no change; others proposed new trigger arrangements, for example the establishment of a new specialist treaty committee which could request extensions, a motion by a single MP, or a motion signed by 10 percent of MPs.

154. Some respondents expressed strong support for the principle that a vote against ratification should bind the Government. Others suggested it would be better not to specify the legal effect of a vote. There was very little comment on the details of what the legal effect of votes should be or on the relationship between votes of the two Houses.

155. The consultation document asked what provision there should be for the Government to present a new proposal to ratify the same treaty if there had previously been a vote against it. A number of respondents felt that that if the outcome of a vote is binding, there should be provision for the Government to re-propose the same treaty for ratification, although views were mixed on how quickly it might be able to do so. Some respondents argued for maximum

flexibility to allow Government to decide as it sees appropriate, by not specifying the effect of a vote in legislation.

156. Some support was also expressed for the establishment of a new parliamentary select committee or sifting committee on treaties, and one respondent set out a detailed proposal for streamlined legislative powers to implement treaties which had been scrutinised by the proposed new specialist committee. Some suggested pre-signature scrutiny of treaties, coupled with a system of "soft-mandating" whereby the Government is given a general negotiating mandate and has to account to a parliamentary committee for any departure from it. These issues were not raised in the consultation document but are discussed later.

The Way Forward

157. The Government has given all of the responses to the consultation careful consideration and proposes that the present arrangements for parliamentary scrutiny of treaties should be placed on a statutory footing. The minimum 21 sitting-day period during which treaties must be laid before Parliament should remain unchanged, but should be made mandatory in the draft Constitutional Renewal Bill, subject to a procedure to accommodate exceptional circumstances.

158. A vote against the ratification of a treaty in either House of Parliament should be given legal effect. In the event of a vote by the House of Commons against ratification of a treaty, the Government could not proceed to ratify it. If the Government later wished to re-present the same treaty to Parliament for ratification, it would have to lay an explanatory statement before both Houses and re start the 21sitting-day laying period from the beginning, in which a further debate and vote could be triggered. Another negative vote would again block ratification. In other words, the House of Commons would have the last word. In the event of a vote by the House of Lords against ratification of a treaty, the Government could not proceed to ratify it, unless it first laid an explanatory statement before both Houses explaining why the treaty should be ratified notwithstanding the views of the Lords. The Government believes that this approach would respect the primacy of the House of Commons, while recognising the importance of the role of the Lords in treaty scrutiny.

159. The legislation should make provision for alternative procedures for consulting and informing Parliament so as to provide flexibility when needed in exceptional circumstances. The consultation document (paragraphs 148-155) sets out examples where the Government has informed and consulted Parliament on a treaty using various alternative procedures, in circumstances where it was not possible to publish and lay the treaty for 21 sitting days prior to ratification. These examples show that such cases are very rare,

but that they still can and do occur; for example, a treaty may need to be ratified during a Parliamentary recess, in circumstances where delay would be detrimental to the national interest. Other cases of urgency may occur, very rarely, when Parliament is sitting. In such cases, the Government would inform and consult Parliament by the most expeditious and practical means available (see paragraphs 148-155 of the consultation document for examples of such alternative procedures which have been used in the past. These examples include making an oral announcement to Parliament, laying a written statement, and consulting Opposition leaders during a recess).

160. In such exceptional cases, the Government proposes that the legislation would require it to lay a statement before Parliament at the earliest opportunity to explain why the treaty requires ratification without completing the normal period of Parliamentary scrutiny, and the steps taken or to be taken to consult Parliament by an alternative more rapid means. This would ensure that Parliament is able to call Government to account for any treaty where it has invoked this alternative procedure. This requirement to lay a written statement would not preclude Government from informing and consulting Parliament by any additional procedural means practically available.

161. The draft Constitutional Renewal Bill should exclude treaties covered by section 12 of the European Parliamentary Elections Act 2002 and Clause 5 of the EU (Amendment) Bill 2007 from the proposed arrangements, since these treaties will already be subject to specific arrangements. Section 12 of the European Parliament Elections Act 2002 provides that no treaty which provides for any increase in the powers of the European Parliament is to be ratified unless it has been approved by an Act of Parliament. Clause 5 of the EU (Amendment) Bill 2007 provides that any future treaty amending the founding EU treaties in accordance with Article 48(2) to (5) of the Treaty on European Union may not be ratified unless approved by an Act of Parliament.

162. The Bill should also exclude treaties relating to taxation, in view of the specific provision for Parliamentary scrutiny which is already provided under other legislation, namely the Inheritance Tax Act 1984, the Income and Corporation Taxes Act 1988 and the Finance Act 2006. This category of treaties is an established exception to the Ponsonby Rule. The relevant Acts of Parliament provide that an Order in Council to implement the treaty is subject to an affirmative resolution of the House of Commons, and a copy of the treaty is attached to the draft Order.

163. All Government Departments and Agencies are continuing to analyse and reflect on the range of treaties which have been or might be concluded on all aspects of domestic and foreign policy, to determine whether there are any other categories which should be excluded from the requirements of the Bill, for example because there are already other specific arrangements for parliamentary scrutiny. If the Government has any additional category

to propose when the Bill is introduced, it will be proposed in the form of an additional clause on the face of the Bill.

164. Useful suggestions were made during the consultation on the setting up of parliamentary committees to scrutinise treaties prior to ratification. The Government would welcome any institutional change which would enhance the capacity of Parliament to contribute to the scrutiny of treaties within the statutory framework proposed. It is for the Houses themselves to decide upon such arrangements, as well as such other procedural matters as the means by which Parliament may trigger a debate or request an extension of the laying period. Accordingly, such matters should not be put on a statutory footing, as it properly remains within the competence of each House to regulate its internal procedures.

165. The Government awaits with interest any proposals that may emerge from the Houses of Parliament for such enhancements, and will be pleased to engage in a dialogue with the committees concerned to ensure that any new arrangements work in the most constructive and expeditious manner possible. The Government does not consider that a formal mechanism for the scrutiny of treaties prior to signature is practical or workable, given the diverse circumstances and timeframes in which treaty negotiations are conducted.

166. Clauses to reflect these proposals can be found in the draft Constitutional Renewal Bill (CM 7342-2).

Civil Service

Background: 'The Governance of Britain' Green Paper

167. *The Governance of Britain* Green Paper set out the Government's commitment to bring forward legislation to enshrine the core principles and values of the Civil Service in law. A central theme of the draft Constitutional Renewal Bill is the removal of Royal prerogative powers, and the intention is that this should be applied in respect of the Civil Service.

168. Over the past 150 years, the Civil Service has been managed under the Royal Prerogative. The Government is of the view that it is now time to put the role, governance and values of the Civil Service on a statutory basis. This will enshrine in legislation the fundamental values of the Civil Service.

169. As the Green Paper recognised the merits of Civil Service legislation have been the subject of considerable debate in recent years. In 2003, the Public Administration Select Committee published a draft Civil Service Bill and a year later, building on this, the Government launched a consultation on its own Bill.

170. The Government welcomes and values the contributions made by the Select Committee and others, including the Committee on Standards in Public Life, on this issue.

171. Comments on the Government's proposals for a Civil Service Bill published in 2004 were received from 51 respondents. A summary of the responses is set out in *The Governance of Britain – Analysis of Consultations* (CM 7342-3).

The Way Forward

172. This section sets out how the proposals for Civil Service legislation will be taken forward, taking account of work done by the Public Administration Select Committee, and the responses to consultation on the Government's 2004 draft Bill.

Scope of the Bill

173. The draft Constitutional Renewal Bill covers civil servants working in the Civil Service, the Diplomatic Service and the Forestry Commission. Civil servants who support the devolved administrations in Scotland and Wales are members of the Civil Service and therefore within the scope of the Bill. The Diplomatic Service is covered by the legislation but it will continue to be a separate and distinct constituent of the Civil Service recognising the worldwide mobility obligation on its staff.

174. The draft Bill defines the civil service as the civil service of the State. Rather than listing every part of the civil service which is to be covered by the legislation, it goes on to list specific parts of the Civil Service which are not within its scope. For example, the Northern Ireland Civil Service and the Northern Ireland Court Service are separate Civil Services and for this reason are not included.

175. The Security and Intelligence Agencies (the Secret Intelligence Service, the Security Service and GCHQ) operate within a separate statutory framework which provides structures for Parliamentary oversight and for the investigation of complaints while leaving them the operational freedom they need to carry out their duties. The Government does not propose to alter the existing statutory approach in relation to these Agencies, and hence they are outside the scope of this Bill.

Civil Service Commission

176. The draft Bill will enshrine the historic principle of appointment on merit on the basis of fair and open competition. It will put the Civil Service Commission on a statutory footing, and establishes the Commission as a body corporate. The primary responsibility of the Commission will be to uphold the principle of selection on merit on the basis of fair and open competition. The Commission will be established as an executive non-departmental public body thereby reinforcing its independence from Government.

177. The draft Bill requires the Commission to publish recruitment principles following consultation with the Minister for the Civil Service. The draft Billsets out the long-standing arrangements for certain categories of appointment to be excepted from the principle of recruitment on merit. It also provides for the Commission to except other appointments through their recruitment principles if, in their view, it is justified by the needs of the Service.

178. In view of the important role of the Commission in upholding the core principle of recruitment on merit which underpins the permanent nature of an impartial Civil Service able to serve any Administration, the draft Bill provides for the First Civil Service Commissioner to be appointed by Her Majesty The Queen upon the recommendation of the Minister for the Civil Service following consultation with the leaders of the main Opposition parties. The current First Civil Service Commissioner was appointed in this way. Placing such a requirement on the face of the legislation will ensure confidence in the postholder to uphold the impartiality of the Civil Service.

179. The leaders of the devolved administrations in Scotland and Wales will also be consulted on the appointment of the First Civil Service Commissioner on the basis that the Commission has a responsibility for civil service appointments in their respective administrations.

180. The draft Bill provides for appointments of the Commissioners for single, non-renewable terms of up to five years which will also serve to strengthen their independence.

181. The draft Bill also provides for the Commission to audit departments' and agencies' recruitment policies and practices to ensure that their recruitment principles are being followed. It provides for the Commission to publish an annual report about the carrying out of its functions and in exceptional cases to provide for the publication of a special report. The Minister for the Civil Service will lay a copy of the report before Parliament. The First Ministers for Scotland and Wales will be required to lay copies of the report before the Scottish Parliament and the National Assembly for Wales. The Government believes that these arrangements will promote transparency and accountability of processes.

182. The Commission will also continue to hear appeals by civil servants under the Civil Service Code. The draft Bill also provides for the Commission to determine procedures for the making of complaints and for the investigation and consideration of complaints by the Commission, including provision for the Commission to consider taking a complaint direct from a civil servant without having to go through internal complaints procedures. This will follow existing procedures.

183. The Government has considered whether the Civil Service Commission should be given a power to undertake inquiries without a complaint being made by a civil servant. Following consultation with the Civil Service Commissioners, the Government does not believe such a power is necessary or that it should be for the Commission to be responsible for taking this decision alone. If concerns were raised by the Commission which required investigation, the draft Bill provides for such inquiries to be made with the agreement of the Commission and the Government, on the advice of the Head of the Civil Service.

Civil Service values

184. The Government is committed to a permanent, impartial Civil Service governed by the key principles of impartiality, integrity, honesty and objectivity. Enshrining these values in statute will protect the Civil Service against the risk of some future Government making changes to these core values without proper parliamentary debate and scrutiny.

185. The draft Bill places a responsibility on the Minister for the Civil Service and the Foreign Secretary to publish, and lay before Parliament, a Civil Service Code and a Diplomatic Service Code. The core values of the Civil Service – integrity, impartiality, objectivity and honesty – are set out on the face of the legislation.

186. The draft Bill also requires the Minister for the Civil Service to publish separate codes of conduct for civil servants who serve the Scottish Executive or the Welsh Assembly Government.

187. The Government believes that this approach will ensure that Parliament and the public can have confidence that an impartial Civil Service able to serve any Administration will be maintained for the future.

Special Advisers

188. Special Advisers have a valuable role to play in advising and assisting Ministers on Government policy. They add an important dimension to the advice and assistance available to Ministers while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support.

189. Special Advisers are not new; the first appointments were made in the early 1970s. Their employment is governed by clear terms and conditions set out in a Model Contract for Special Advisers and there is a specific Code of Conduct for Special Advisers. Both the Code and Model Contract were introduced by this Government in 1997 and both are public documents.

190. Special Advisers are temporary civil servants and funded by the taxpayer, reflecting the work they do on Government business. Special adviser appointments are personal appointments made by the Minister and in view of the personal and temporary nature of their role they are exempt from the principle of recruitment on merit through fair and open competition. The Government continues to believe this is the right approach. There is a specific provision on the face of the draft Bill exempting them from the provisions on impartiality and objectivity under the civil service code, thus recognising their political allegiance is to the Governing party and that they are not expected to retain the confidence of future governments of a different complexion.

191. The draft Bill therefore provides for Special Advisers to be appointed on this basis. The draft Bill also provides for transparency on Special Adviser numbers and their cost by way of an annual report on Special Advisers to Parliament and the publishing of the Code of Conduct for Special Advisers.

192. The draft Bill provides for similar appointment and reporting arrangements in respect of Special Adviser appointments made by the First Ministers in Scotland and Wales. Under this approach, the Government does not believe that it is necessary to continue with the arrangement whereby a cap on numbers is specified for appointments in Scotland and Wales. Transparency and accountability are ensured through the publication of the annual statement and adherence to the Code of Conduct for Special Advisers.

193. The draft 2004 Civil Service Bill proposed that up to two special advisers in No10 should have executive powers. A number of respondents argued that no special advisers in No10 should have such powers. In June 2007, on taking up office, the Prime Minister's first act was to revoke the provision in the Civil Service Order in Council which enabled special advisers to be appointed with executive powers. The draft Bill reaffirms this approach.

Civil Service Management

194. The draft Bill provides the Minister for the Civil Service with a power to manage the Civil Service. The Foreign Secretary will be given a similar power to manage the Diplomatic Service. In practice, the Minister for the Civil Service will manage the Civil Service through the Civil Service Management Code. This power will continue to be capable of delegation to other Ministers and other relevant bodies. This essentially reflects existing practice.

Security vetting

195. The only area where it is planned that prerogative powers should be retained in relation to the Civil Service is in the area of security vetting. To place vetting for civil servants on a statutory footing would mean that a parallel system under the prerogative would still be required to cover vetting for those working in the intelligence agencies and those outside the Civil Service, for example, the Police and contractors. The Government does not believe it would be sensible to operate two different systems, and therefore a saving provision for the retention of the prerogative in this area is on the face of the draft Bill.

196. The approach outlined in this section on Civil Service legislation is reflected in the clauses of the draft Constitutional Renewal Bill (CM 7342-2).

War Powers

Background: 'The Governance of Britain' Green Paper

197. In *The Governance of Britain* Green Paper the Government stated that *"There are few political decisions more important than the deployment of the Armed Forces into armed conflict."* It further stated that the current position, whereby the Government can exercise the prerogative power to deploy the Armed Forces without requiring any formal parliamentary agreement, was now an outdated state of affairs in a modern democracy.

198. The deployment of Armed Forces to armed conflict abroad has been the subject of much parliamentary discussion in the recent past. It was part of the Public Administration Select Committee's report *Taming the Prerogative* (Session 2003-4 HC 422) and the House of Lords Constitution Committee's enquiry in 2005-6, concluded that a convention on the need for parliamentary agreement before deploying Armed Forces to armed conflict would be the best way forward (Session 2205-6 HL 236). There have also been several Private Member Bills on the subject in the last five years. The Government recognises that any new procedures should retain some important practical aspects of the current arrangements. First, no new system should prejudice government's ability to take swift and decisive action to protect national security. Secondly, individuals who had taken actions in the course of a deployment which may not have been properly approved under any new mechanism should not be subject to any civil or criminal liability as a result of that lack of approval.

199. The Government proposed to undertake further consultation on this issue and, as a result, published *War powers and treaties: Limiting Executive powers* (CM 7239) on 25 October 2007. One of the main points for discussion was how any mechanism for seeking the approval of Parliament for the deployment of UK troops to armed conflict overseas would be best implemented: by parliamentary resolution alone, by statute , or by a hybrid option with statute making clear that the matter was for parliamentary resolution, the detail of which would be for the House of Commons to determine. A number of other important issues were considered:

- The scope of the new mechanism, and how 'armed conflict' should be defined for this purpose;
- Whether there should be exceptions to the requirement for parliamentary approval in the case of urgent or secret operations, and whether further protection needed to be given for less clear-cut situations where national security or international relations would be adversely affected by following the process;
- When Parliament's approval should be sought and what information should be provided to help it make the decision. Both of these issues whilst

not easy to clarify, are likely to be of great importance in ensuring an effective mechanism. The Government asked whether there was a need for a new parliamentary committee, to consider in more detail information about a proposed deployment;

- Whether members of our Armed Forces sent into a conflict that lacks parliamentary approval would be exposed to any new civil or criminal liability as a result; and
- As the deciding voice in the new mechanism should be the House of Commons as the representative body of the people, what role should the House of Lords have in this process?

Summary of consultation responses

200. The consultation closed on 17 January 2008. There were 15 responses in all. Respondents included academics, Christian faith groups, members of the public and other organisations. This low level of responses means it is difficult to gauge public opinion on these issues. However, many of the responses received were of a high quality.

201. A detailed analysis of the consultation responses can be found in the linked document '*The Governance of Britain*: *Analysis of Consultations*' (CM 7342-3). Points made by respondents are given below.

202. Fourteen of the fifteen respondents were in favour of the principle of providing Parliament with a role in approving the deployment of troops into armed conflict but expressed varying degrees of concern about the practical difficulties that would be involved.

203. Some respondents suggested that the term 'armed conflict' (as usually understood in international humanitarian law) lacked definition, especially when considering the way modern military operations are conducted. Suggested alternatives included 'deployment in a conflict environment' and 'hostilities'.

204. Respondents were concerned to ensure reserve forces and contractors were included in any definition of what constituted 'Armed Forces'. Two respondents agreed with the approach suggested in the consultation document , namely that Armed Forces should be defined as in section 374 of the Armed Forces Act 2006, which includes regular and reserve forces. Others thought it should be a common sense definition or make reference to international law.

205. All but one of the respondents agreed that there should be exceptions to the requirement for parliamentary approval. There was, however, some concern that the exclusions should not be drafted so widely as to defeat the purpose

of the mechanism – that parliamentary approval should be required in all but exceptional cases.

206. One respondent thought the information outlined in the consultation document – objectives, locations and an indication of the legal basis for an operation – was sufficient information to supply to Parliament. Four suggested it should go beyond this and others thought it should be 'sufficient for Parliament to make an informed decision'. Various ways of examining sensitive evidence were suggested: a secret session of Parliament, a committee, or the involvement of the Information Commissioner. There was a fairly even split between those who believed the Prime Minister should decide what information should be disclosed and those who believed it was a matter for Parliament.

207. Generally the respondents considered that a balance should be struck between seeking approval too early and seeking it too late, as both had disadvantages. Of more concern was the idea that leaving it too late would not allow Parliament to take a considered view of the issues and feel pressurised to support our troops. There were differing views as to who should determine the timing, some suggesting the Prime Minister and some suggesting Parliament. Half of the respondents to this question expressed support for the idea of committee involvement, with five respondents believing that there could be a role for a parliamentary committee in deciding the best timing.

208. Eleven respondents commented on whether a regular re-approval process was needed. Of these seven suggested there should be some kind of regular re-approval process, and some thought that Parliament should be able to initiate a re-approval process when it felt necessary. All but one of the eleven respondents thought that the Government should seek retrospective approval from Parliament if it had deployed troops for reasons of urgency or secrecy. Opinions as to appropriate consequences for not securing approval varied, but some foresaw severe consequences including resignation of Ministers, a vote of no confidence and immediate withdrawal from the conflict.

209. Eleven respondents agreed that it was appropriate that the House of Lords should inform the debates of the House of Commons but not take a vote on the subject. The majority felt that the final decision was a matter for the 'democratically elected house'. Three responses gave specific consideration to using the experience of the House of Lords, believing any deliberations or debates should take place there, prior to any debate in the House of Commons, in order to inform the Commons' decision.

210. Eight of the respondents favoured a legislative approach as opposed to a resolution or a convention, and there was little discussion of the hybrid option. Legislation was favoured because it would provide certainty and protect the proposed mechanism from being ignored or circumvented.

211. The House of Lords held a debate on the consultation documenton 31 January 2008.

212. Twenty-three Peers spoke in the debate to address a number of the relevant issues on war powers. Most welcomed the idea of increasing the involvement of Parliament in these decisions, but were strongly of the opinion that the essential flexibility of the Armed Forces and considerations of security and surprise should be maintained. As to the scope of any new mechanism, there was an awareness of the diverse nature of modern deployments, which make them particularly hard to define – a single deployment may need to swiftly change from peacekeeping to defensive action and back again.

213. There was a general agreement that there would have to be exemptions from the new mechanisms in order to maintain operational effectiveness and flexibility. Fifteen speakers appeared to favour the establishment of a parliamentary convention while two supported legislation. There was also general agreement with the consultation document that the role of the House of Lords should be to inform debate but not take a vote.

214. The Lords debate saw general agreement that flexibility was of the utmost importance when deciding the point at which to consult Parliament. It was also widely acknowledged that a balance would have to be struck regarding the information supplied to Parliament, between protecting sensitive information and allowing Parliament enough information to make a well-informed decision. It was stressed that any information supplied should not compromise national security or the effectiveness of the Armed Forces.

The Way Forward

215. While not ruling out legislation in the future, the Government believes that a detailed resolution is the best way forward. This will take the form of a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict. The resolution could be underpinned by a specific standing order, but that is ultimately a matter for each House and not the Government. The uncertain nature of military deployments and likelihood that the lead up to each conflict or potential conflict situation would not necessarily conform to any pattern would require a high degree of flexibility from the proposed mechanism. A resolution will define a clear role for Parliament in this most important of decisions, while ensuring our national security is not compromised by the introduction of a less flexible mechanism.

216. In common with the majority of respondents and the contributors to the House of Lords debate, the Government believes it essential that any new mechanism contains exceptions to the requirement for parliamentary approval

that will allow the Government to respond swiftly in an emergency or carry out an operation in secrecy if necessary. This is vital to ensure that our national security, our ability to conduct effective operations and the safety of the UK Forces are not compromised by the implementation of the new mechanism.

217. The Government proposes that for any conflict decision involving the Special Forces or other members of the UK Forces, where their only purpose is assisting the activities of the Special Forces, prior approval would not be required.

218. The Government also proposes that there should not be a requirement to obtain retrospective approval for a conflict where prior approval had not been sought because of the secret or urgent nature of the deployment. Instead the Government proposes that there would be a requirement for the Government to inform Parliament as soon as possible that such a deployment had taken place, once any requirement for secrecy had expired. Whilst the Government notes that there was support for a retrospective approval mechanism amongst the respondents to the consultation document, it believes that there could be some very serious and undesirable consequences of a failure to gain parliamentary approval for an operation which was underway. A requirement to seek retrospective approval for operations which are underway has the potential to call into question the credibility of the UK's use of force, our international relations and crucially, the safety and morale of the UK Forces, were a retrospective approval denied. It would, however, be the intention of the Government always to seek the prior approval of the Commons when appropriate.

219. For similar reasons the Government does not accept the need for a requirement for a regular re-approval process. The Government would use the existing parliamentary procedures to report regularly to Parliament on the progress of a conflict.

220. The Government does not see a requirement to make special arrangements for the recall of Parliament if a deployment is necessary when it is either adjourned or dissolved. Proposals for Members themselves to request a recall of Parliament, currently being considered by the Modernisation Committee, will provide adequate safeguards in themselves.

221. Given the well recognised imperative of the safety and effectiveness of our Armed Forces, and the many and various circumstances which could lead to the consideration of entering into armed conflict, the Government believes that the Prime Minister is the most appropriate authority to decide what information should be supplied to Parliament in the approval process.

222. The Government proposes that specific information provided to Parliament should generally be codified to the objectives and location of the proposed conflict. In common with standard practice the Government does not propose

that the actual advice of the Attorney General should be made available to Parliament, although Parliament would be informed about the legal basis of the proposed conflict. The consultation responses contained a number of different suggestions about the types of information that should be supplied. However the Government feels that the uncertain and variable nature of deployments mean that it would not be possible to provide a detailed or prescriptive list to be used in every situation.

223. For similar reasons the Government proposes that it is for the Prime Minister to determine the most appropriate timing for seeking parliamentary approval in relation to the build up and deployment of forces or the progress of international negotiations. The contributors to the House of Lords debate were strongly of the opinion that flexibility was of the utmost importance when deciding the time of a vote. In each circumstance the Prime Minister will have to consider the time required to give Parliament a real say in the decision and the need not to compromise safety of troops stationed abroad or continuing diplomatic efforts by too early a declaration that the Government intend to initiate armed conflict.

224. The Government does not recognise a need for a new committee to oversee Parliament's decision making. The involvement of existing committees in the approval process will be for the House of Commons to determine.

225. In common with the consensus of the consultation responses and the opinion expressed in the House of Lords debate, the Government believes that the House of Lords should hold a debate to inform the deliberations of the House of Commons but they should not hold a vote. Whilst the Government recognises the expertise that resides in the House of Lords, the responsibility to make the final decision is for the House of Commons as the representatives of the people.

226. Annex A of the Government's consultation document *War Powers and Treaties: Limiting Executive powers* included, for illustrative purposes, a draft of a possible detailed resolution. Attached now at Annex A is an updated version of that resolution, taking into account further consideration by the Government during the course of and in response to the consultation exercise and reflecting the Government views above. This again is published for illustrative purposes. The exact form of any resolution will be for the House of Commons to determine.

ANNEX A
DRAFT DETAILED WAR POWERS RESOLUTION

That an humble Address be presented to Her Majesty praying that decisions of Her Majesty's Government relating to the use of force by Her forces outside the United Kingdom be made subject to the following provisions.

1. Approval required

(1) The approval of this House should be obtained for a conflict decision made after [insert appropriate date]

(2) A conflict decision is a decision of Her Majesty's Government to authorise the use of force by UK forces if the use of force:-

(a) would be outside the United Kingdom, and

(b) would be regulated by the law of armed conflict.

(3) 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.

(4) In these provisions "UK forces" means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006.

2. Process for approvals

(1) Sub-paragraphs (2) to (7) below are 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.

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.

(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 which result from the decision or with which the decision is otherwise connected];

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

(i) members of UK forces;

(ii) members of other forces assisting (directly or indirectly) UK forces;

(iii) other persons assisting (directly or indirectly) UK forces or other forces within sub-paragraph (ii).

(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 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 the Prime Minister thinks appropriate.

(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:-

(a) that the circumstances set out in sub-paragraph (3)(a) above continue to exist or that the laying of the report could prejudice national security or the United Kingdom's international relations, and

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

4. Exceptions to requirement for approval: special forces

(1) Approval is not required for a conflict decision if the decision covers one or both of the following only:-

(a) members of special forces;

(b) other members of UK 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.

Flag Flying

Background: 'The Governance of Britain' Green Paper

227. *The Governance of Britain* Green Paper committed the Government to consult on whether the guidance for flying the Union Flag on UK Government buildings on only 18 appointed days of the year should be revised. The Green Paper set out the Government's view that in recent years the Union Flag, the most recognisable symbol of the United Kingdom, has often become the preserve of political extremists and a symbol of discord rather than harmony. Removing restrictions on flying the Union Flag from Government buildings is a statement reclaiming public ownership of the best-known symbol of British values.

Summary of consultation responses

228. The Government published a consultation document *The Governance of Britain – Flag Flying* in July 2007 and the consultation period ran until November 2007. The Government received over 300 responses to the consultation and 60 percent of respondents were in favour of the Union Flag being flown on UK Government buildings all of the time. A summary of the responses can be found in *The Governance of Britain – Analysis of Consultations* (CM 7342-3). While the consultation was taking place, the Government relaxed its guidance and granted UK Government departments the freedom to fly the Union Flag on their buildings when they wished, and many now do so all the time.

The Way Forward

229. The Government has now decided that this change should become permanent so UK Government departments will continue to have the freedom to fly the Union Flag on their buildings whenever they wish.

230. Under the current flag flying guidance, on St George's Day the cross of St George may be flown from UK Government buildings in England with two or more flag poles. Similarly, in Scotland and Wales, the Saltire and Red Dragon may be flown on UK Government buildings with two or more flag poles on St Andrew's Day and St David's Day respectively. The Government has decided that to celebrate these patron saints' days, the flags of Scotland and Wales may also be flown with the Union Flag on Whitehall Government buildings where there are two or more flag poles if departments wish to do so.

231. The flag flying guidance issued by the Department for Culture, Media and Sport will be revised to reflect these two changes.

232. As stated in the consultation document, arrangements for flag flying in Northern Ireland are already governed by specific legislation – the Flags (Northern Ireland) Order 2000 and the Flags Regulations (Northern Ireland) 2000. The UK Government has no plans to change these arrangements.

233. The consultation also gave rise to some broader suggestions relating to the Union Flag. There were some interesting suggestions to increase the prominence of the Union Flag that the Government feels merit greater consideration. The Government therefore proposes to explore the greater use of the Union Flag on other public buildings and to consider whether the Union Flag, and explanatory information, should be included in material for new British citizens.

234. The consultation document only covered UK Government buildings in England, Scotland and Wales, and did not extend to devolved administration buildings in Scotland or Wales. We shall consult further with devolved administrations in Scotland and Wales about these wider Union Flag flying suggestions.

Other policies

Reform of the Intelligence and Security Committee

235. The Intelligence and Security Committee (ISC) is a Committee of Parliamentarians drawn from both Houses which provides oversight of the expenditure, administration and policy of the Security Service, the Secret Intelligence Service and Government Communications Headquarters ("the Agencies"). The Committee's remit often requires it to have access to highly classified information, disclosure of which would be gravely damaging to the national interest and could put individuals at risk. Although the ISC's remit is in line with that of a departmental select committee, the unique nature of its work means that it is established and governed by separate arrangements, set out in the Intelligence Services Act 1994, and it meets only in private. These arrangements have led some to argue that the process by which the Committee is appointed, operates and reports is insufficiently transparent. In *The Governance of Britain* Green Paper, the Government committed to considering how the Committee's arrangements could be amended to bring it as far as possible into line with select committees, while maintaining the necessary arrangements for access to, and safeguarding of, highly classified information on which effective security depends.

236. The Government has concluded that it can make significant changes immediately to improve the transparency and effectiveness of the Committee's operation, in advance of any future legislation the Government brings forward. The Intelligence and Security Committee, which has been consulted on the proposals set out below, is also of this view. The Government proposes to seek parliamentary endorsement of these proposals soon, through a resolution of both Houses.

How the Committee is appointed

237. The Intelligence Services Act specifies that Committee members are to be appointed by the Prime Minister in consultation with the Leader of the Opposition. The Government is of the view that Parliament has an important role to play in determining the appointments to the Committee. The Government proposes, therefore, to amend the appointments procedure to enable the full participation of Parliament, by adopting a process similar to that for joint select committee appointments, which sees nominations for membership being sent to the Prime Minister who would make the final appointments in consultation with the Leader of the Opposition, consistent with the Intelligence Services Act. This would be provided for in the resolution

the Government puts before both Houses on reform of the Intelligence and Security Committee.

How the Committee operates

238. The Agencies necessarily operate in a secret environment, and much of the information that they produce is highly classified. It is vital that oversight, while being as effective as possible, is arranged in such a way as to ensure the continued security of such information. The ISC cannot therefore simply adopt select committee arrangements and hold its hearings in public. While that would meet the ideal of transparency, it would radically curtail the evidence the Committee is able to hear, and would therefore severely impair the Committee's effectiveness. The Government is, however, committed to the goal of increased transparency, and will therefore work with the Committee to provide public briefings where this can be achieved, without compromising national security or the safety of individuals. The Government proposes that such briefings should be provided by Agency Heads or Ministers. Public briefings by lower-ranking staff whose identities are not known could put them at risk of being targeted by hostile organisations or individuals.

239. Previously, an investigator was appointed to support the Committee, his role being to examine the detail of particular subjects the ISC was investigating in order to assist the Committee in the production of their reports. The Government proposes that this post should be revived with consideration to be given to a pool of individuals with different expertise on whom the Committee could call depending on the nature of their investigation.

240. At present, the ISC offices are based within a Cabinet Office building that provides the necessary private, secure environment for the Committee to be able to take and retain evidence. This does not make the Committee, or its Secretariat, part of, or beholden to, the Cabinet Office in any way, but the Government proposes that to emphasise the Committee's independence, it will explore alternative accommodation options that would provide the requisite level of security.

Reporting

241. Select committees report to the House. In contrast, the ISC reports directly to the Prime Minister. This has led some to argue that the ISC is not a fully independent Committee. However, the independence of the cross-party ISC rests on its ability to draw on its access to sensitive information when compiling its reports. This can mean the reports themselves are highly classified and unsuitable for public disclosure in full. The current arrangements allow the Committee to report fully its findings to the Prime Minister, after which sensitive information can be removed and the reports made publicly available.

242. At present, ISC reports are debated only in the House of Commons. As the ISC includes at least one Lords member, however, the Government proposes that in future debates should also take place in the House of Lords, timetabling considerations permitting.

243. Debates on ISC reports in the House of Commons are currently opened and closed by Government Ministers. There is no reason, however, why ISC debates should not follow the practice of debates on select committee reports, which are opened by the Chair of the Committee, and the Government proposes that this practice should be adopted. Lords debates should be opened by the senior Lords Committee member.

Consultation

244. The Government's proposals have been developed following a helpful consultation with the ISC itself. We now intend that these proposals will be put to both Houses for endorsement before they are implemented.

Wider Review of the Royal Prerogative

245. A central theme of the Green Paper *The Governance of Britain* is the Government's commitment to reform of the prerogative powers exercised by the executive on behalf of the Crown. We have consulted and seek to legislate on specific prerogative powers to ensure Parliament's involvement, scrutiny and control over key decisions, such as the the ratification of treaties.

246. As set out in *The Governance of Britain*, the full extent of the prerogative executive powers, which are devolved from the Monarch to Her Ministers, is uncertain and the conventions that govern the exercise of these powers remain conventions, and thus uncodified. The Government is conducting an internal scoping exercise of the executive prerogative powers – those which remain in use and those which have been superseded in whole or in part by statute, such as the power to grant pardons and remission to prisoners. The Government will consider the outcome of this work and will, in the coming months, launch a consultation on the next steps. The Joint Committee will of course be able to contribute to this consultation process, as will any other parliamentary committee within whose terms of reference it falls.

Passports

247. United Kingdom Passports are currently issued under the royal prerogative by the Home Office Identity and Passport Service in the United Kingdom and by Foreign and Commonwealth Office posts abroad. Refusal or withdrawal of passport facilities is rare. Any cases are considered on their individual merits and decisions to do so are open to scrutiny by the courts. There are circumstances in which a passport would be refused or withdrawn and these have been reported to Parliament. In line with its aim of putting the executive prerogative powers onto a statutory basis, the Government believes that it should remove the prerogative in relation to passports. The Government has decided in principle that it will introduce comprehensive legislation on the procedures for issuing passports and that draft legislation should be published for consultation before it is introduced to Parliament. It will announce the timetable for this in due course.

National Audit Office

248. On 6 March 2008, the Public Accounts Commission reported on the future governance of the National Audit Office (NAO). The Government accepts the Commission's recommendations and will legislate to implement them. Accordingly the Constitutional Renewal Bill as presented for introduction, will seek to restructure NAO.

249. NAO will remain the Government's auditor, independent of government and answerable directly to Parliament through the Commission. Its audit reports, both financial audit and value for money, will continue to be laid in Parliament and the Public Accounts Committee will continue to hold scrutiny hearings on some of them. As chief executive of NAO, the Comptroller and Auditor General (C&AG) will continue to lead its audit work and to make professional judgements on its audit reports.

250. In future, however, NAO will also have a board with a majority of non-executives, including a non-executive chair. The board will be charged with setting NAO's strategic direction and supporting the C&AG. The C&AG will have a fixed term of ten years. Until the new arrangements come into effect, the current C&AG, Tim Burr, will lead NAO.

Public Appointments

Strengthening the role of the House of Commons

251. *The Governance of Britain* Green Paper included a specific proposal to increase parliamentary scrutiny of certain senior public appointments by way of pre-appointment hearings with the relevant select committee. In taking forward this commitment, the Government has carefully considered the types of appointments it considers suitable for this type of parliamentary scrutiny and has listened to the views of key stakeholders, in particular the Liaison Committee and the Public Administration Select Committee of the House of Commons and the Commissioner for Public Appointments. As a result, the Government has decided to proceed with pre-appointment hearings on a pilot basis. This will involve monitoring closely the appointment process for those posts subject to pre-appointment hearings and seeking feedback from all those involved. The purpose of the pilot will be to ensure that the right balance is struck between strengthening the role of Parliament in scrutinising public appointments and maintaining an appointments process which is proportionate and continues to attract high quality candidates.

252. In line with the principles set out in the Green Paper, pre-appointment hearings will be held for posts which exercise statutory or other powers in relation to protecting the public's rights and interests. In addition, the Government believes that pre-appointment hearings should be held for posts that play a key role in the regulation and administration of the appointments process itself. On 23 January 2008, the Prime Minister announced an initial list of posts that we are proposing should be subject to pre-appointment hearings[5]. In keeping with our commitment in the Green Paper, we have consulted the Liaison Committee and the Commissioner for Public Appointments on the proposed list which includes senior ombudsmen, HM Chief Inspectors and chairs of key regulatory bodies. The Government's approach has been supported by the Public Administration Select Committee, which has recommended that pre-appointment hearings should apply to "major auditors, ombudsmen and other complaint investigators, regulators and inspectors, as well as to those responsible for the appointments system itself."[6] The Liaison Committee published their views on the Government's initial list on 5 March 2008 (Session 2007-08 HC384). The Government will continue to work with the Liaison Committee to agree a final list of suitable posts.

5 House of Commons Hansard, Col 1520, 23 January 2008

6 Public Administration Select Committee "***Parliament and public appointments: Pre-appointment hearings by select committees***". Third Report of Session 2007-08. HC152.

253. The format of pre-appointment hearings will follow the process set out in the Green Paper. This will involve the relevant House of Commons select committee being invited to take evidence from the Government's preferred candidate for selected posts. We believe that committee hearings should be in public and that questions should focus on issues of professional competence and on the candidate's suitability for the role. Hearings will be non-binding but Ministers will review the committee's recommendations and conclusions before proceeding with the appointment. We will work with the relevant House authorities on any appropriate amendments to House Standing Orders.

Church of England Appointments

254. The Government proposed in *The Governance of Britain* that the Prime Minister's role in ecclesiastical appointments in the Church of England should be significantly reduced. At present, he receives two names from the Crown Nominations Commission for appointment as new Diocesan Bishops. In future, he will ask for only one name which he will then forward to Her Majesty The Queen. The Government undertook to discuss with the Church any necessary consequential changes to procedures. This discussion also considered the role of the Prime Minister and of his Appointments Secretary in the appointments process for cathedral deans, where the Appointments Secretary was responsible for conducting the appointments process and making the final recommendations, and some other senior appointments in the Church.

255. Following an internal consultation exercise, the Archbishops of Canterbury and York put proposals to the meeting of the General Synod in February 2008. Synod approved the proposed modifications to the appointments process. They called for a continuing role for a senior civil servant at the heart of Government to help in ensuring that the wider needs of the church and of the community continued to be given adequate weight in the appointments process. However, they agreed that in future the decisive voice in all appointments would be that of the Church itself. In relation to diocesan bishops, the Crown Nominations Commission would continue itself to select two names – a preferred name and a reserve – but would forward to the Prime Minister only the preferred name. In relation to appointments to Cathedral Deaneries, there would in future be a selection panel chaired by a layperson selected by the archbishop of the province after consultation with the diocesan bishop and the proposed Crown appointments adviser. It was proposed that the Government would continue to provide administrative support for the process of appointments to Crown parochial livings (in the same way as, for example, where a bishop has the right of presentation the church authorities would provide support to the parish in the process). The Government is discussing with the Church future long-term arrangements within government in the light of the Synod's decisions.

256. The changes to the appointments processes for Diocesan Bishops and Cathedral Deans are internal Church procedures and require no legislation. The Church will itself legislate by Measure for a number of consequential changes. These are to remove the requirement for two names to be forwarded for appointment to Suffragan Bishoprics (a requirement of a 1534 Act); to bring crown parochial appointments into line with all others by allowing the parish representatives a right of veto; and to remove the right of the Crown to appoint to certain positions which have become vacant through the preferment of the incumbent to a diocesan bishopric, or where there is a vacancy in the episcopal see which would normally have the right of appointment.

Next steps

We are publishing the Constitutional Renewal Bill in draft. We invite Parliament and others to consider and comment on the draft Bill and would welcome their views.

There are also a number of new policy proposals contained within this document, such as the Intelligence and Security Committee and around certain aspects of Judicial Appointments, where we have not previously held a public consultation. We therefore would welcome any views that members of the public have on these.

Please send your response to:

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