Ministry of JUSTICE

Governance of Britain

The Governance of Britain – Analysis of Consultations

Part 3 of 3

Governance of Britain – Analysis of Consultations

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

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Introduction

1. In the Green Paper *The Governance of Britain* (CM 7170) the Government made a commitment to consult on a number of significant proposals for constitutional change. The Government subsequently published the following consultation documents.

    - The Attorney General: Between 25 July 2007 until 30 November 2007 the Government consulted on changes to the role of the Attorney General (CM 7192).
    - Flag Flying: Between 26 July 2007 to 9 November 2007 the Government consulted on altering the current guidance on flying the Union Flag from UK Government buildings.
    - War Powers and Treaties: Between 25 October 2007 and 17 Janauary 2008 the Government consulted on the deployment of the Armed Forces and on the process for ratifying treaties (CM 7239);
    - Judicial Appointments: Between 25 October 2007 and 17 January 2008 the Government consulted on the system for appointing judges (CM 7210).
    - Managing Protest around Parliament: Between 25 October and 17 January 2008 the Government consulted on the rules relating to protest around Parliament (CM 7235).
    - Civil Service: in 2004, the Government consulted on the merits of enshrining the core values of the Civil Service in statute, by publishing a draft Civil Service Bill.

2. The Government received nearly 1000 separate responses to these consultations and is grateful to all of those who provided comment – members of the public, parliamentarians, parliamentary committees, local authorities, the judiciary, charities, religious organisations, academics, interest groups and a wider range of other important organisations and associations.

3. This document provides an analysis of each consultation, in the order that the measures appear in the draft Constitutional Renewal Bill, which is published alongside this document. For some consultations the Government is able to provide a detailed analysis of the responses received to each question. For others, the types of responses received did not lend themselves to a quantitative breakdown and so the analysis seeks to describe the overarching tone of responses received.

4. A separate document that accompanies this analysis, *Governance of Britain*, sets out the Government's proposals in light of these consultations.

5. A full list of all responses received to each consultation (other than those who requested anonymity) will be provided on request from the Ministry of Justice at the following address:

Ministry of Justice
Selborne House
54 Victoria Street
London
SW1E 6QW
email: Governance@justice.gsi.gov.uk

Managing Protest around Parliament

6. The consultation document *Managing Protest around Parliament,* which was published on 25 October 2007, sought views on whether there remained a sufficiently strong case for a distinct legislative framework to apply to the policing of protests in the vicinity of Parliament as currently set out in sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCAP). Consultations closed on 17 January.

7. The background to the consultation document was the Government's commitment in *The Governance Of Britain* Green Paper 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 freedom of expression.

8. The Metropolitan Police Service (MPS) and the Association of Chief Police Officers (ACPO) had previously raised practical concerns about the related but distinct issue of the different sorts of conditions that can be applied to assemblies and to marches in England and Wales generally. The Government accordingly used the consultation document as an opportunity to also seek wider views on the harmonisation of the sorts of conditions that can currently be applied to marches and assemblies in sections 12 and 14 of the Public Order Act 1986.

9. The Government is grateful for all the responses received which have been helpful in informing the way forward. The following summarises the views of a wide range of respondents.

10. A quantitative breakdown of different responses to the questions posed in the consultation document has not been possible. Around half the responses received did not directly answer the questions posed in the consultation document but sought simply to express strong opposition to the SOCAP provisions in particular and/or any restrictions on the right to protest more generally. This summary does, however, attempt to provide an accurate reflection of both the direction and tone of responses received.

Summary of responses to the consultation questions

11. The Government received 512 responses during the 12 week consultation period. Representations were received from 25 campaign groups, from six MPs and two Peers, from a number of other interested stakeholders including the Metropolitan Police Service, the Greater London Authority, Westminster City

Council and the Law Society of Scotland. However, most responses – over 90 percent – were received from members of the public.

12. The vast majority of responses – over 95 percent – either explicitly or implicitly called for the straight repeal of sections 132 to 138 of the Serious Organised Crime and Police Act (SOCAP), rejecting arguments that a distinct framework for managing protest around Parliament could be justified on security grounds, or on grounds that the business of Parliament needed special protection, or by a need to safeguard wider public enjoyment of the space.

13. There was a clear and strongly articulated view that sections 132 to 138 of the Serious Organised Crime and Police Act, and in particular the requirement to notify the police in advance, have restricted and stifled spontaneous protest in the area around Parliament. There was also a clear view expressed by members of the public that the area around Parliament is special in that it is the focus of political protest and that nowhere is the right to protest and voice one's views more important than at the seat of Parliament itself.

Question 1: The Government believes peaceful protest is a vital part of a democratic society, and that the police should have powers to manage public assemblies and processions to respond to the potential for disorder. Should the powers generally in relation to marches and assemblies be the same?

Question 2: Do you agree that the conditions that can be imposed on assemblies and marches should be harmonised?

14. To provide a wider context against which to consider the case for distinct provision for protest in the vicinity of Parliament, the consultation started by looking at the framework in the Public Order Act 1986, which covers the policing of marches and assemblies in England and Wales. The document invited views on whether the current provisions covering marches and assemblies should remain the same and also invited views on whether the sorts of conditions that the police can impose on marches in section 12 of the Public Order Act should be aligned or harmonised with those on assemblies in section 14 which are narrower.

15. The vast majority of those who responded to these questions interpreted them as a proposal to harmonise the provisions on marches and assemblies in their entirety, and accordingly expressed their concern that there should be no attempt to extend the police's ability to restrict and constrain freedom of assembly.

16. A small number of respondents thought the current provisions of the Public Order Act already went too far and were against any kind of restrictions on the organisers of marches or assemblies.

17. The Metropolitan Police supported the harmonisation of section 12 and 14 conditions and believed that the Public Order Act should be amended to allow appropriate and proportionate conditions to be imposed on any procession or assembly taking place anywhere on the grounds of security and public safety.

18. The overall view, however, was that the current framework of the Public Order Act should not be changed.

19. An indication of the general mood of the consultations can be drawn from the following quotations:

> *"The very fact these questions are in a consultation purporting to be about protest near Parliament makes me question the intentions of the Government."*
>
> *"Harmonisation of marching/assembly laws would lead to stricter rules for demonstrations in London and across England and Wales. This is unacceptable and should not be considered in context of a review designed to relax rules governing demonstrations around Parliament."*
>
> *"The distinction made by Parliament around wider discretion given to police to impose conditions on marches still holds good."*
>
> *"Marches and Assemblies are different in kind. Marches entail different levels of disruption – to highways, transport or the life of a city. Assemblies are static and from the perspective of management of these situations pose different problems"*.

Question 3: Is special provision needed for static demonstrations and marches around Parliament and if so what?

Question 4: Are there any other considerations the Government should take into account?

20. The consultation document sought views on whether different arrangements should continue to apply to an area around Parliament, taking into consideration the security situation, the requirement to allow the business of Parliament to proceed unhindered and the wider public enjoyment of the Parliament Square area.

21. The vast majority of those responding to this question (around 95 percent) were strongly against special provision for demonstrations around Parliament, believing that protests around Parliament should be treated in the same way as in the rest of the country and consequently calling for the repeal of the current provisions in SOCAP.

22. A number of those who responded to these questions were clear that the public must have the freedom to express its views anywhere, but particularly in the vicinity of Parliament. Parliament was seen by many as the natural focus for protest, as the following quotations testify.

> *"Nowhere is the right to protest and voice one's political views more important than at seat of our democratic system itself. There should be no additional constraints on or special provisions for protest around Parliament."*
>
> *"Government should consider carefully the symbolic importance of Parliament in our democracy. Any restriction on expression of dissent in [the?] area around Parliament has a far greater negative impact on public perception of how responsive Government is to [the?] electorate, than would be created by similar restrictions elsewhere. Restrictions on protest around Parliament run the risk of conveying the message that Government wishes to keep disaffected groups out of sight."*

23. The consultation document set out 4 factors to be considered in deciding whether different arrangements should continue to apply to a designated area around Parliament. The general view was that existing legislation such as the Public Order Act already contained sufficient powers to achieve all that was needed around Parliament.

Business of Parliament

24. The majority of respondents (more than 90 percent) considered that special legislative provision was not necessary to facilitate the proper operation of Parliament. Respondents either considered that there was no justification for MPs and Peers to have special protection from any potential disruption from peaceful protest or, while agreeing that elected representatives and Peers should not be prevented from accessing the House, believed the police already had appropriate powers to deal with disorder in the Public Order Act and powers to deal with obstruction. However, the fact that 25 responses asserted that the Sessional Orders in themselves provided the police with appropriate powers, served to reveal the confusion about the effect of the Sessional Order.

25. The Metropolitan Police commented that, to ensure transparency and consistency for both protestors and police, the Government should clearly define levels of access that are required by peers, MPs and officials to the Palace of Westminster and Downing Street and define any activities and behaviours which it considers would hinder the operation of Parliament.

Security Risk

26. While it was accepted that Parliament was a security target, the great majority of respondents to this question (more than 95 percent) were opposed to a legislative provision which would allow conditions to be imposed on a demonstration to prevent a security risk. Respondents concerns were:

    - A 'security risk' could be used as a blanket excuse to prevent lawful protest;
    - There were already tough safeguards in place to protect Parliament;
    - Government had failed to establish why peaceful demonstrators posed any more of a security risk than the large numbers of student or tourist groups that passed through the vicinity of Parliament on a daily basis;
    - There was no evidence that SOCAP had helped improve security threat around Parliament;
    - SOCAP requirements would not deter anyone intending to attack Parliament. Potential terrorists were unlikely to notify the police in advance of their intention to demonstrate and could mingle as easily with crowds of tourists as they could with protestors.

27. The following quotes give a flavour of the responses received

> *"Hard to argue that in an area visited by tens of thousands of tourists, in addition to those passing through Westminster, how protests pose more of a security risk than "business as usual". On the contrary, with increased police presence during march/demo security risk likely to be less."*
>
> *"Arbitrary conditions on peaceful assembly and demonstrations should not be applied. Security should be maintained with a visible and alert police presence in the general area that is currently the designated SOCPA zone."*

Equal Access to Right to Protest

28. Very few people commented on this issue, but those who did, felt that the opportunity to demonstrate outside Parliament should not be monopolised by a small number of individuals or interest groups. It was felt that a permanent occupation of part of a location in a public place limited the scope for other groups to raise issues before Parliament and denied its use as an amenity to others.

A World Heritage Site

29. The small number of respondents who commented on this point mainly considered that any argument that special provision should apply to Parliament Square, given its world heritage site status, was flawed and that on the contrary demonstrations and political protest were part of the heritage. The following quotations capture the mood of those who expressed a view.

> *"To subordinate the historic role of the area around Parliament as a forum for civic discussion to its role as a tourist attraction is grotesque. The true symbol of the Westminster Parliament and the proper test of the importance of Parliament is the vibrancy of the democracy that it works for. There are few things that can better capture the dignity of that democracy than peaceful supportive dissonant or varied expression of opinion at the gates. The area around Parliament is exceptional, precisely because it should be our symbolic place to speak and act, protest and meet, peacefully and freely."*

Question 5: Do you have views on the model that should apply for managing demonstrations around Parliament?

Question 6: Do you consider that a prior notification scheme should apply to static demonstrations in the vicinity of Parliament? Should any scheme only apply to static demonstrations over a certain size? And if so, what size of demonstration?

Question 7: Do you agree that conditions in order to prevent a security risk or hindrance to the operation of Parliament should remain in relation to demonstrations in the vicinity of Parliament?

Question 8: Do you have a view on the area around Parliament that any distinct provisions on the right to protest should apply to?

30. The consultation document concluded by considering the model that should apply to managing protests around Parliament and inviting views on whether a prior notification scheme should apply over a certain size; and whether the same or a broader range of reasons to impose conditions should be applied to demonstrations around Parliament as it did to assemblies elsewhere.

Model for managing demonstrations around Parliament

31. The vast majority (around 95 percent) of those who responded to Question 5 believed the model around Parliament should be same as exists for the rest of country. A small number of respondents suggested having clearly marked-out spaces where people could congregate for a limited period.

32. The Greater London Authority (GLA) commented that any discussions on management of protests in Parliament Square needed to take into account proposals to redevelop Parliament Square "to create a more accessible, safe and high quality place". They also commented that while Trafalgar Square was a good model for successfully managing demonstrations, its layout was different to Parliament Square in terms of its safe pedestrian access and hard landscaped surfaces. The GLA believed that Trafalgar Square had a long and established historical tradition as a place to protest as opposed to Parliament Square.

Prior notification scheme

33. While the majority of those who responded to Question 6 believed that there should not be a prior notification scheme for demonstrations around Parliament, around 50 responses considered that there could be a case for prior notification provided that:
    - prior notification was not confused with prior authorisation
    - prior notification only applied to demonstrations over a certain size (suggesting figures of 20 or more, to 500 or more and where there was a public safety issue).

34. The contrary view was that any form of prior notification would stifle spontaneous protest, that notification should be encouraged as best practice not written into statute and that in practice large groups of demonstrators would inform the police of their intentions.

35. The Metropolitan Police thought that there should be prior notification for assemblies of 2 or more people that take place in the close proximity of Parliament and Downing Street, to allow the police to manage the very large number of protests that take place in these areas.

Security risk condition

36. The vast majority of those who commented specifically on Question 7 were very strongly against retaining a condition to prevent a security risk, as the quotation below illustrates. The main concerns expressed were that security risk was too broad a term and could be invoked to prevent any demonstration (see above). The Metropolitan Police holds the view that the issue of security is not restricted to the area around Parliament and can equally apply in other areas.

> *"It is reasonable to impose restrictions on demonstrations where there's a specific known security risk, provided all evidence of risk is made public. Generalised security concerns such as "200 000 people converging on Parliament will cause chaotic situation that terrorist might take advantage of" should not be used as basis for restricting demonstrations."*

Hindrance to the proper operation of Parliament

37. Most of those who commented on retaining hindrance to the proper operation of Parliament as a basis for conditions, agreed that there was a legitimate concern that access to Parliament should not be blocked or hindered, but most considered that the police already had powers to prevent this situation in the Public Order Act, and their powers to deal with obstruction; the Sessional Order was also cited (see paragraphs 23 and 24 above).

Size of designated area

38. Very few people commented specifically on Question 8, having covered their points in other questions. A small number commented on the size of the designated area around Parliament and the majority view (more than 95 percent) was that it should be abolished or made much smaller.

Other comments

Loudspeakers

39. Thirty-seven respondents commented on the ban on loudspeakers in the area around Parliament. Of those who commented, the majority thought the ban was too restrictive, and restricted the ability of peaceful protestors to co-ordinate themselves collectively and protest effectively.

40. However, comments were received on behalf of 52 Members of Parliament about the serious disruption to MPs and those working in the Houses of Parliament from the noise from loudspeakers used by those demonstrating opposite Carriage Gates.

> *"If people are prepared to shout themselves hoarse for their cause, then so be it, but to have a constant barrage of banal comments electronically amplified is an imposition on those whose offices face out on to Parliament Square, let alone passing public."*

Permanent demonstrations

41. A small number of responses expressed concerns about the issue of permanent demonstrations and particularly encampments.

42. One MP raised concerns about protestors standing on the pavement at the entrance and exit to Parliament harassing those entering and leaving. He felt there was a need to recognise the difference between the rights of groups to protest peacefully and the taking over of public places on a long-term basis to the exclusion of others.

43. The Greater London Authority commented that a key concern for the Mayor was proportionality and duration, arguing that if a protest took place it would limit public use of Parliament Square and protests should therefore be limited in duration.

Role of the Attorney General

44. The public consultation on the role of the Attorney General opened on 26 July 2007 and closed on 30 November.

45. The consultation covered all aspects of the Attorney General's role, focusing in particular on two areas:

    - Perceived tensions between the Attorney's status as a Government Minister and the role as the Government's chief legal adviser; and
    - Perceived tensions between the Attorney's Ministerial role and the post's public interest functions (including those in relation to individual prosecutions) which must be exercised independently of Government.

46. Fifty-two written responses to the consultation were received. A wide range of people chose to respond to the consultation ranging from MPs, and members of the House of Lords, members of the judiciary, the Clerk of the Parliaments and the Clerk of the House of Commons, members of the legal profession, academics and non-governmental groups such as JUSTICE. The Attorney General's Office (AGO) also held a series of meetings and seminars with the following groups to discuss the issues raised by the consultation:

    - Representatives of the prosecuting authorities which the Attorney General superintends under statute (the Crown Prosecution Service, Serious Fraud Office and Revenue and Customs Prosecutions Office), HM Crown Prosecution Service Inspectorate, and AGO staff;
    - Lawyers from the Government Legal Service;
    - MPs and members of the House of Lords (including Opposition spokespeople, former Law Officers, a former Lord Chancellor, and former senior members of the judiciary);
    - Academics having an interest in constitutional and legal issues;
    - Representatives of the Bar, Law Society and Institute of Legal Executives; and
    - Representatives of the Association of Chief Police Officers.

47. The consultation was an open one and the consultation document did not propose preferred options. Six specific questions were asked in the consultation document. Although a large number of respondents chose not to deal specifically with those questions, they form a useful framework for summarising the response to the consultation. The Government would like to thank those respondents who provided their comment on the role of the Attorney General.

Summary of responses to the consultation questions

Question 1: Do consultees consider that the role of chief legal adviser to the Government should be separated from that of a political Government Minister? If so, who should exercise the role?

48. The majority of respondents who responded on this point (27 out of 38 who expressed a clear view) took the view that the chief legal adviser to the Government should remain a Minister. These respondents included a large number of Parliamentarians (including Opposition spokespersons and former Law Officers). This was also the view expressed in the overwhelming majority of the responses from academics (including Professor Zellick, Professor Horder and the Constitutional and Administrative Law Bar Association) and members of the legal profession (including the Working Group of the Bar Council and the Law Society).

49. The reasons given for the Attorney remaining a Minister varied. Some respondents stressed the constitutional importance of the chief legal adviser being a Minister.

> *"The office embodies the principle that law should be at the heart of government. Since the change in the role of the Lord Chancellor it is all the more important now that there should be within Government a senior member of it whose primary responsibility is to ensure that the Government respects and upholds the Rule of Law. A non – political "Chief Legal Counsel" would not be in the same position, as the Attorney General is, to do this."* (Bar Council Working Group)
>
> "*The dual role of the office [as chief legal adviser and Minister of the Crown] is not a constitutional weakness but a fundamental constitutional strength*." (Criminal Bar Association)
>
> "*A key reason for [the Law Officers remaining members of the Government] in my view is because of the need for constant vigilance as to adherence to the rule of law within government*." (Lord Goldsmith)

50. Other respondents (including Administrative Law Bar Association (ALBA) and the First Division Association (FDA)) made the point that Ministers were more likely to accept, and to follow, advice which has been given by one of their peers.

> "*Ministers are more likely to accept what may be unpalatable advice from a senior lawyer who is also one of their colleagues and in whom they have implicit trust*." (ALBA)

51. Some respondents (generally those who were themselves lawyers) stressed that there was no hard and fast dividing line between "law" and "policy".

> "*We believe the concept of "neutral" legal advice is flawed: in practice and in its practical application legal advice involves the exercise of judgement to a greater or lesser extent. … Democratic government benefits from a lawyer who can assess law and policy from within existing political structures*." (Bar Council Working Group)

> "*Many issues which arise for legal advice are not "purely" legal. They are not necessarily hard-edged questions of law but embrace issues of public policy. For example, in human rights and Community law, the issue will often turn on whether a proposed measure satisfies the principle of proportionality. This involves weighing up competing interests, including governmental interests."* (ALBA)

52. Others took the view that the most effective means of ensuring that the Government does in fact act in a lawful and appropriate manner was to have its legal adviser at the "heart" of Government as a Minister.

> "*The Attorney General's status as a Minister gives him or her a greater possibility than could be secured by any other arrangement of ensuring that the legal considerations are not misunderstood (or even brushed aside) in high-level decision-making on foreign affairs."* (Sir Franklin Berman and Sir Michael Wood, former Foreign Office Legal Advisers)

> *"It is both easier and more fitting for a Minister, especially one who has a recognised, separate constitutional role as a Law Officer, to point out to fellow Ministers the balance of legal arguments or bounds of legality. It is difficult to see how this role could properly be performed by anyone other than a Minister."* (FDA)

53. A large number of respondents (including Dominic Grieve MP, Lord Carlile of Berriew, Lord Lloyd of Berwick, Lord Goldsmith and Lord Mayhew of Twysden) supported the Attorney General remaining a Minister because they attached particular importance to the ability of Parliament to hold the Attorney General to account. Comments included:

> "*The removal of the current Parliamentary accountability of the Attorney General would dilute and diminish the authority of the position, and more significantly the accountability of the government for its actions as set alongside legal advice received*." (Lord Carlile of Berriew)

> "*It is essential that the chief legal adviser should be answerable to Parliament; by which I mean he must answer questions relating to the advice which he has given on the floor of the House in the ordinary way. For this purpose he must be a member of one House or the other.*" (Lord Lloyd of Berwick)

> "*Accountability to Parliament is crucial. [Parliament] will demand explanations. They will not be satisfied by anything other than a direct answer from the Minister. They will want the organ-grinder and not the monkey.*" (Lord Mayhew of Twysden)

> "*In a typical year during my term in office the Solicitor General and I answered some 400 Parliamentary questions and another 250 letters from MPs and Peers. We attended the House to answer urgent and other questions. … I can assure those of you who have not had the experience that there is little that concentrates the mind so much on a decision making process that within hours, certainly days, of the decision you may find yourself at the dispatch box having to justify the decision under close questioning by MPs and Peers.*" (Lord Goldsmith)

54. Others (including Professor Jeffrey Jowell and JUSTICE) questioned the extent to which in practice Parliament was in a position to call the Attorney to account in relation to the legal advice he/she has given.

> "*The Attorney advises on the law and, in cases of uncertainty, estimates the relative strength of an argument. These are not matters for which political accountability is appropriate. The advice is either professionally correct or not.*" (JUSTICE)

55. A number of respondents (including Lord Goldsmith, Lord Borrie, the Society of Labour Lawyers and the Bar Council Working Group) stressed the need for the Attorney to be a Minister and member of the Government in light of the fact that it is no longer necessary that the Lord Chancellor be a lawyer.

56. Some respondents stressed that one way to address some of the concerns was to recognise that it would not always be appropriate for the Attorney to give legal advice. Examples of cases where the Attorney would not be best placed to advise included where there is a potential conflict of interests (Professor Philip Stenning); where it is felt to be of assistance to seek advice from someone who is outside the Government and who may have a different perspective (London Solicitors Litigation Association); where there is a need for specialist advice which lies outside the expertise of the Attorney (Lord Rodgers of Quarry Bank); or where the issue is "sensitive" in some way (Law Society). In such cases, respondents suggested that advice could be sought from outside Counsel.

57. Some respondents argued very strongly that it would be inappropriate for the Government's chief legal adviser not to be a Minister of the Crown.

> "*It would not be acceptable for the Government to seek ad hoc advice from a succession of career lawyers until they get the advice they want. ... [The suggestion] that a career lawyer might be "accountable" to Parliament in some other manner e.g. like the Parliamentary Ombudsman ... would be wholly inadequate*." (Lord Lloyd of Berwick)

> "*Government would never be able to free itself from the claim that it is paying for the advice it wants to hear*." (Professor Jeremy Horder)

58. A significant number of respondents qualified their support for the maintenance of the position of Attorney General as a Ministerial post on the basis that other changes to role of the Attorney General should be made.

59. A number (including Lord Carlile of Berriew QC, Lord Goodhart, Simon Hughes MP and Unlock Democracy) felt that the post should become less political in some way. Suggestions as to how to achieve this included the possibility of the Attorney:

- ceasing to be the lead Minister in relation to controversial Bills (a point highlighted by Lord Thomas of Gresford, Lord Campbell of Alloway and Lord Howe of Aberavon);
- not generally voting in proceedings (Lord Goodhart, Mishcon de Reya);
- ceasing to take the party whip (Lord Goodhart, Unlock Democracy);
- ceasing to be subject to the doctrine of collective responsibility (Mishcon de Reya, Lord Goodhart);
- ceasing to be a member of either House of Parliament (Mishcon de Reya, Unlock Democracy; Lord Goodhart proposed an alternative approach under which the Attorney would not be an *elected* member of either House of Parliament).

60. Comments included:

> "*For both Law Officers the emphasis should be on their role as lawyers rather than any political function*." (Lord Carlile of Berriew)

> "[*Having an Attorney who is an MP or who takes a party whip or exercises a right to vote] would make the office too political and would cause problems if the Attorney General was called upon to advise on the legality of a provision for which she had voted*." (Lord Goodhart)

61. Some respondents (including Lord Mackay of Clashfern and Lord Goldsmith) felt that the Attorney is already in a different position to other Ministers in that he/she exercises a significant number of functions in the public interest.

62. Unlock Democracy supported the Attorney General remaining a Minister on the basis that he/she would cease to have a role in the formulation of criminal justice policy.

63. However, there was a range of arguments made against the Attorney General remaining a Minister of the Crown. Eleven out of 38 respondents who expressed a clear view considered that another person should exercise the role of chief legal adviser to the Government. Suggestions included:

- a civil servant (JUSTICE, Mr Justice Calvert-Smith);
- an independent office holder (proposed by Lord Goodhart, Unlock Democracy, JUSTICE, Clifford Chance, Anne Palmer, Bernard Rofe, Professor Jeffrey Jowell; this was also an option favoured by ALBA if, contrary to their view, change to the status of the Attorney as chief legal adviser was thought to be needed);
- a person (not a politician) who supported an Opposition party (Anne Palmer);
- Counsel appointed either on an ad hoc basis (the General Council of the Bar of Northern Ireland) or standing basis (minority report of Bar Council Working Group; also the option supported by ALBA if, contrary to their view, change is thought to be needed);
- a member of the Law Lords, chosen by the Law Lords themselves (John Tyler).

64. A number of respondents favoured some form of parliamentary involvement in the appointment of the legal adviser.

65. Arguments in favour of such options varied. Some stressed the importance of the Government getting, and being seen to be getting, advice from a source which is independent of it.

> *"To retain the status quo will always leave the Attorney General and the Government open to suggestions of politically motivated or biased advice and decision making. In this instance it is the perception rather than the reality which will determine [the] public's confidence in the Government and the perception will not be favourable."* (Assistant Chief Constable of West Yorkshire Police)

> *"The present role [of the Attorney General] is unsatisfactory because it goes against the principle of separation of powers by combining legal and quasi-judicial functions with political ones."* (Bernard Rofe)

66. Others (including the minority report to the Bar Council Working Group) took the view that the current approach gave rise to a high degree of risk of a conflict of interest arising or appearing to arise.

> *"If the legal adviser to the Government is a political appointee, he may well also harbour political ambitions – or he may at least be perceived to harbour such ambitions. That being so, there is always a risk that his advice will be contaminated by the insidious inclination … to tell the client what he wants to hear. … It is positively perverse to maintain in place a regime which enables legal advice to be given on particularly delicate and difficult cases by political appointees who also participate in the executive and legislative branches of Government."* (minority report to the Bar Council Working Group)

67. Some respondents (including the minority report to the Bar Council Working Group and JUSTICE) took the view that it was possible and appropriate to split consideration of legal issues from consideration of policy.

"*The content of any legal advice is not a matter of policy. The proper interpretation and application of the law is not a political activity: it is a matter of legal expertise. As such, there is no principled argument in favour of a politician giving legal advice to the Government*." (minority report to Bar Council Working Group)

68. Those respondents also queried the contention that the Government would not accept or follow advice from a person who is not a Minister.

> *"[It is not accepted] that Government Ministers are less likely to value or accept advice from an independent legal adviser who is not a political minister because he or she is not "one of them". We believe that Ministers accept legal advice on the basis of expertise."* (Unlock Democracy)

> *"The best means of ensuring that an unwilling Government respects the rule of law is for it to be faced with wholly independent legal advice from an office holder whose tenure does not depend on the whim of the Prime Minister."* (minority report of the Bar Council Working Group)

69. A small number of respondents (including Lord Howe of Aberavon) expressed concern as to the limited range of suitably qualified candidates in Parliament, especially in the House of Commons.

Attendance at Cabinet

70. A number of respondents expressed a view as to whether the Attorney General should routinely attend Cabinet.

71. The majority of respondents who expressed a clear view on this (21 out of 25) felt that the Attorney should only attend Cabinet in order to provide legal advice or where a matter which specifically required the Attorney's input was on the agenda. Views as to how often this would necessitate attendance varied significantly. For example, Professor Jeffrey Jowell considered that the Attorney would, as legal adviser, need to attend every meeting of Cabinet.

72. Comments included:

> *"The Attorney General is primarily a Law Officer. He is not a member of the Cabinet and should not attend unless required to give legal advice."* (Lord Mackay of Clashfern)

> "*Any policy insight which might derive from the Attorney General's membership of, or regularly attending, Cabinet is more than outweighed by the threat or perceived threat to the independence of the office. The Attorney General, who is not a member or regular attendee of Cabinet, is better able to advise on issues with an objective eye.*" (Bar Council Working Group)

73. The merit of the Attorney General attending Cabinet when a matter giving rise to issues of law or propriety is being considered was recognised by nearly all respondents who commented on this point. A number of respondents highlighted the need for it to be possible for the Attorney to attend Cabinet in light of the fact that the Lord Chancellor need no longer be a lawyer. The Welsh Assembly Government commented that:

> "*[We] feel that there is great value in having [the Government's] final and authoritative legal adviser closely involved in the processes of government at Cabinet level.*"

74. A small number of respondents (including Julie Morgan MP) argued strongly for the Attorney to attend Cabinet on a regular basis. The FDA also commented that the current arrangements "have worked well and do not appear to require change".

> "*Surely it is the Attorney General who flags up the legal issues involved in decisions to his colleagues and it is not always possible to determine accurately before hand when these issues might arise.*" (Julie Morgan MP)

75. One respondent (Rodney Curwin) felt that the Attorney should never attend Cabinet.

Role in relation to Parliament

76. A small number of respondents expressed views on the role of the Attorney General in providing advice and assistance to Parliament. While a number of different views were expressed, the majority (including the Clerk of the Parliaments and the Clerk of the House of Commons and Lord Lloyd of Berwick) supported the current position. Comments included:

> *"There might be perceived to be a tension between the Attorney General's role as legal adviser to Government and her role as legal adviser to, and advocate on behalf of, the two Houses of Parliament in relation to parliamentary privilege (and other matters). Successive Attorneys General have discharged their responsibilities towards the two Houses of Parliament with exemplary impartiality. We greatly value the assistance of the Attorney General in all [these] matters and would wish to preserve the two Houses' access to, and receipt of advice from, the Attorney General in any new arrangements."* (Clerk of the Parliaments and the Clerk of the House of Commons)

77. The Criminal Bar Association noted that there was nothing to stop Parliament or any member of Parliament seeking their own legal advice. JUSTICE considered that the Attorney General should provide advice to Parliament in circumstances specified by statute. Richard Jackson expressed the view that the Attorney General should cease to advise Parliament and that Parliament should have its own dedicated legal adviser.

Role of the Solicitor General

78. No respondent made detailed and specific recommendations in relation to the role of the Solicitor General.

Question 2: What are consultees' views on the options for change in paragraphs 3.6 to 3.10 of the Consultation Document?

79. Paragraphs 3.6 to 3.10 of the consultation document contained a number of proposals to clarify and to strengthen the role of the Attorney General. These options included reforming the Attorney General's oath of office and the creation of a select committee specifically to scrutinise the exercise of the Attorney General's functions.

80. All 21 respondents who expressed a clear view on this point supported the proposal to reform the oath of office of the Attorney General.

81. Some concerns were expressed (by Lord Morris of Aberavon, Sir Ian Glidewell and Richard Jackson) as to the proposal to establish a select committee to scrutinise the work of the Attorney General. Respondents queried whether it was necessary and observed that there would be limits on the questions which could properly be asked of, or answered by, the Attorney General. For example:

> *"I think some care would be needed in spelling out the boundaries of a select committee. It would be counter-productive if the Attorney were seen to be un-cooperative in being able to answer some questions which would undermine his other obligations to the Government. The proposal as it stands is a little too simplistic."* (Lord Morris of Aberavon)

82. Not all respondents agreed that it was necessary or appropriate to implement these changes by way of legislation.

83. Some respondents suggested additional proposals. These included:
    - a fixed term of appointment for the Attorney General (Lord Carlile of Berriew);
    - approval of the Prime Minister's candidate for Attorney General by Parliament, which would also have the power to remove the Attorney (Simon Hughes MP);
    - appointment of the Attorney General on the recommendation of a select committee (Mishcon de Reya); and
    - a specific Question Time to be held at least once a month (Lord Carlile of Berriew).

Question 3: Do consultees consider that legal advice to the Government should be published (and if so in what circumstances), or that the legal basis for key Government decisions should be made publicly available?

84. The majority of respondents (19 out of 31 who expressed a clear view, including former Law Officers, members of the legal profession – including the Bar Council and the Law Society, and academics, including Unlock Democracy,) considered that the Attorney General's advice should not generally be published. Others considered that certain categories of advice should not generally be made public. For example, David Howarth MP considered that advice in relation to the conduct of litigation should not generally be published, a view supported by Clifford Chance.

85. The reasons given for this approach varied.

86. Concerns were expressed that publication as a general rule would impede the willingness of Ministers to be full and frank with the Attorney when seeking

advice and that this might affect the Government's willingness to seek advice in the first place. Comments included:

> "*Its [the doctrine of legal professional privilege] rationale is to encourage clients to be frank with their lawyers, so facilitating legal advice and assistance and the settlement of hopeless claims*." (Bar Council Working Group)

> "*Routine publication [of legal advice] would inevitably inhibit the Government in seeking full and frank advice, and is likely adversely to affect the scope and quality of the advice which is given. This would be seriously detrimental to the public interest and the rule of law."* (Criminal Bar Association)

> "*The government should be able to seek legal advice without fear of political scandal*." (Unlock Democracy)

> "*That Ministers are able to seek and receive legal advice in confidence is a fundamental principle on which the business of Government rests as it ensures open and honest debate within Government. If this principle is abandoned, even in limited circumstances, there would be major implications as it would then be extremely difficult for the convention [that legal advice is not generally disclosed] to be maintained in other situations*." (Welsh Assembly Government)

87. Some noted that disclosure of legal advice would put the Government at a disadvantage vis-à-vis other persons who have sought legal advice, especially in the litigation context.

88. Concerns were also expressed (for example by the FDA and by those who attended the seminar held for the members of the Government Legal Service) that disclosure of legal advice given by the Attorney would lead to increased pressure to reveal other legal advice on which Ministers were relying including advice from members of the Government Legal Service and from Counsel.

89. Some respondents (including Anthony Aust, former FCO Deputy Legal Adviser) expressed concern that the disclosure of the legal advice would necessitate the disclosure of other information including the materials on which the advice was based, or require the Attorney to produce an additional self-contained opinion. Concern was also expressed (for example by the Society of Labour Lawyers) as to the disclosure of information which would prejudice national security.

90. DWP Prosecution Division felt that widespread disclosure of advice would lead to an increase in litigation.

91. A number of respondents (including Lord Lloyd of Berwick, the Society of Labour Lawyers and the General Council of the Bar of Northern Ireland), while supporting the general presumption against disclosure, thought there were cases where publication on an exceptional basis would be appropriate or should be seriously considered. Various formulations were offered as to the class of case where disclosure should, on an exceptional basis, be considered including:

- advice on "key" decisions (ALBA and Unlock Democracy);
- where the Attorney's advice is expressly relied upon by the Government (Simon Hughes MP, who felt in such cases the advice should be published in full);
- advice provided in relation to national emergencies (Lord Lloyd of Berwick and Julie Morgan MP);
- advice in relation to the use of armed force, particularly in time of war (Lord Lloyd of Berwick);
- advice on the interpretation of existing legislation (David Howarth MP);
- advice on matters which, because of their nature, are unlikely to be the subject of legal challenge (the Society of Labour Lawyers, gave examples which relate to matters of international relations or foreign policy and which were not amenable to detailed scrutiny by the courts).

92. Some respondents (including the Bar Council Working Group and Unlock Democracy) who favoured the maintenance of the current approach to the disclosure of legal advice stressed the need for other mechanisms to support good governance.

> "*There certainly should be no dissembling or misrepresentation in relation to advice. In the handling of sensitive issues, where legal advice has been influential in the action taken, we conceive as fundamental the need for a thorough and timely explanation by government of the basis of the action it takes. There is no reason for this not to include an explanation of the legal dimensions*."
> (Bar Council Working Group)

93. Some respondents considered that other mechanisms should be developed to ensure transparency and accountability. For example, Unlock Democracy proposed that there should be a Select Committee with responsibility for scrutinising the role of Attorney General which could seek the legal reasoning (but not the advice) which underpinned Government action.

94. However, a minority of respondents (8 out of 31 who expressed a clear view) supported change in this area. They considered that the legal advice given by the Attorney should be published in certain cases. These respondents stressed the importance of transparency in maintaining public confidence.

> *"We think it would be good practice for the Attorney General's advice to be published as fully as possible wherever there is public or Parliamentary concern about the legality of a particular action. We believe that the habit of publication would reinforce public confidence that the Government takes seriously its obligation to act in accordance with the law."* (The Law Society)

95. Views on when publication would be appropriate varied. Options proposed by respondents included:

    - the publication of a summary of the advice given by the Attorney (proposed by Professor Jeffrey Jowell);
    - the publication of advice in full or in summary form in "appropriate circumstances" except where the Attorney and the Prime Minister had certified that publication would be contrary to national security or the national interest (Lord Carlile);
    - the disclosure to Parliament of advice which relates to a proposal being considered by Parliament (proposed by David Howarth MP and, in relation to the interpretation of legislation, Lord Thomas of Gresford) including the human rights implications of Government Bills (JUSTICE);
    - the disclosure to Parliament of advice which relates to the legality of a proposed course of action which is a matter of public or Parliamentary concern (the Law Society);
    - the publication of advice some time after the relevant decision has been taken (proposed by David Howarth MP in relation to advice which relates to the legality of proposed action; this option was also supported by Lord Thomas of Gresford and Anne Palmer); and
    - publication subject to the limits set out in the Freedom of Information Act 2000 (Professor Zellick).

96. A minority of respondents (4 out of 31 who expressed a clear view, including Clifford Chance, the Assistant Chief Constable of West Yorkshire Police and John Tyler) considered that the Attorney General's advice should be published as a matter of course, subject to very limited exceptions. Respondents had various proposals as to what those exceptions might be, including national security or cases where publication of the information could inflame the public against any particular group.

97. The rationale for this approach offered by respondents included:

> "*There is in a democratic society an even stronger common interest between the Government and those it governs in legal advice taken by the Government*." (Clifford Chance)

Question 4: Do consultees consider that changes to the role of the Attorney General in relation to criminal proceedings (including the role as superintending Minster for the prosecuting authorities) are needed? What are their views on the options outlined at paragraphs 3.26 to 3.39? Should other options be considered?

98. The consultation document set out four options for change in this area. A number of respondents did not consider specifically those options. Some respondents proposed variant models.

The Attorney General's superintendence functions

99. The majority of respondents (26 of the 31 respondents who expressed a clear view) considered that the Attorney General should retain the function of superintending the main prosecuting authorities. However, the majority of such respondents supported modifying this role as suggested by option (i) in the consultation document (clarifying the ambit of superintendence, including making it clear that the Attorney General cannot give a direction as to whether a particular prosecution should be brought), option (ii) (removing or limiting the Attorney General's public interest functions in relation to criminal prosecutions) or a variant model along similar lines.

100. General comments included:

> "*Paradoxically, however, such a change [removing the Attorney's functions of making decisions in relation to individual cases] would leave the argument for a political Attorney General in a stronger position, since the second and third principles [the merits of political interventions in relation to individual prosecutions and in the setting of prosecutorial policy being the subject of parliamentary accountability] are clearly political in nature. The Attorney would be responsible to Parliament for any policy decisions about the prosecution services and for "public interest" communications from the government to prosecutors. These sorts of decision do not fit with a non-political or independent Attorney General.*" (David Howarth MP)

101. Respondents who supported the Attorney General retaining the function of superintending the prosecuting authorities generally accepted that the Government has a legitimate role in the priorities and high level policies pursued by the prosecuting authorities. Reasons for this included the coercive nature of the prosecuting function and the need for accountability. For example:

> "*[There are] operational decisions about the delivery of the prosecutorial and criminal system such as the decision to concentrate resources on the enforcement of certain crimes… and correspondingly to reduce the priority of others… Such a decision concerns the allocation of scare resources – a matter traditionally within the realm of the executive*." (Professor Jeffrey Jowell)

> "*The government should be allowed to give general guidelines to prosecutors not only about procedural aspects of prosecution decisions but also about criminal justice priorities*." (David Howarth MP)

> "*We accept that ultimately the Attorney General should be responsible for prosecution policy. That seems to offer a safeguard for the public in that ultimately there is someone who can be held to account for the overall conduct of the prosecution services*." (Bar Council Working Group)

> "*The basic principle [is] that Ministers make policy and that civil servants are responsible for its implementation in individual cases*." (FDA)

> *"Prosecutorial decisions may perhaps not be so different from all kinds of other governmental decisions which have a direct impact on people's lives, liberty and security."* (Professor Philip Stenning)

102. Professor Jeremy Horder stressed the role of the Attorney in protecting the independence of the prosecutors.

> *"The Attorney General should be primarily the guardian of the independence of the CPS and of the DPP in particular. The Attorney General should be regarded as shielding the CPS/DPP from becoming mired in political controversy."* (Professor Jeremy Horder)

103. Other respondents highlighted the role of the Attorney in ensuring that the prosecutors adopt a consistent line where consistency is required but an agreed approach cannot be reached by the prosecutors themselves.

104. A small number of respondents (including DWP Prosecution Service and those who attended the seminar held for members of the Government Legal Service) emphasised the importance of the Attorney's functions in relation to those prosecuting authorities which the Attorney General has no statutory function of superintending (the Director of Service Prosecutions, authorities such as DBERR, DWP etc). These respondents emphasised the role of the Attorney in ensuring that the concerns of the smaller prosecuting authorities are not put at a

disadvantage as compared to the concerns of the larger prosecuting authorities. Comments included:

> "*From time to time, conflict arises between the demands of the court and administration of justice, and Ministerial policies. The Attorney General's role as pressure valve in this type of situation has been helpful.*" (DWP Prosecution Service)

The Attorney General's functions in relation to individual cases

105. The majority of those who responded on the point supported the proposal to clarify the concept of "superintendence".

> "*The first and most important point to make about the current position is that, whatever view one takes of the role of the Attorney in the prosecution services, the "superintendence" relationship is unsatisfactory and should be made clearer.*" (David Howarth MP)

106. Some respondents made general comments as to whether the Attorney should continue to have functions which related to individual cases including the power of direction in relation to individual cases. The majority considered that in general the Attorney should not have powers in relation to individual cases. Comments included:

> "*It is not in keeping with the doctrine of separation of powers… for the Attorney General to both set policy and apply it to individual cases, such as in individual criminal prosecutions. Therefore the Attorney General's responsibility in this area should be limited to the operational delivery of prosecutions (such as setting high level policy and strategy for the prosecuting authorities), removing the right to make decisions in individual prosecutions and making it clear that the Attorney General should not be giving directions on whether a particular prosecution should or should not be brought.*"
> (Mishcon de Reya)

107. But this view was not shared by all. A small number of respondents expressed reservations about providing that the Attorney General does not have the power to give a direction as to the handling of individual cases. Some were concerned about the adverse effect this would have on the ability of Parliament to scrutinise such decisions while others felt that the Attorney was best placed to exercise functions which are exercisable in the public interest.

> *"The various functions [that the Attorney currently has] in relation to criminal proceedings … exist to protect the public interest and the integrity of criminal proceedings. In exercising these important functions, the Attorney General, as a Minister of the Crown, is best placed to assess the public interest. In our view, the Attorney General is best placed to exercise legal functions in the wider public interest."* (Criminal Bar Association)

108. Some respondents supported the Attorney retaining the superintendence function only on the basis that other aspects of the role would be changed. Some felt the Attorney should cease also to be the Government's chief legal adviser. Some based their support for the Attorney continuing to superintend the prosecuting authorities on the basis that the role should cease to have any functions in relation to the formulation of criminal justice policy.

The Attorney General's functions in relation to criminal justice policy

109. Option (iii) in the consultation document envisaged the Attorney General continuing to superintend the prosecuting authorities but ceasing to play a role in the formulation of criminal justice policy.

110. Of the respondents who expressed a clear view on this point, a majority favoured ending this role or substantially reducing it. Comments included:

> "*Only one of the Attorney's current functions is unjustifiable: he or she should not be involved in policy making. It is not possible to be both policy-maker and adviser.*" (Lord Goodhart)

> "*We think that the disadvantages of his direct involvement in the general formulation of criminal justice policy are obvious: there is the potential for the Attorney General to be embroiled in politically contentious matters. There must be alternative mechanisms for the views of the prosecution to be fed into criminal justice policy than through the very direct involvement of the Attorney General and her office in criminal justice policy formulation*." (Bar Council Working Group)

111. A minority felt the opposite. For example:

> "*The role should extend to involvement in setting general prosecutions policy. The Attorney General's role in relation to general criminal justice policy should extend to involvement in, but not taking the lead on, criminal justice issues*." (Lord Phillips of Worth Matravers)

> "*It is vital that the Attorney General should retain his shared responsibility for criminal justice policy… more especially as the Lord Chancellor may not now be a lawyer*." (Lord Lloyd of Berwick)

> "*If the office of Attorney General (as the Minister for prosecutions) did not exist it would be necessary to invent it. Without such a Minister, the CPS in particular runs the risk that its funding requirements and its operational considerations will not be given adequate weight because there is no Minister to fight their corner with other Ministers*." (FDA)

Transferring functions in relation to criminal justice policy and superintending functions to another Minister

112. Option (iv) envisaged the Attorney's responsibility for criminal justice policy and the superintendence of the prosecuting authorities transferring to another department, possibly the Ministry of Justice.

113. All but one (Alan Beith MP) of those who expressed a clear view on this option strongly opposed the transfer of the superintendence of the prosecuting authorities to another existing Minister. Comments included:

> "*There must be complete separation between the prosecuting agencies on the one hand and the judiciary and the administration of the courts on the other. They must be, and must be seen to be, independent of each other. If the prosecuting authorities form part of the same ministerial department as the judiciary and the courts the independence of both may be threatened and it will be difficult to maintain the necessary perception that they are truly independent of each other*."(Lord Phillips of Worth Matravers)

> *"It would make no sense at all to transfer any of the criminal justice policy functions and superintending functions to a junior minister in the Ministry of Justice with no professional legal qualifications, especially the decision to prosecute in a particular case. It would add nothing of value. It would serve only to make the prosecuting authorities seem less independent of government."* (Lord Lloyd of Berwick)

> "*We feel that the MoJ already has a heavy brief, including responsibility for the judiciary, which some might argue is inconsistent with responsibility for the prosecution*." (Society of Labour Lawyers)

> "*Without a [separate] Minister the necessary "political" championing of prosecution authorities will be lost between the Home Office and the Ministry of Justice, and there may also be perceptions that [the] independence of prosecution decisions is imperilled*." (FDA)

Alternative suggestions

114. Some put forward alternative suggestions.

115. A minority of respondents felt that no change at all was needed to the current role of the Attorney General in relation to criminal proceedings. This included a number of former Law Officers. Comments included:

> "*While I appreciate that the public perception of the political independence of such decision-making is an important ingredient of public trust in it (and in the role of the Attorney General), I believe that any increase in such public perception would be achieved at too high a price – namely, significantly reduced effective public and political accountability – by most of these suggested reforms*." (Professor Stenning)

> "*I worry if one detaches the responsibility for prosecuting, even in individual cases, from that of a person fully responsible to Parliament in the way that only a Member of Parliament and one who is a member of a government can be held to that transparency and accountability for prosecuting decisions will disappear in large measure to the significant detriment of the public. … I have little doubt that a fully detached independent prosecuting system would find it difficult to respond to … the demand for accountability. It would be the public that would be the loser*." (Lord Goldsmith)

116. A number of respondents supported the creation of a new Ministerial post (but not as part of the Ministry of Justice) to carry out the functions of the Attorney in relation to prosecutions, possibly modified as outlined in options (i) and (ii). This was felt to reduce the potential for conflict between the role as legal adviser and the role in relation to prosecutions.

117. A number of respondents favoured appointing the Directors of the prosecuting authorities on a fixed term so as to give the holder of the post some guarantee of tenure.

118. One respondent (Professor Jeffrey Jowell) favoured an "independent" (presumably non-Ministerial) Attorney General exercising the current functions of the Attorney, possibly modified as outlined in options (i) and (ii).

Responses in relation to specific functions

119. A number of respondents commented on particular functions the Attorney General currently exercises in relation to criminal proceedings.

120. Respondent's views as to whether the Attorney should, in general, continue to have functions which relate to individual prosecutions are dealt with elsewhere. The comments of respondents which relate specifically to individual functions are below.

121. In relation to the Attorney General's function of consenting to prosecutions, the majority of respondents favoured the Attorney retaining a limited range of consent functions, in particular those which related to offences which have implications for national security or international relations. The rest would be transferred to the DPP. (This approach reflects the recommendations made in 1998 by the Law Commission – see *Consents to Prosecution* LC 255.)

122. Others (including the minority report to the Bar Council Working Group, Mishcon de Reya, the FDA, John Tyler) favoured transferring all of these functions to the DPP. Comments included:

> *"Changes would probably neither increase nor decrease the risk of controversy. The risk would transfer to the DPP, but he/she would not be a member of the Government."* (Richard Jackson)

123. Others wished to go further and abolish all provisions requiring the consent of the Attorney General to a prosecution (including the Assistant Chief Constable of West Yorkshire Police, Transparency International (UK)) although a small number (including the Criminal Bar Association) favoured retaining the status quo.

124. A number of respondents (including Lord Mackay of Clashfern) noted that the fact that Parliament continues to legislate so as to confer new consent functions on the Attorney is testimony to continuing public confidence in the role.

125. In relation to the Attorney General's function of entering a *nolle prosequi* (the effect of which is to halt a trial on indictment), the majority of those who expressed a view (including Sir Iain Glidewell, Mr Justice Calvert-Smith, DWP Prosecution Division and Richard Jackson) considered that this should be abolished or transferred to the relevant prosecutor. Some considered that the prosecutor should consult the Attorney in cases of difficulty. Others (the Criminal Bar Association and the FDA) favoured the Attorney retaining this function.

126. In relation to the Attorney General's function of referring unduly lenient sentences to the Court of Appeal, views were evenly split. Some (including Professor Jeremy Horder) considered that this should be transferred to the prosecuting authorities, possibly with a requirement to consult the Attorney in cases of difficulty. Others (the Society of Labour Lawyers and Mr Justice Calvert-Smith) felt this function should remain with the Attorney on the basis that the decision whether to refer a sentence required wider consideration of the public interest and that the function might involve consideration of cases where the prosecution has been at fault.

127. In relation to the Attorney General's function of referring points of law in criminal cases to the Court of Appeal, views were divided. Some respondents (including Mr Justice Calvert-Smith) considered that this function should be transferred to the prosecuting authorities. Others felt that this was a "rule of law" function which properly rested with the Attorney General.

128. In relation to the suggestion in the consultation document that the Attorney General retain a role in relation to particular cases which gave rise to implications for national security or the wider public interest, 14 of the 16 respondents who commented on this point favoured the Attorney retaining some role in this area although views varied as to what form the role should take. Some felt the Attorney (or other Minister) should have the power (subject to appropriate mechanisms to ensure accountability) to prevent a prosecution from proceeding which threatens national security or other key public interests. For example:

> "*The argument in principle is that authority should follow responsibility, and that it is not appropriate that the government, which has ultimate responsibility for the security of the nation, should not have the authority to decide whether a prosecution that seriously threatens that security should be allowed to proceed*." (Professor Stenning)
>
> "*It is essential that the delineation [of the relationship between the prosecutors and the Attorney] preserve the powers of the Attorney General in respect of cases involving national security.*" (Criminal Bar Association)
>
> "*If anyone is to be given a power to discontinue individual prosecutions in the public interest then it should be a Minister. Any such decisions would by definition, involve non-legal political considerations. As such, they should be taken by a politician who is accountable to Parliament, not by the DPP.*" (Minority report to the Bar Council Working Group)

129. But other respondents (including JUSTICE, the Society of Labour Lawyers and David Howarth MP) considered that the prosecutor, after consulting the Attorney or other relevant Ministers, could form his/her own view as to whether bringing a particular prosecution would prejudice national security or otherwise be contrary to the public interest.

130. Professor Jeremy Horder noted that the requirement to obtain the Attorney's consent to a prosecution of certain offences was an inadequate means of ensuring that the Attorney's views on the implications of a prosecution for national security or international relations were identified. Such issues may arise in cases for which there is no consent requirement.

Question 5: What if any changes do consultees consider are necessary to the Attorney General's public interest functions (other than those functions which relate to individual criminal prosecutions)?

131. A large number of respondents who commented on this point considered that no change was needed to the Attorney General's public interest functions (other than those functions which relate to individual criminal prosecutions).

General responses

132. JUSTICE favoured codifying the functions. One consultee (Professor Zellick) considered that a new public office should be established for the purpose of exercising the Attorney General's wider public interest functions.

Specific functions

133. JUSTICE considered that the power to bring contempt proceedings should be transferred to the prosecuting authorities.

134. JUSTICE considered that the power to bring proceedings to restrain vexatious litigants should be transferred to the prosecuting authorities.

135. A small number of respondents (the Society of Labour Lawyers and the FDA) favoured the establishment of an independent office holder to represent the public interest in civil proceedings. Views as to what such a Director of Civil Proceedings would do varied and ranged from taking civil proceedings against Ministers where there was concern about the legality of their action (proposed by the Society of Labour Lawyers) or to exercise functions which bear on an individual case but which do not necessarily relate to the wider public interest (proposed by the FDA). The minority report to the Bar Council Working Group favoured transferring the function of intervening in private law cases to another Minister.

136. A small number of respondents (Richard Jackson and the General Council of the Bar of Northern Ireland) considered that the functions of the Attorney General in relation to charity proceedings should transfer to the Charity Commission and the functions in relation to family proceedings should pass to the Treasury Solicitor. A small number of respondents (Donor Watch and Peter Southwood) expressed concerns that the Attorney General's functions in relation to charities and his/her role as a Minister of the Crown may give rise to a conflict of interest.

Question 6: What if any other changes do consultees consider are needed to the role of the Attorney General?

137. The majority of respondents who commented on this point considered that no other changes were needed to the role of the Attorney General.

Judicial Appointments

Background

138. The consultation document, *The Governance of Britain*: *Judicial Appointments* was published on 25 October 2007. It was one of three consultation documents arising from *the Governance of Britain* Green Paper published on 3 July 2007, which sought to address two fundamental questions: how should we hold power accountable, and how should we uphold and enhance the rights and responsibilities of the citizen?

139. In terms of the powers exercised by the executive, the Green Paper stated that: *The Government will seek to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive (subject to consultation with interested parties and, where necessary, legislation)*. The paper lists a number of areas where it includes an intention for the Government to surrender its powers. These include: *the right to have a say in the appointment of judges*.

140. The Judicial Appointments consultation document sought 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.

141. 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.

142. The consultation document also 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.

143. The consultation period closed on 17 January 2008 and this report summarises the responses.

Summary of responses to the consultation questions

144. Thirty-four responses to the consultation document were received. Of these, 10 responses 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. The Government would like to thank respondents who provided their comments on the Judicial Appointments process.

145. The consultation document asked 16 questions. Some of the respondents covered all the questions asked in the consultation document, whilst others addressed particular points. Some respondents replied specifically to the questions, whilst others preferred to highlight relevant issues by way of general comments.

146. All views have been taken into account and responses have been summarised accordingly.

Responses to Specific Questions

Question 1: Do you consider these principles for judicial appointments to be broadly right?

147. Twenty-seven responses were received to this question. Most respondents addressed the question directly, with all but one respondent (who did not elaborate) agreeing that the principles of independence of the judiciary, appointment on merit, equality, openness and transparency, and efficiency and effectiveness were broadly right.

148. The Judicial Executive Board and Judges' Council, responding jointly, commented that the present constitutional structure is right, having been founded on extensive and constructive discussions in Parliament and between the Government and judiciary.

149. A small number of those who agreed did so with qualifying comments. The Bar Council pointed out that the principles should be seen not as a finished blueprint, but rather as a route map towards a new constitutional settlement. A joint response submitted by two Social Security and Child Support Commissioners agreed that the principles were broadly right, but suggested that the principles of efficiency and effectiveness could be more fully realised for tribunal appointments. The Chancery Bar Association commented that the principle of equality, as outlined in the consultation document, appeared to be confused, consisting of different facets, such as a fair and open system, diversity, and outward focus (namely an understanding and appreciation of the needs and experiences of individuals who appear before judges).

Question 2: Are there any other fundamental principles that should underpin the process for judicial appointments?

150. Twenty-eight responses were received to this question. Approximately one third of respondents suggested additional principles. A legal academic argued that accountability should be seen as an important principle in the appointment of 'increasingly unelected judicial decision makers'. A number of respondents, including the Law Society and two legal academics, emphasised the importance of diversity, which, it was argued, should be seen as a stand-alone value rather than being subsumed under equality. One respondent commented that, in light of the changing demographic make-up of the country, consideration should be given to implementing requirements analogous to those which apply to the Northern Ireland Judicial Appointments Commission, namely to appoint solely on the basis of merit, but to also engage proactively in measures to ensure that judicial office holders are reflective of the community.

151. Other general principles suggested by respondents included flexibility, proportionality, security of tenure (for judicial office holders), skill, diligence, understanding, impartiality and integrity.

152. A legal academic, whose submission was concerned exclusively with the appointment of Justices to the new UK Supreme Court, suggested that appointments to the Supreme Court should be balanced to reflect the changing nature of legal decisions and our legal system.

Question 3: Do you consider the existing arrangements for making judicial appointments properly take account of these principles?

153. Twenty-eight responses were received to this question. Approximately one third agreed that the existing arrangements took into account the principles.

154. Sir John Brigstocke KCB, Judicial Appointments and Conduct Ombudsman, commented that, from his experience of the relatively small number of appointments-related complaints he had received, the process is nearly always fair and open, and achieves appointment on merit.

155. The Judicial Executive Board and Judges' Council commented that while some improvements could be made to ensure the process ran more smoothly and with less delays, the judiciary saw no reason to change the essential scheme of the Concordat and the Constitutional Reform Act 2005 (CRA). Similarly, the Civil Court Users Association commented that, while there was scope for improvements, the general principle of a process involving both the Judicial Appointments Commission (JAC) and the Lord Chancellor was favourable.

156. A legal academic felt that the current system represented a major improvement on the old, in terms of the potential to take account of the key principles outlined in the consultation document, but, along with some other respondents, questioned whether diversity was being given due priority.

157. Those respondents who did not agree that the existing arrangements properly take account of the principles advanced a variety of reasons. The Bar Council expressed concern that the current arrangements do not properly take into account the fundamental principle of equality as described in the consultation document. They suggested that diversity should be a specific quality and ability for judicial appointment, in the same way as there is such a competency relating to diversity in the Silk appointments procedure.

158. One respondent argued that the principle of independence could not be considered to operate if the Lord Chancellor retained the power to accept, reject, or require reconsideration of the JAC's recommendations.

159. The Law Society highlighted a number of what it saw as deficiencies in the current system. The Society felt that the status of the JAC, as a non-departmental public body sponsored by the Ministry of Justice, meant that the Government retained too much influence over the appointments process. The Society also expressed concern about the level of judicial influence over the process through the significant judicial presence on the JAC and the JAC's practice of seeking references before rather than after the interview stage for appointments. A lack of representation of women and Black Minority Ethnic (BME) communities amongst the judiciary was also cited as a concern, as was a lack of solicitors, particularly above the level of District Judge. The Law Society also raised general concerns in respect of there being a lack of a single organisation responsible for judicial appointments, and about the overall length of the appointments process.

160. The Judge Advocate General, His Honour Judge Jeff Blackett, suggested that having witnessed and participated in the selection process, the process of application by completion of self assessment form was not entirely satisfactory, having a tendency to favour those more proficient at form filling.

Question 4: Should the current role of the executive in judicial appointments be altered? If so, how?

161. Twenty-eight responses were received to this question. Slightly under half of respondents said that the role of the executive should remain broadly the same.

162. The Judicial Executive Board and Judges' Council agreed that there is a formal constitutional role for the Lord Chancellor in the process, which should serve as a final check to ensure that due process has been followed, as part of his wider responsibility for the maintenance of the judicial system.

163. A legal academic argued that there has been no suggestion of any threat to judicial independence as a result of executive involvement and nor is this likely to occur. Another legal academic argued that the executive has a legitimate strategic interest in the proper functioning of the Judiciary as a whole.

164. One respondent argued that change was premature and that, in any event, there needs to be proper accountability to Parliament through the executive.

165. Although not in favour of changing the current balance, the JAC did suggest that improvements could be made to the operation of the system. These included a parliamentary element in the appointment of the JAC's Chairman and greater availability of information about the process by which Commissioners are appointed. The JAC also argued for abolition of the statutory right of the Secretary of State to issue guidance about its procedures and for a statutory duty on Government to provide sufficient funding for it to carry out its work effectively.

166. Of those respondents in favour of change, the Law Society advocated the complete removal of the executive from the appointments process, stating that the Lord Chancellor's role is incompatible with judicial independence and creates the perception of patronage by Ministers. The Society suggested that the JAC should become a non-Ministerial Department and take over the role of making or, where appropriate, recommending appointments to Her Majesty The Queen.

167. The Council of Circuit Judges argued that the principle of the separation of powers, the fact that the Lord Chancellor had not thus far exercised his powers to reject or require reconsideration of a decision by the JAC, and the fact that the Lord Chancellor is no longer required to be legally qualified, all pointed towards grounds for removal of the Lord Chancellor from the process. His Honour Judge Jeff Blackett, Judge Advocate General, argued for removal of the Lord Chancellor from the process, as his role carries a danger of perception of political interference. He suggested, in common with some other respondents, that the Lord Chief Justice should be given the power to make appointments, or make recommendations to Her Majesty The Queen.

168. While most respondents discussed removal of the executive in general terms, a significant number advocated the removal of the Prime Minister from the process of appointments to the most senior posts. This was generally on the grounds that such involvement added no value to the process, with one respondent also suggesting that his involvement created confusion about the process.

Question 5: Should the current role of the judiciary in the process be altered, and if so how?

169. Twenty-eight responses were received to this question. Just over half of respondents favoured maintaining the current role of the judiciary in the appointments process. Of those advocating change, six favoured an increased role for the judiciary. Two respondents argued for a reduced role.

170. The majority of respondents recognised the importance and value of a consultative role for the judiciary in the appointments process. The Judicial Executive Board and Judges' Council argued for retention of the current arrangements, while advocating giving the Lord Chief Justice a statutory right to delegate his role in the consultative process, set out in sections 87, 88 and 94, of the CRA to other suitable judges. The JAC stated that it is in the process of preparing guidance on how the process of statutory consultation can be made more helpful.

171. A retired senior judicial office holder pointed out the importance of listening to and taking account of the views of the senior judiciary and suggested that this should be extended to consulting Presiding Judges on the circuits, as they have considerable knowledge of judges on circuit.

172. Suggestions for an extended role for the judiciary included placing the power to make appointments, or making recommendations to Her Majesty The Queen, in the hands of the Lord Chief Justice acting on the recommendation of the JAC, and a power enabling the Lord Chief Justice to require the JAC to reconsider its selected candidate for an appointment.

173. Of those who advocated a lesser role for the judiciary, a legal academic argued that the high status afforded to judicial references and consultation should be lessened to reduce inherent bias against able lawyers who do not have regular contact with judges. Similarly, a firm of solicitors argued that while a consultative role for the judiciary was important, the system favours those candidates who practise oral advocacy and as such have regular contact with the judiciary. The Law Society argued for a reduction and clearer demarcation of the judiciary's role in the process. The Society's main concerns were the practice of taking up judicial references prior to selection, and the involvement in senior appointments of a panel composed of two senior judges and two lay members of the JAC. The Law Society proposed placing both the selection and appointments of judges into hands of the JAC, which should have an increased number of lay members.

Question 6: Whether or not there is a change in the role of the executive or the judiciary, should the legislature be involved in the process in some way, for example by holding post-appointment hearings? If so, how?

174. Twenty-nine responses were received to this question. Nineteen respondents opposed involving the legislature in the appointments process, while five respondents offered suggestions on how the legislature could play a valuable role, although only one respondent argued in favour of hearings.

175. Arguments against a role for Parliament generally echoed those outlined in the consultation document. The main objection was the danger, real or perceived, of politicising the process. The Residential Property Tribunal Service argued that our constitutional arrangements, unlike those of the United States, are not suited to either pre or post-appointment hearings. Respondents also commented that the involvement of Parliament would add little, if any, value to the process, be a drain on, or subject to, parliamentary time and resources, and be liable to delay the overall appointments process. It was also argued that the spectre of attending pre or post-appointment hearings would deter candidates from applying.

176. Of those who favoured a role for Parliament, a legal academic advocated post-appointment hearings for the most senior judicial offices, pointing out that newly established Canadian confirmation hearings have been widely considered a successful way to inject accountability into the system and allow more to be known about top level judges.

177. One respondent suggested that if the role of the executive in appointments is reduced, there may be a need to introduce increased scrutiny, which could be achieved by extending the role of the Ombudsman to proactive audit of the process, and by decoupling the role of the Ombudsman from the executive and linking the office directly to Parliament.

178. The JAC stated that post-appointment hearings carried too great a risk of politicisation of the process, but thought that, subject to appropriate safeguards, a parliamentary element in the appointment of the JAC Chairman could have more merit. The Law Society argued for the Chairman of the JAC to become directly accountable to Parliament for the operation of the JAC.

Question 7: Should any change to the arrangements for judicial appointments be across the board, or should it apply to a group of appointments, for example by removing the Lord Chancellor from the process of appointment for all but the senior judiciary?

179. Twenty-three responses were received to this question. Approximately one half of respondents argued that any changes should be applicable across the board. Around a third of respondents argued that the changes should be partial and

apply only to certain appointments, and a small number did not express any particular conclusion.

180. While a number of respondents advocating change across the board did so as part of argument in favour of removing the executive from the process, others argued for across the board change on the grounds that certain key principles applied to all levels of appointment.

181. The JAC's position was that the current arrangements were satisfactory, but if change was to be made it should apply to all levels of appointment on the basis that constitutional considerations are the same regardless of whether the appointment is at Deputy District Judge or High Court level. The JAC did, however, state that there may be a case for a review of the system for appointments to the Court of Appeal, Heads of Division and the Lord Chief Justice.

182. A member of the High Court Judiciary responding in an individual capacity argued that it would be divisive to distinguish between different ranks of judiciary by involving the Lord Chancellor in only certain appointments.

183. Responses advocating that any change should be partial were largely concerned with reduction or change to the role of the Lord Chancellor in the process. A number of these respondents commented that executive involvement in the most senior appointments was justified by the wider ramifications of decisions made by the most senior judges.

184. The Judicial Executive Board and Judges' Council suggested that in light of the fact that the Lord Chancellor is no longer required to be legally qualified, the usefulness of his personal involvement in appointments was questionable, although there were arguments for involvement at the High Court level and above in terms of the constitutional position of the role and the involvement of Parliament in any disciplinary measures in relation to appointments at and above this level. Below the High Court, the Lord Chancellor's role should become to formally accept the advice of the JAC, thereby surrendering his statutory power to require reconsideration or reject a selection.

185. A senior member of the tribunals judiciary argued that if the Lord Chancellor were to retain a role in any appointments there would be no reason for that role to include lower levels of the judiciary, including all tribunals judiciary, which should be placed in the hands of the Lord Chief Justice. A joint response from two tribunal office holders suggested that the Lord Chancellor need only retain a role in sensitive tribunal appointments, such as those relating to security matters.

Question 8: Should there continue to be some check (currently exercised by the Lord Chancellor) on recommendations from the JAC? And if so, who is best placed to perform that role?

186. Twenty-six responses were received to this question. Over two thirds of respondents were in favour of continued checks on recommendations from the JAC. Approximately one third of these respondents, including the JAC itself, advocated retaining the current arrangements.

187. A legal academic commented that the current system 'has only just been implemented and there is no indication that it won't work well'. Another respondent stated that the Minister for Justice is appropriate for the role, as someone who is not a member of the judiciary and is accountable to Parliament.

188. The Bar Council argued that, in light of the fact that the appointments system is still an 'evolving process', the Lord Chancellor should perform this function in consultation with the Lord Chief Justice. They also suggested, however, that this issue should be revisited at a later date.

189. Suggestions by respondents who advocated or considered a continued check on recommendations of the JAC, other than the current arrangements, generally favoured two broad options: an expanded role for the Lord Chief Justice by giving him the power to require reconsideration of a selection by the JAC, or giving him a power of veto, or an expanded role for the Judicial Appointments and Conduct Ombudsman (JACO). The Civil Court Users Association argued for a system of scrutiny of the process by the JACO, who would report any concerns to the Lord Chancellor.

190. The small number of respondents, including the Law Society, who advocated removal of checks on the JAC's recommendations did so on the basis of a wider argument that the executive should be removed from the appointments process.

Question 9: Should the need for consultation or concurrence be removed for decisions on authorisation, nomination, assignment, and extensions of service?

191. Twenty-three responses were received to this question. Around two-thirds of the respondents were in favour of completely removing the need for the Lord Chancellor's concurrence with one respondent suggesting that the Lord Chancellor should be able to delegate that function to junior ministers or senior officials. The remaining third of respondents suggested ways in which the requirement for the Lord Chancellor's concurrence could be removed in part, with two respondents arguing that there should be no change to the existing requirement for the Lord Chancellor's concurrence.

192. One respondent argued for removal on the basis that the current arrangements involved an unnecessary duplication of work. Another argued that the Lord Chief Justice, in consultation with the Heads of Division and Presiding Judges, has the necessary knowledge and should be left in charge of such matters. One respondent pointed out that, as the Lord Chancellor has always accepted the recommendation of the Lord Chief Justice, his involvement is no longer warranted. Another respondent argued for removal, save where the Lord Chief Justice's proposals would have financial implications. Similarly, the Judicial Executive Board and Judges' Council argued that there was no reason for the Lord Chancellor to be involved in decisions with no financial implications – such decisions should be for the senior judiciary.

193. Although most advocates of change felt that the responsibility for decision making should lie with the Lord Chief Justice, the Law Society argued that, in the interests of fairness and transparency, the JAC should make the decisions.

194. The JAC suggested that the judiciary should be invited to propose, for each type of significant designation or nomination, a set of procedures which would satisfy the criteria of openness and accountability. The JAC would then be invited to approve these procedures. When it had done so, these would be put in operation by the judiciary, with no role for the JAC in concurring with individual decisions.

195. The Bar Council suggested that, in light of the fact that the posts in question entail an element of judicial leadership, they should be filled via open and transparent procedures, having been advertised in advance to enable interested parties to make their interest known.

196. Of those who favoured maintaining the status quo on this issue, one respondent argued that such decisions could be just as important as the original appointment decision. The only other respondent who directly answered 'no' to this question did not give reasons.

Question 10: Should the Lord Chancellor's functions in making or recommending judicial appointments be exercisable by junior Ministers or senior officials, or should the Lord Chancellor always exercise those functions personally?

197. Twenty-four responses were received to this question. Approximately one half of respondents argued that the Lord Chancellor should retain a personal role. Approximately one half were agreeable to some form of delegation for appointments up to a certain level (see responses to question 11 below). One respondent was content for the Lord Chancellor's functions to be delegable to senior officials, but not to junior ministers. A legal academic agreed that the workload created the risk of delays and was in favour of delegation to junior

ministers, provided that suitable systems were in place for scrutiny and the Lord Chancellor remained accountable overall.

198. Of those opposed one respondent argued that if the issue was sufficiently important to retain the involvement of the Lord Chancellor he should take direct responsibility, and that his special role under the CRA meant that such functions were not suitable for delegation. The Law Society commented that if the Lord Chancellor's role was to be retained at all, it should be exercised by him personally. The Council of Circuit Judges argued similarly that if, against their views, the Lord Chancellor was to retain his functions, they were of sufficient importance to rest with him personally.

Question 11: Should the Lord Chancellor be required to act personally when making or recommending judicial appointments above a certain level, and if so, what should that level be?

199. Twenty-five responses were received to this question, with a number of respondents referring to their answers to question 10. As reflected in responses to question 10, approximately half of respondents were in favour of some form of delegation and the majority of these agreed that this should be limited to appointments below a certain level. Three respondents argued that the Lord Chancellor should act personally for appointments to the High Court and above (the Chancery Bar Association also suggested including specialist county court judges appointed under section 9 of the Supreme Court Act 1981 to sit in the High Court). Another made the point that, while there should be no formal distinction, it was clearly appropriate for the Lord Chancellor to be more proactive and engaged in the case of the most senior appointments. The London Common Law and Commercial Bar Association advocated a personal role for the Lord Chancellor in appointments at and above the level of Circuit Judge.

200. Three respondents specified that the Court of Appeal and above was the right level for the retention of a personal role by the Lord Chancellor. Among them, Sir John Brigstocke KCB, Judicial Appointments and Conduct Ombudsman, commented that the Lord Chancellor should retain a role in appointments at this level due to the importance of the link provided by the Lord Chancellor between the Government and the Judiciary.

201. The Judicial Executive Board and Judges' Council argued that if, against their views, the functions of the Lord Chancellor in relation to judicial appointments were to be delegated, it would be necessary to also delegate his statutory duty to uphold judicial independence, to ensure the Judiciary have the necessary support to enable them to exercise their functions, and to have regard for the public interest in judicial matters.

Question 12: Should it be possible for junior Ministers or senior officials to act on behalf of the Lord Chancellor, when his concurrence or consultation is required in relation to nominations, authorisations, assignment, or extensions of service?

202. Twenty-five responses were received to this question. One quarter of respondents were in favour of junior Ministers or senior officials being able to act for the Lord Chancellor. It should be noted that a number of respondents referred to their response to question 9, in which they had advocated removal of the Lord Chancellor's role in such matters.

203. One respondent argued against delegation of this function to guard against the risk of it being used to bestow 'political favours'. However, another commented that the aim should be for the process to be as flexible and efficient as possible, which could include provision for delegation to Ministers or senior officials. Another respondent argued that if, against their views, the Lord Chancellor's function was not to be removed, it should be delegated to senior officials. Conversely, another respondent suggested that while junior Ministers would be acceptable, delegation to senior officials would not.

204. As with their response to question 9, the Judicial Executive Board and Judges' Council argued that if, against their views, the functions of the Lord Chancellor were to be delegated, it would be necessary to also delegate the Lord Chancellor's statutory duty to uphold judicial independence, to ensure the Judiciary have the necessary support to enable them to exercise their functions and to have regard for the public interest in judicial matters.

Question 13: Do you agree that the Lord Chancellor should ultimately have the responsibility for determining eligibility criteria for specific judicial posts?

205. Twenty-six responses were received to this question. Three respondents agreed that the Lord Chancellor should have ultimate responsibility. Of the remaining respondents, the majority (18) argued for some form of joint arrangement involving consultation between the Lord Chancellor and JAC or the Lord Chancellor and the Judiciary. A smallnumber of respondents suggested that the responsibility should lie with either the JAC or the Judiciary alone, or both.

206. Of those respondents who agreed with the proposal, Sir John Brigstocke KCB, Judicial Appointments and Conduct Ombudsman, argued that the JAC exists to select judges who meet the needs of the system and that it follows that it should be 'the system', in the form of the Lord Chancellor, who has responsibility for identifying those needs.

207. Of those who argued for joint arrangements, the Judicial Executive Board and Judges' Council commented that the Lord Chancellor should have responsibility for determining non-statutory criteria in consultation with the judiciary, and

that the consultative role should be established in statute. Another respondent argued that the criteria should be determined by the Lord Chancellor in consultation with the Lord Chief Justice and JAC. One respondent argued that the Lord Chancellor should determine the criteria in consultation with the Lord Chief Justice or Senior President of Tribunals, in order to ensure that concerns such as encouraging diversity are balanced against business need and judicial performance. A firm of solicitors argued that the Lord Chancellor should obtain the concurrence of the Lord Chief Justice for any changes to statutory criteria and that non-statutory criteria should be decided between the Ministry of Justice and the senior judiciary, with no involvement from the JAC.

208. The Bar Council argued that it was vital for the JAC to be consulted about, and be in agreement with, the eligibility criteria for a specific judicial post. They recommended that the position should remain as it is while the relatively new appointments process beds down.

209. The JAC argued that it was ideally placed to balance business needs with the wider public interest and as such it should have the legal responsibility for making the final decision, for which clarification of the legal position would be helpful. The Law Society also advocated giving responsibility solely to the JAC. Another respondent argued that it should be for the JAC alone, as a further means to remove any political element from the process.

Question 14: Should medical checks be carried out earlier in the selection process?

210. Twenty-four responses were received to this question. All but two respondents favoured medical checks being carried out earlier in the selection process.

211. Of those who disagreed, the Bar Council suggested that medical checks could only practicably be carried out in relation to candidates already assessed as suitable for appointment. The other respondent disagreed with medical checks altogether.

212. Those who agreed with earlier checks tended to do so on the basis that it would speed up the appointments process and that the risk of a candidate who had undergone the checks subsequently not being appointed was very low.

213. The JAC argued that medical checks should not form part of the selection process, but are instead relevant to appointment decisions. It suggested that the Ministry of Justice should take full responsibility for managing medical checks, as the body with responsibility for making appointments. These could be carried out concurrently with other aspects of the process, thereby speeding up the overall process.

Question 15: Should the CRA be amended to allow the Judicial Appointments Commission to take the preliminary steps in a selection process before a formal Vacancy Notice is received?

214. Twenty-five responses were received to this question. All but two respondents agreed that the JAC should be able to take preliminary steps prior to issuance of a formal vacancy notice.

215. As with responses to question 14, those who were in favour cited the potential for reducing delays. The Bar Council, for example, argued that this change would speed up the appointments process and provide maximum notice to potential applicants of an impending opportunity.

216. The JAC pointed out that, in order to manage its selection process as efficiently as possible, it needs to engage as soon as possible with the Court Service and Tribunals Service, a process which, under the CRA, is triggered by receipt of a vacancy notice and thereby could be seen to inhibit early discussions. However, the JAC stated that agreement has been brokered in consultation with interested parties to ensure that at the start of the financial year it is provided with full and accurate documentation on all vacancies for which appointments will be sought over the coming year.

217. Of those who disagreed, one respondent argued that such a change would affect the transparency of the process. The other respondent who objected did not give reasons.

Question 16: Are there, in your view, any additional changes that should be made to the judicial appointments process?

218. Twenty-five responses were received to this question. Some respondents made general points of principle about the appointments process, some argued against change, while others made specific suggestions for changes.

219. A number of respondents, both individuals and organisations, made the general point, in response to this and other questions, that the current system, having existed in its present form for approximately two years, should be given more time to bed in before judgements could reasonably be made about whether to make further changes.

220. One respondent argued that the CRA should be amended to recognise the large part of the JAC's work represented by tribunal appointments. It was argued that, given that only one Commissioner directly represents tribunals, there should be a provision for the JAC to delegate to a tribunals appointments committee.

221. The Bar Council, pointing to a lack of significant increases in applications from women and BME candidates, argued that confidence amongst these groups must be boosted and that positive measures such as mentoring and encouraging applications from under-represented groups should be contemplated to widen the pool of applicants. The Law Society argued in favour of removing the current prohibition on holders of judicial office returning to legal practice on ceasing to hold office.

222. In order to remove what it sees as an element of undesirable uncertainty in the appointments system, the JAC argued for abolition of competitions carried out under the provisions of section 94 of the CRA, whereby the JAC draws up lists of candidates potentially selectable for vacancies, which may or may not ultimately arise. It was argued that all competitions should instead be run under Section 87 of the CRA, whereby set numbers of vacancies would be specified.

223. The London Common Law and Commercial Bar Association commented that the system should be more "applicant friendly", particularly in relation to applicants passed fit for appointment but not appointed immediately and who wish to reapply during a subsequent appointment round. The Association suggested that such applicants should not have to go through the full process again and that a system should be developed to enable to them to simply disclose any material changes in their fitness for appointment since their previous application.

224. The Commercial Bar Association (COMBAR) responded to only question 16 to raise concerns that the current appointments system created lengthy periods of uncertainty for candidates, whereby they may be deemed suitable for appointment to the Commercial Court with no certainty of appointment, or substantial delays before appointment. This had negative implications for their work as barristers. COMBAR argued that changes should be introduced to ensure that the JAC and Lord Chief Justice know who the best candidates for specialist posts are, so that when vacancies arise they could be filled quickly. A similar point was made by a judge of the Commercial Court, who pointed out that the court was finding it increasingly difficult to attract judges of suitable calibre and experience since the new system came into being.

Treaties

225. The consultation document on *War powers and treaties: Limiting Executive power* which was published on 25 October 2007, proposed that the procedure for allowing Parliament to scrutinise treaties should be formalised and sought the public's views on this matter. Consultations closed on 17 January 2008.

Summary of responses to the consultation questions

226. Eleven responses were received to the consultation on treaties. Of these, seven gave responses on a question by question basis and four responded in the form of general comment.

227. The Government is grateful to respondents for the comments they provided. The following summarises respondents' views on the 8 questions raised with regard to treaties in the consultation document.

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

228. Six responses indicated support for placing the Ponsonby Rule onto a statutory footing, or said that there was no reason why this should proceed as proposed in the consultation document. Four were against this proposal or saw no benefit in it; of these, two considered that current arrangements provide Parliament with adequate powers of scrutiny, while the other two advocated leaving the Ponsonby Rule to operate as a convention while instituting other reforms to parliamentary practice. One was in favour of statutory provision for parliamentary oversight but considered the Ponsonby Rule ineffective.

229. Two respondents suggested that it did not go far enough, because the Ponsonby Rule was seen as insufficient and very rarely leads to debates or votes on treaties. One suggested that the Ponsonby Rule should only be triggered after a select committee has produced a report expressing their view on a particular treaty. One respondent did however support making statutory provision for parliamentary oversight of treaties.

230. None expressed strong opposition to the proposal.

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

231. The consultation document explained that occasionally it is necessary to depart from standard procedures by shortening the 21-sitting day period or by using alternative methods to consult and inform Parliament (for example, when Parliament is not sitting). Six respondents answered this question, all of whom indicated support for the provision of alternative procedures and flexibility to accommodate exceptional circumstances.

232. Three respondents suggested that flexibility should be built into the legislation so long as the overall supremacy of Parliament is recognised.

233. One respondent suggested that if the Ponsonby Rule remained a constitutional convention, there would be no need to provide for flexibility in statute. Another response said that it will be necessary to retain the present flexibility for exceptional cases, the precise nature of which cannot be predicted in advance.

Question 14: Should established exceptions to the Ponsonby Rule (such as double taxation treaties – where alternative arrangements are provided for under statute) also be provided for and if so how?

234. Five respondents agreed with the view put forward in the consultation document that established exceptions for categories of treaty such as double taxation treaties should be retained; four respondents did not offer a reply. Some respondents also expressed the view that it should be up to Parliament to determine the level of scrutiny required for a particular treaty.

235. One respondent argued that all treaties should be subject to the Ponsonby rule (but the same respondent argued against putting the Ponsonby Rule onto a statutory footing).

236. A specific proposal to give the Government a power to specify by Statutory Instrument a category or categories of treaties to which the Ponsonby Rule does not apply was set out in the consultation document and illustrated in the draft Clauses. One respondent thought the proposed clauses satisfactory, but there was no specific comment from others.

Question 15: Are changes required to parliamentary procedures in either House for triggering a debate on a treaty?

237. The consultation document summarised existing procedures for triggering a debate, without presenting any proposal on this issue. Three respondents said that there was no need to change existing parliamentary procedures for triggering a debate on a treaty and four did not offer a reply. Four respondents proposed that it should be made easier to trigger a debate. Options included:

mandatory debates for all treaties, select committees able to trigger debates, debates automatically triggered by a motion signed by one MP, or triggered by a motion signed by 10 percent of MPs, respectively.

Question 16: Should there be provision for extending the 21 sitting-day period if Parliament asks for further time (and if so how) or should there be a longer minimum period without provision for extension?

238. The question outlined a range of options without expressing a government preference. Responses indicated broad support for flexibility so as to enable Parliament to have additional time to scrutinise particular treaties when necessary. Seven supported – or did not express opposition to – 21 sitting days as the standard laying period and four did not comment. One respondent commented that 21 sitting days is already a substantial period which has given rise to some difficulties in practice and that a general extension of the time period would have little countervailing advantage. Another respondent commented that a significant extension would engender a degree of uncertainty in the capacity of the Government to conclude treaties with other states.

239. No one expressed support for it to be extended to 40 days in all cases (although one response proposed 3 months as standard).

240. A variety of views were expressed on *how* requests for extensions should be made and considered. For two respondents the main concern was to ensure that the Government is able to ratify treaties promptly, while for two others it was to ensure parliamentary control over the length of the scrutiny period, for example by giving select committees the power to trigger an extension of the scrutiny period. One respondent suggested that the Government be required more formally through convention to accede to reasonable requests for an extension. No specific proposals were made for statutory extension mechanisms.

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

241. The question presented four options without indicating a government preference.

242. Five respondents supported the principle that a vote against ratification should be legally binding and four did not comment. Some considered this very important; others less so as they expected government would respect the outcome of a vote anyway and/or they placed a higher priority on other areas of reform, such as enhancing Parliament's practical capacity to scrutinise treaties through new committees. Two argued that it would be better not to specify the effect of a vote or that the effect of the vote should be established through convention.

243. There was very little comment on the relationship between votes of the two Houses, or on the relative merits of the three statutory options set out in the consultation document. No clear view was expressed on whether legislation should make a negative vote by the House of Lords binding or advisory. (One respondent, who was opposed to a statutory mechanism, offered the view that it should be established through convention that the Lords' votes are advisory but the Commons' binding.)

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

244. Two possible options were presented in the consultation document, without indicating a Government preference.

245. Seven respondents agreed that if the outcome of a vote is binding, there should be provision for the Government to re-propose the same treaty for ratification. Four respondents offered no comment. Two respondents argued for maximum flexibility for government to decide when to do so, by not specifying the effect of a vote in legislation or by providing a flexible procedure.

246. Two respondents wished to constrain the Government by, prohibiting it from re-proposing the treaty in the same session or within a certain number of months, or by a requirement to hold a referendum. One respondent argued that a vote on ratification should be required to secure a two-thirds majority.

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

247. The question was asked without indicating any government view or proposal. Little adverse comment was made about the present practice of laying an Explanatory Memorandum with every treaty. Several considered present practice satisfactory. Three respondents suggested there was room for improving the contents of Explanatory Memorandums, and one suggested replacing the practice by reports from select committees.

248. *Enhancing Parliament's capacity to scrutinise treaties*. Several respondents made proposals for improving Parliament's practical ability to scrutinise treaties, for example through the establishment of new specialist committees, such as a select committee on treaties or a treaty sifting committee. Two respondents felt that this would be of more practical benefit than putting the Ponsonby Rule onto a statutory footing. There was no suggestion that any such reforms should be the subject of legislation.

249. *Pre-signature scrutiny of treaties*. A couple of respondents proposed pre-signature scrutiny of treaties, coupled with a system of "soft-mandating" whereby Government is given a general negotiating mandate and has to account to a parliamentary committee for any departure from it.

250. *Fast-tracking legislation to give effect to treaty obligations*. One response set out a detailed argument for a quid pro quo approach - Greater parliamentary participation in treaty-making through a new select committee on treaties, coupled with a new simplified regime for treaty rights and obligations to become available in UK law.

251. On 31 January 2008 Lord Guthrie of Craigiebank rose to call a debate in the House of Lords on the War powers and treaties: Limiting executive powers consultation document. Lord Hunt of Kings Heath, Parliamentary Under-Secretary for the Ministry of Justice assured the House that the debate would be fully taken into account as part of the consultation process. The debate with regard to treaties is summarised below.

252. Nine Peers spoke to address the issue of treaties. One Peer expressly welcomed the Government's proposal to place the Ponsonby Rule on a statutory footing although three Peers favoured an approach based on convention. One Peer considered that arrangements under the Ponsonby Rule were sufficient.

253. Two Peers implied support for a statutory regime of some kind for treaty scrutiny, while three Peers advocated other reforms without referring to legislation. Seven Peers spoke in favour of establishing a parliamentary select committee to scrutinise treaties and decide which ones were so significant to be discussed and debated in Parliament before a vote on ratification.

254. In response to those Peers who argued in favour of pre-scrutiny by a Select Committee, one pointed out that there is often a long delay between treaty negotiations commencing and treaty ratification and that it would not be practical to involve Parliament in the negotiation process without risking excessive delay. Another Peer pointed out if the treaty was of major importance, then not only the Government, but also Parliament and the public would see it coming and it would naturally be subject to both parliamentary and public debate without having to be specifically provided for in advance.

255. One Peer suggested that the 21 sitting day laying period allowed for under the Ponsonby rule was not long enough.

256. One Peer commented that the Government should be bound by a parliamentary vote unless a Minister had laid a certificate before Parliament. Another Peer commented that the laying of a ministerial statement after a negative vote may operate as a means to allow the Government to get out of a significant parliamentary obligation.

Civil Service

257. The basis of the Civil Service as we know it today dates back to the Northcote-Trevelyan Report of 1854. The Report set out the enduring core values and key principles that underpin the role and governance of the Civil Service – integrity, honesty, impartiality and objectivity. In recent years, the merits of Civil Service legislation, enshrining these core values and principles, have been the subject of considerable debate, and there have been growing calls to bring forward legislation for the Civil Service. In 2003, the House of Commons Public Administration Select Committee published a draft Civil Service Bill and, building on this, the Government launched a consultation on its own draft Bill a year later.

258. The Government's paper *A Draft Civil Service Bill – A Consultation Document* (CM 6373) was announced publicly by being presented to Parliament as a Command Paper on 15 November 2004. A press notice was also issued. The consultation document was placed on the Cabinet Office website and comments were invited either in writing or to a dedicated e-mail address. The Cabinet Secretary wrote to all Permanent Secretaries asking them to draw the consultation to the attention of the civil servants for whom they were responsible, and key stakeholders were sent personal copies and invited to feed in their views.

259. The consultation ran for a 15-week period until 28 February 2005. Fifty-one responses were received.

Summary of responses

260. Of the 51 responses received, 27 were from serving or retired civil servants, 17 were from organisations or groups (including the Public Administration Select Committee, the Committee on Standards in Public Life and the Office of the Civil Service Commissioners), and seven were from other individuals.

261. Six of the 51 responses did not relate to the issues raised in the consultation document.

262. A range of issues were raised, and a summary of the key points and a cross section of the responses received is set out below.

The need for legislation

263. The consultation document invited views on whether legislation is a necessary and desirable step to take in support of the enduring values of the Civil Service. Eighteen respondents supported the idea of legislation, six were opposed, and 20 respondents provided comments or queries on the proposals but did not express a specific view on their support for or opposition to legislation.

264. Of the 18 respondents in favour of the principle of legislation, eight were individual serving or former civil servants. Comments in support of the legislation included:

> *"This Bill is admirable in that it provides a statutory basis for the constitutional role of the Civil Service."* Former civil servant

> *"As a permanent civil servant, I consider this to be a commendable Bill."* Serving civil servant

> *"First, I would like to say that I welcome the principles of the Bill. Although, we have managed without a statutory basis for the Northcote-Trevelyan principles, for some 150 years, this does not mean that the Civil Service was as good as it could have been, had there been a statutory basis underpinning it."* Serving civil servant

> *"A Bill would not solve all the problems, but it would provide a clearer framework within which the Civil Service can work and implement reform. It would provide Parliament and the public with reassurance that the conventions which underpin the Service are not being abused and that the Civil Service is not being politicised. It would provide a better basis for Parliamentary challenge and oversight than at present."* Lord Wilson of Dinton, former Cabinet Secretary

265. Two individual former or serving civil servants had concerns about the proposed legislation, and one Department ran a focus group with staff where concerns were also raised. Comments included:

> *"I do not believe that a Civil Service Bill should be implemented. As the consultation document itself states, the 'non-statutory approach has stood the test of time and change' On top of this, I believe that such a bill would be counter-productive in terms of suggesting – both to the general public and to civil servants themselves – that the Civil Service is in need of a tighter rein, when the truth is that it continues to provide a benchmark of reliability and effectiveness to the rest of the world."* Serving civil servant

> *"My view is that legislation is neither necessary nor desirable.... The most common reaction [from visitors and delegations from other countries] was amazement and admiration that the UK was able to make such considerable improvements without recourse to legislation. There was positive envy at such a pragmatic and sensible system, so firmly based on Northcote Trevelyan which had lasted so well and become if anything more relevant over the years."* Serving civil servant

266. Organisations or groups in favour of the principle of a Civil Service Bill included the Public Administration Select Committee (PASC), whose work, as the consultation document made clear, the Government took account of and often drew upon in preparing its own draft Bill; the Committee on Standards in Public Life (CSPL), which recommended that consultation should begin on a Civil Service Act in both its Sixth and Ninth Reports; The Odysseus Trust of which Lord Lester, who introduced a Private Member's Bill on the Civil Service in the House of Lords in 2004, was then Director; the Civil Service Commissioners, and the Council of Civil Service Unions.

> *"There is wide support for a Civil Service Bill. It has had a protracted genesis; but there is now no reason why there should be delay in converting draft into actual Bill. This Committee demonstrated in its own draft Bill that it was perfectly possible to give legislative protection to certain key constitutional relationships without impeding change and development in the Civil Service. We welcome the fact that the Government has now accepted this in bringing forward its own draft Bill. Although we believe that it is capable of improvement in the ways we suggest [Third Report of Session 2004-05, printed 10 February 2005], its implementation will represent a significant constitutional moment."*
> Public Administration Select Committee (PASC)

> *"Of course legislation itself is no panacea, for this [allegations of politicising the Civil Service or eroding other core principles] or any other issue. Conduct (which is the manifestation of these core values) is about individual behaviour which in itself is affected by organisational culture and values. However, what a Civil Service Act, along the broad lines of the draft Bill, can do is to provide a clear and explicit basis to guide the behaviour of Civil Servants, Ministers and special advisers to fulfil their proper and important constitutional roles within the Executive."*
> Committee on Standards in Public Life (CSPL)

"We hope that the Government and its successors will recognise the pressing need for a Civil Service Act and will introduce legislation early in the new Parliament, giving effect to the PASC recommendations and to the 1854 Northcote-Trevelyan Report by enshrining the key principles and structures governing the Civil Service, in the interests of good governance for the peoples of the United Kingdom."
The Odysseus Trust

"We believe that the constitutional position of the Civil Service and the core values which underpin its work are too important to be left to an Order in Council and a Code, both of which could be changed at the whim of any Government without prior Parliamentary debate and scrutiny. The Civil Service exists to serve the Government of the day. But it also exists to serve successive administrations with equal commitment and loyalty. To do this effectively, the Civil Service must be underpinned by a stable and enduring set of core values – integrity, impartiality, honesty, objectivity and appointment on merit – and we believe that there should be no capability to change these without the consent of Parliament. A Civil Service Act would provide this assurance." Civil Service Commissioners (CSC)

"We believe… that in a period of substantial civil service change the reinforcement of the underpinning values and ethos of the civil service through the passage of primary legislation would make reform easier. Whilst there are a range of views as to the extent to which these values have already been eroded, there is no doubt that many civil servants feel that the continuing rapid change puts even greater stresses upon the existing values; passage of a Civil Service Act will reassure all concerned once and for all that change poses no threat on this front."
Council of Civil Service Unions (CCSU)

267. There were groups or individuals who voiced concerns on the proposals.

"We have a number of concerns about the justification for the introduction of this legislation and the changes it might bring, not least to the employment status of civil servants and the role of trade unions." AMICUS

> *"The proposed legislation is neither "necessary" nor "desirable". The main argument against the draft bill is that it overturns a major feature of the British Constitution. Civil servants are servants of the Crown which, today, means the duly-elected Government. They serve ministers, not MPs, nor peers, nor select committees. They have no constitutional identity separate from that of the Government they serve. For over 150 years they have been regulated by Orders in Council under the Royal Prerogative – that is by Government's not Parliament's rules. Putting the permanent part of the executive of a statutory basis will produce a Parliamentary civil service, not a Government civil service."* Academic

268. Only about half of the respondents to the consultation exercise commented on the broad principle of whether legislation was desirable or necessary. Other respondents commented or raised questions on specific elements of the proposals. A summary of the comments received is set out below under the areas covered in the consultation document.

Coverage of a Bill

269. Eighteen respondents commented on the coverage of the Bill. Most comments were requests for clarification over whether particular bodies would be covered by a Bill. Two respondents thought that a Bill should be used as an opportunity to split the Scottish Administration from the Home Civil Service, and two respondents thought that the Northern Ireland Civil Service should be covered by a Bill, although the Civil Service Commissioners commented that:

> *"We accept that there are sufficient differences of history and circumstances for the Northern Ireland civil service to be excluded from the draft Bill. Nonetheless, there must be a strong argument for their role to be similarly protected by statutory legislation"* Civil Service Commissioners (CSC)

> *"In order to allow the Scottish Executive to develop the best approach, it would be helpful to enshrine the independent nature of the Scottish Civil Service. An appointment of a Head of the Scottish Civil Service who reports directly to the First Minister, rather than a Home Civil Service Permanent Secretary who reports to the First Minister, would seek to achieve this. A calculated effort to encourage divergence rather than to simply avoid it would be encouraging."* Private Individual

270. Other comments related to the definition of a civil servant.

> *"Our first concern is that the Bill seems to shy away from any definition of a civil servant, which we feel should be central to a Bill which seeks to "make provision about the Civil Service." We recognise...that such a definition may not be straightforward. However, s.2(2)'s statement that "references to civil servants are references only to civil servants in those parts of the civil service to which this Act applies" seems vague and somewhat circular and to imply that there may be civil servants in England and the devolved administrations of Scotland and Wales to whom the Act does not apply."*
>
> *"The Consultation Document endeavours to define who is a civil servant and this endeavour is to be applauded. The unions recognise this is a very complex task and do believe that the attempt made in Schedule 1 of the draft bill to define part of the civil service to which an Act would apply do contain some anomalies. For example there is an inconsistency between the detailed provided in Schedule 1 for Wales, where four discrete organisations are detailed in contrast to Scotland who are just covered by a general heading of "Scottish Administration".... Certainly, if as a consequence of the bill any groups of staff are no longer deemed to be civil servants they should be given continued access to PCSPS and to civil service inter-departmental trawls."*
> Council of Civil Service Unions (CCSU)
>
> *"My main concern with the Draft Bill as published is the attitude of the Bill as regards the definition of the civil service. The Cabinet Office has taken a different approach from that of the Public Administration Select Committee ('A Draft Civil Service Bill: Completing the Reform – Volume One' (First Report of Session 2003-04) HC 128-I) in asserting that there "is no satisfactory, authoritative and comprehensive definition of the term 'civil service'". ... I have argued not only that existing definitions of the civil service, including the definition given by the Public Administration Select Committee, are unsatisfactory but also that a definition of the civil service is possible and necessary especially in a statue intended to elucidate the "basic principles and values" of the civil service." [Draft definition provided]* University undergraduate

Civil Service Commission

271. A number of respondents commented on the Bill's proposals relating to the establishment of a Civil Service Commission as an independent statutory body whose primary responsibility would be to uphold the principle of selection on

merit on the basis of fair and open competition. The Commission would also continue to hear appeals by civil servants under the *Civil Service Code*.

272. Six respondents (PASC, CSPL, CCSU, the Civil Service Commissioners, Lord Wilson of Dinton (former Cabinet Secretary) and Sir Robin Mountfield (former Cabinet Office Permanent Secretary) thought that the Commission should have the power to undertake inquiries into the operation of the *Civil Service Code* and the *Code of Conduct for Special Advisers*.

> *"We disagree with the Government on this point, and maintain our view that the Civil Service Commission should be given the power to undertake such inquiries. The Government's argument against the involvement of "outsiders" in such staff matters would also be an argument against the long-established involvement of the Civil Service Commissioners in the recruitment and promotion of civil servants. The power to undertake such inquiries would be an entirely logical and modest extension of the powers already successfully exercised by the Commission, and we are surprised at the Government's opposition to this proposal."*
> Public Administration Select Committee (PASC)

> *"The Government should accept the proposal of the Public Administration Select Committee that the Commission should have the power to undertake inquiries in to the operation of the Civil Service Code and the Code of Conduct for Special Advisers. Paragraph 32 of the Consultation Document is weakly argued. It is of course for the management of departments to ensure that the Codes are effectively applied and operated. No one is suggesting that they should 'abdicate…central responsibilities.' The suggestion is that there should be some form of external audit or inquiry where things may have gone wrong. This is quite a different matter. Enforcement of the Code must primarily be the responsibility of Parliament, and should be supported by the Commission with a power to make independent inquiry."* Lord Wilson of Dinton, former Cabinet Secretary

> *"We note that the Government is concerned about any arrangements that would cut across or interfered with normal lines of management. However we continue to have concerns that individuals may be constrained from pursuing appeals for fear of the impact on their careers, notwithstanding the opportunity civil servants would have under the proposed new arrangements [welcomed by the Commissioners] to bring an appeal direct to the Commission under certain circumstances. We also know from our work that too few civil servants are aware of the Code or understand the implications for their work. So we have limited confidence in a mechanism that relies on individual civil servants taking the initiative."*
> Civil Service Commissioners (CSC)

> *"The CCSU was disappointed that the Government has not accepted the arguments for giving the Civil Service Commission the additional power to undertake enquiries into the operation of the Civil Service Code and the Code of Conduct for Special Advisers. We believe the argument in paragraph 2 of the Consultation Document that "it must ultimately be for management in departments to ensure the effective application operation of these codes" to be fallacious. It is precisely in circumstances where departments may have failed to undertake that responsibility effectively that the Commission may well have a role in taking the initiative to conduct its own investigation. We have full confidence that the Commission would only seek to exercise this right in exceptional and appropriate circumstances. Moreover, we are confident the Commission would be capable of withstanding "pressure to undertake enquiries into matters of political controversy", recognising however that almost any aspect of concern within the civil service is potential a matter of political controversy…"*
> Council of Civil Service Unions

273. Public Concern at Work's response to the consultation focussed on the whistleblowing provisions in the draft Civil Service Bill. They had some concerns about the proposed role of the Civil Service Commission.

> *"Whether the Bill's [whistleblowing] scheme is mandatory or optional, we question whether it is sensible that it should present the Commission as the body to oversee the full range of misconduct that may occur in the Civil Service. First, the Commission lacks the powers to address any substantive wrongdoing. Secondly, this whistleblowing scheme to the Commission expects departmental procedures to be exhausted first and so will have little impact on getting managers to take personal responsibility in the first place. Thirdly, the Commission has recognised the limits of its ability to deal with concerns of substantive wrongdoing."* Public Concern at Work

274. On the issue of appointments to the Commission, a small number of comments were made:

> *"The system for appointing Civil Service Commissioners should be open and transparent. Anyone should be able to apply using the public appointments procedure however at least one Commissioner slot should be reserved for a trade union representative."* Serving civil servant

> *"Paragraph 28 states that the independence of the Civil Service Commission should be beyond dispute across the political spectrum. Public perception of that independence would be secured better if the Commission were appointed by, and responsible directly to Parliament instead of to the Executive of the day. Otherwise the Northcote-Trevelyan fear that successive governments might well "imperceptibly abandon" the political neutrality of the civil service would be realised. The Commission should be put in the same position as the Parliamentary Commissioner for Administration and the Comptroller and Auditor General, in terms of oversight of core values and responsibility to report direct to Parliament."* Academic

> *"An independent Commissioner and Commission for Scotland would be desirable. This would allow closer scrutiny of the machination of the Scottish Civil Service, which at present can sometimes be avoided due to the logistics of distance (both in a physical and metaphorical sense) between the Commission and the Scottish Executive."* Private Individual

275. The Commissioners fed in some specific comments about their existing powers in relation to recruitment and the proposals in the draft Bill.

Special Advisers

276. A number of comments about the role and status of special advisers were made. Eleven respondents thought that no special advisers in No 10 should have executive powers and/or that special advisers should not be able to commission work from civil servants. The draft Bill proposed that a maximum of two special advisers in No 10 should have executive powers. On 28 June 2007, the new Prime Minister revoked provision in the Civil Service Order in Council granting powers to enable up to three special advisors to give instructions to civil servants.

277. Four respondents thought that special advisers should not be civil servants, and should not be funded by the taxpayer. One respondent thought that provided suitable safeguards were in place to restrict the powers of special advisers there

was no need for a cap on numbers, one thought that there was no need for a cap on numbers, but numbers should be approved by Parliament, while four respondents thought there should be a cap on the numbers to be approved by Parliament. One respondent thought that numbers should be reduced to less than one per Cabinet Minister.

278. Five respondents thought that greater clarification on the boundaries within which special advisers could operate were needed. One respondent thought that special advisers should be required to carry out their duties with objectivity and impartiality.

> *"I do not support the employment of special advisors. If they cannot be banned altogether then their numbers should be reduced to less than one per cabinet minister."* Serving civil servant

> *"The position of special advisers is a serious threat to the impartiality and political neutrality of the Civil Service. If special advisers are in a position to direct "genuine" civil servants in their work the control of the political machine over the machinery of Government is accomplished, and the party state delivered. ... Provided a mechanism can be arranged which denies special advisers any degree of control over genuine civil servants, I see no need for a statutory limit on their numbers, or to subject them to the usual recruitment processes. I fully accept that they perform a valuable role both for Ministers and for the permanent Civil Service.* Serving civil servant

> *"Special advisers should not be classed as civil servants even if there is to be a separate code for them. They should be commissioned as consultants and paid for by the political party which hires them. There is no logical reason for special advisers being paid for from the public purse."* Serving civil servant

> *"We acknowledge the force of the Government's argument that the nature of the functions and responsibilities of special advisers is far more important than their overall numbers. We do not accept the case for an arbitrary cap on numbers, but maintain our support for parliamentary approval of the total number. Our recommendation would, we believe, increase transparency and help to maintain public confidence, without in any way drawing Parliament into detailed management questions."* Public Administration Select Committee (PASC)

"Within limits, Special Advisers play an important role in maintaining the impartiality of civil servants by undertaking work of a political nature. However, there is currently no specified limit – only convention – to the number of Special Advisers the Government can appoint... The CCSU supports the proposal that Parliament at the beginning of each session should set some parameters around the numbers of special advisers that can be employed. Whilst recognising the argument that an arbitrary cap on the numbers of special advisers is not appropriate within the Bill, we believe that nonetheless Parliament should have the responsibility and the right at the beginning of each session to approve the total number of special advisers to be employed." Council of Civil Service Unions (CCSU)

"It is highly regrettable that the Government has retreated from its commitment to a limit set by Parliament on the number of special advisers. A second major point is that special advisers should not be able to participate in the recruitment of permanent civil servants... A third major point is that special advisers should not be able to give instructions to civil servants. Finally, the case for up to two special advisers to have executive powers, as proposed in paragraph 39, is not made out." Lord Wilson of Dinton, former Cabinet Secretary

"It is important to limit the numbers of "Special advisers". If there was a low limit – for example one per Minister then there would be very few concerns about reaching the maximum number." Serving civil servant

"The Government's draft Bill helpfully sets out what special advisers cannot do.... In the consultation document, however, the footnote on page13 suggests an interpretation of "exercising line management functions" which is far narrower than that understood by the Committee. The footnote implies that the restriction on "line management functions" in Clause 16(8) does not include the commissioning of work from civil servants, on behalf of their appointing Ministers. This Committee continues to believe that this is "de facto" part of line management and that requiring special advisers to act as a conduit for instructions from ministers to civil servants risks confusing accountability with civil servants in the Ministers private office whose role this currently is. The Government's draft Bill does not set a limit for number of special advisers, nor does it provide for any limit to be set or amended by parliament. The Government argues that the issues raised by the emergence of special advisers are not susceptible to resolution by the imposition of an upper limit on their number. The Committee has never argued that setting a limit would address all the issues raised by emergence of special advisers. What the Committee made clear in both its Sixth and Ninth Reports is that there is a need for an accountable mechanism by which a limit could be set, hence the recommendation for this responsibility to be given to parliament. Committee on Standards in Public Life (CSPL)

"There is some hysteria about special and political advisers, which leads some to call for defining boundaries, roles and relationships, presumably to stop advisers from intruding into civil-service roles, and for limiting the numbers of advisers. In most cases civil servants and advisers get on well together, and most civil servants welcome advisers as protecting them from too deep an involvement in party political matters. Tensions have occurred in only a few departments, where personal relationships broke down. Such tensions would have occurred whether or not there were a Civil Service Act. Legislation cannot guarantee good behaviour, respect and trust. The Government has already [para 41], rightly, rejected putting a limit on the number of advisers. It would be a rigid curb on government, hindering its capacity to respond to changing events and circumstances." Academic

"The advocates of a stronger Act exaggerate the threat posed to the civil service by ministerially-appointed special advisers. There is no crisis that justifies the need for statutory protection for civil servants. Around 80 advisers, many of whom are serving the Prime Minister and Chancellor of the Exchequer, are not undermining a civil service numbering around 3,500 at the top. Academic

Core values of the Civil Service

279. Seven respondents thought that Ministers' responsibilities in relation to the Civil Service should be clearly set out on the face of any Bill, including the duty on Ministers to uphold the core values of the Civil Service. The Public Administration Select Committee, however, did not see a need for the inclusion of Ministerial obligations on the face of the BIll.

> *"We are unclear as to why the Government has chosen, as a mechanism to place this obligation on Ministers ("not to impede civil servants in their compliance with the code"), the Code of Conduct for Civil Servants which is a code that is legally binding on Civil Servants, not Ministers. We can see no reason why such a requirement cannot appear on the face of the Bill which is the correct place for such a statutory obligation."* Committee on Standards in Public Life (CPSL)

> *"Ministers' duty to uphold the political impartiality of the Civil Service should be stated on the face of the Bill, not circuitously through the Civil Service Code; there should also be directly-stated duties to give fair consideration and due weight to informed and impartial advice from civil servants, and not to abuse influence over appointments for partisan purposes."* Sir Robin Mountfield, former Permanent Secretary

> *"An omission within the Bill however is any obligation upon Ministers beyond that set out in clause 5(10). The Ministerial Code provides a much fuller description of the duties upon Ministers in relation to civil servants and these should be reflected within the Civil Service Bill."* Council of Civil Service Unions (CCSU)

> *"We are not minded to recommend that statutory form needs to be given to the obligations of Ministers towards their civil servants. It is right that the Prime Minister should continue to be the final judge of Ministers' compliance with the Code."* Public Administration Select Committee (PASC)

280. Seven respondents thought that Parliament should approve the full content of the Civil Service Code (and other Codes of Conduct).

"The Government's draft Bill places the Minister for the Civil Service under a duty to publish a Civil Service code and a Code of Conduct for Special Advisers. However such Code will be made by an Order with no provision for parliamentary debate, approval or amendment (Clause 25). This, in the committee's, view undermines the principal that the framework for managing the Civil Service as an institute of the State should be subject to parliamentary scrutiny and decision. The two Codes in question are the principle mechanisms for embodiment of the core values set out on the face of the Bill and, as such, parliamentary scrutiny and decision on their content must be an intrinsic element in providing the necessary reassurance that these values will be maintained." Committee on Standards in Public Life (CPSL)

"As regards the Civil Service Code, clause 5(7) of the proposed Bill requires civil servants to carry out their duties for the assistance of their administration. Clause 5(8) requires civil servants to carry out their duties in a variety of entirely laudable ways, including, at (f), "in accordance with law". The duties in (7) and (8) may conflict. It is necessary that (8) be given clear primacy over (7)." Serving civil servant

"The Bill provides only for the Code to be laid before Parliament, not approved by it. This does not give it adequate authority: the Code and any subsequent amendment should be subject to affirmative resolution. I would myself have preferred to see the draft Code set out in a Schedule to the Bill, and for it to be therefore endorsed by Parliament and subject to subsequent amendment."
Sir Robin Mountfield, former Permanent Secretary

"...I would recommend that the National Statistics Code of Practice be considered another code of professional standards that could be made statutory under the Civil Service Act, should the bill be made law."
National Statistician and Registrar General

"A further reason for an Act would be its ability to reconcile the number of different codes now in operation which are beginning to overlap with a considerable lack of clarity. There are codes for civil servants, Ministers, Special Advisers, a model contract for Special Advisers, and the code for the Government Information Service. The unions have argued to the Public Administration Select Committee and elsewhere of the need to define properly the relationship between different parts o the Executive and to have codes that fit together and are comprehensive."
Council of Civil Service Unions (CCSU)

281. A couple of respondents, however, raised concerns with putting the Code onto a statutory basis.

> *"Nor is it "the next logical step" to turn codes into statutes. There is no progression; they are separate and distinct in their origins and purposes. Codes, devised by the executive, are recommended internal guidelines of good practice: statutes, based on an Act of the Crown in Parliament, lay down binding law."*
>
> *"The Government should…stay with a system of codes capable of adjustment to changing circumstances, which allow ministers, advisers and civil servants to interact in a common sense way and to devote their energies to tackling pressing problems in a collaborative team effort."* Academic

Civil Service Management

282. One respondent commented that entry to the Civil Service should be on the basis on an entry examination, and twelve commented on training and recruitment issues that should be covered by the Bill.

> *"Although recruitment procedures are addressed in the Bill promotion procedures are not and these vary widely between departments. There is a case for standardising these to ensure that they are open and above board and offer equality of opportunity."* Serving civil servant
>
> *"The document's emphasis on better training is welcome…policy "generalists" should be given ample time to develop expertise in a particular subject before being moved to unrelated work for reasons of career development."*
>
> *"Advising ministers on policy issues is a hard-won professional skill in itself, and improved relevant training is to be welcomed. A balance has to be struck, however, between postings for career development and the gaining of greater expertise in a particular departmental subject area."* Former civil servant

283. Nine respondents had comments on the terms and conditions of service of civil servants.

> *"It is desirable that any changes to terms and conditions of employment should make it easier, not harder, to move from one part of the civil service to another and to move into or out of the Civil Service. In the past, there have certainly been restrictions on the level at which recruitment can take place."*
> Serving civil servant

> *"Whilst it is the long-standing position of Government that its employees should be treated as if they had such statutory rights, this is a less than satisfactory situation particularly at times of dispute between management and staff where the lack for formal legal redress can act significantly to the disadvantage of civil servants and their trade unions."* Council of Civil Service Unions (CCSU)

> *"Legislation covering the employment status of civil servants should provide them with the same statutory rights as other employees including the right to redress, statutory notice, redundancy and consultation on redundancy."* AMICUS

284. Two respondents commented that civil servants should be able to stand for Parliament without having to resign from the Civil Service.

> *"If Civil Servants are going to continue to have to resign in order to stand for Parliament, then there has to be some kind of arrangement to offset this disadvantage. This should either be in formalising the "job for life" ethos, or perhaps in financial terms... It is inequitable that low paid civil servants (those below Principal grade) should be unable to exercise their democratic rights as citizens without risking the possibility of losing their livelihoods and without enduring financial hardships during the period in which they are seeking election."*
> Serving civil servant

285. Support came from both the Council of Civil Service Unions and the Committee on the Administration for Justice for the inclusion of provisions regarding nationality and Crown employment should the Private Members Bill not be successful in its passage through Parliament.

> *"Given that the Private Members Bill has failed to secure passage through parliament, we assume that the draft Bill will be amended accordingly."* Committee on the Administration of Justice

War Powers

286. The consultation document on *War powers and treaties: Limiting Executive powers* which was published on 25 October 2007, sought the public's views on whether Parliament should have a formal role in approving the deployment of the Armed Forces into conflict situations. Consultations closed on 17 January 2008.

287. The consultation on War Powers attracted 15 responses from a range of respondents including one Member of Parliament, the Lords Select Committee on the Constitution, academics with experience in international relations and international law, lawyers, Christian Faith Organisations and members of the public.

288. The Government is grateful for all the responses received which have been helpful in informing the way forward. The following summarises respondents' views on the 11 questions raised in the consultation document.

Summary of responses to the consultation questions

289. Fourteen out of the 15 responses agreed that in principle, Parliament should have an explicit role in deployment of the Armed Forces.

290. One academic stated that there was no need to curtail the executive's powers to deploy the Armed Forces abroad. The current procedures work effectively because they are particularly flexible and that the aim of the policy review should be to ensure that Government is subject to adequate and appropriate democratic control and accountability. This respondent went on to explain that *"As long as a decision is made by democratically elected governments it is difficult to see why the process should be regarded as somehow undemocratic"*. Another respondent supported the view for no change by explaining that the Government would always provide for Parliament to debate the decision to go to war. In principle providing a power to Parliament of this kind was a good idea, but in practice, for strategic reasons, the respondent argued that a debate would not always be possible.

291. Views about the role that should be taken by Parliament varied, with two respondents preferring an approach that reflected the arrangements set out in a resolution, while eight respondents saw a greater advantage in the introduction of legislation, but only if sufficient flexibility could be achieved. One respondent, who in principle agreed with legislation, argued that the United Kingdom (UK)

Parliament may not be ready for legislation and therefore a convention should be established before attempting to legislate in this area in the future.

292. Of the remaining respondents, two were in favour of no change to the existing arrangements, while three respondents did not favour either the legislative or resolution route. Given the numbers of responses to the consultation and the wide range of views, it is not readily possible to ascertain what the public's views are on this topic. The Government's proposals on how to take the debates on this forward are set out in the accompanying White Paper (CM 7342-1).

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

293. A variety of concepts were discussed regarding the scope of the mechanism and a number of suggestions made. One respondent stated that it was unnecessary to make changes to the present arrangements, however, if the Government were to proceed to make Parliament's role more explicit, further consideration would have to be given to the term 'armed conflict'. It was suggested that there is a lack of agreed understanding regarding the existing definition of 'armed conflict' that serious questions could be raised about whether the term could be used adequately to identify operations simply because of its potential to rely on International Humanitarian Law. This view was shared by four respondents, two of whom proposed that the trigger of any new mechanism should instead be defined by the potential for 'hostilities'. One of these respondents suggested that it was necessary to look elsewhere for a meaningful definition, but did not provide a suggestion of what this could be.

294. Those who suggested that the definition of 'armed conflict' was not appropriate for a new parliamentary mechanism, also pointed out that modern military operations rarely take on a traditional single outcome format. Military operations develop because of the 'surrounding circumstances', as set out in the Ministry of Defence's Manual of the Law on Armed Conflict and, at a tactical level, it is imperative that military commanders have some effective influence on the application of International Humanitarian Law as they steer through shifting conditions in the field. There is the conduct of a campaign followed by perhaps a period of occupation of an opponent's territory resulting on occasion in a peace agreement. There may then well be periods during which the security situation gets both better and worse, with International Humanitarian Law being applied once again, as the circumstances dictate. One respondent therefore suggested that if parliamentary decision-making is to be introduced it should be restricted to occasions when major combat operations are fully anticipated, such as in the case of the Falklands campaign, the 1991 and 2003 Gulf Wars and 1999 Kosovo air campaign.

295. Three respondents took the view that any circumstances in which forces of the Crown are deployed outside the UK, including peace-keeping missions, should fall under the scope of any new mechanism. Most of the remaining respondents agreed that there should be some definition of 'armed conflict'. Views varied on the terminology, some suggested that the term 'armed conflict' should be determined as a matter of fact, or 'common sense'. Two respondents in this category suggested that the term could refer to "potential or actual hostile circumstances" or "foreseeable"' hostilities. A couple of respondents proposed that a general definition might include any activity that *"threatens, anticipates or causes physical damage to persons and property"*, or to *"kill or injure"*. Another respondent took the view that the term should ultimately be determined by Parliament and pass the 'plain English test'.

296. One of the respondents who suggested the use of the alternative term 'hostilities' stated their reasons as follows: it was a non-technical term that would *"avoid the necessity for the government to declare their belief that conflict is likely"* and it would also cover the prior stationing of troops in order for them to engage in a conflict when necessary.

297. Many of those who agreed that it was possible to achieve consensus on the terminology proposed that as a general rule, the definition should operate within the norms laid down in international agreements, such as those in the Geneva Conventions. Some preferred a more general approach, with one or two exclusions, for example, *"The new mechanism should encompass the vast majority of situations where UK armed forces are deployed in an operational capacity in a conflict environment. However, the deployment of UK forces as part of a UN peace-keeping operation should not fall within the scope of the mechanism since UN peace-keeping forces do not use force in a proactive manner. I agree that a general definition of armed conflict – with narrowly specified exceptions- would be useful"*.

298. A number of respondents were concerned about the continued capacity of the UK to respond to international obligations, particularly in providing assistance to the United Nations in peace keeping operations. They felt that the aim should be that the requirement for parliamentary approval must not bring inevitable long delays, that emergency provisions should be effective and therefore requirements for parliamentary approval should be carefully worded to include specific cases where it would be reasonable to take military action. They also proposed that there should be an explicit statement excluding specific cases that may impact on the capacity of the UK to take action under a UN mandate. For instance, cases involving self defence and the defence of others should be specifically mentioned and covered in a new parliamentary mechanism. The mechanism should, however, exclude cases that involve the secondment of a few individual servicemen and women with the armed forces of other states or within the UN. It was suggested that the German model for parliamentary approval of contributions to UN operations, as set out in Annex B

of the Government's consultation document, would also be appropriate for the UK, despite the difference in constitutional arrangements.

299. A couple of respondents, however, thought that it was necessary to go further than the Government's proposals in the consultation document by including specific references to operations which should or should not be captured by the term. For instance, the term could include "policing operations", such as the deployment of the Navy for counter-drug-trafficking operations, but it was suggested that training of troops, humanitarian assistance or ceremonial visits could be excluded from the definition altogether. This approach focuses on attempting to categorise a variety of different operations that could be captured or excluded by the mechanism. In practice this would require the development of an agreed comprehensive list of operations to which the mechanism might apply and such a list would have to be made available to Parliament. Some suggested that a specified definition of this kind would enable better parliamentary oversight and where mandate drift is perceived to easily occur, an annual or frequent review of a specific deployment could be undertaken as a precaution.

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

300. Over half of the respondents provided an answer to this question and all of those who responded agreed that some definition was required. A couple of respondents pointed out that the term 'Armed Forces' refers to the Armed Forces of the Crown, which fall under the command of Her Majesty The Queen. It is suggested that the term in this instance includes the Royal Navy, the Army and the Royal Air Forces, both Regular and Reserve Forces in each case. In contrast, 'Armed Forces' could include the deployment of certain civilian personnel employed in combat functions, such as Private Military Companies (PMCs). It was proposed that some operations will require mixed companies drawing on both Armed Forces of the Crown and forces including civilian personnel providing logistical support or 'special forces' style capabilities.

301. Two respondents therefore proposed that any definition of 'Armed Forces', should not exclude the Government's use of private contractors and that to do so would conflict with the principle that there should be better oversight by Parliament of deployment decisions. One respondent, however, proposed that the term must exclude the civil police services.

302. Two respondents specifically suggested that the term 'Armed Forces' should mean forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006 and almost all of those who answered this question agreed that the term should apply to the reserve forces, without specific reference to the Act. Two respondents, however, suggested a general term would suffice (a "common sense" definition), with one respondent

proposing that international law already makes independent and fully adequate definition of non-civilian protected persons and those that can be made prisoners of war.

303. Whatever suggestion for definition was put forward the majority of respondents shared common concerns about encompassing all those who where likely to be actively involved in a deployment and not defining 'Armed Forces' so as to exclude any particular group.

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

304. Three-quarters of respondents answered this question. With the exception of one organisation which doubted that any deployment could take place so quickly as to make parliamentary approval impossible, the remaining respondents agreed that any new parliamentary procedure should allow for deployments to occur without prior approval in exceptional circumstances, where there is a need for secrecy, to avoid compromising a deployment. One of these respondents went on to suggest that it would be necessary to set up arrangements to ensure that such a provision would not be 'abused' or undermine the objective of the new procedure. It was suggested that once the urgent procedure had been implemented it would be difficult for any parliamentary decision that demanded withdrawal to be implemented, without trespassing into the operational aspects of a deployment.

305. It was suggested that the Government should always consider two questions. First, whether there was time to seek parliamentary consent and secondly, whether there was a need for covert or secret operations. A number of comments echoed the following view that: "It is essential that any new procedure [should allow] for deployment without prior (or sometimes any) parliamentary approval where necessary, that is, cases where the deployment is so urgent that there is no time to seek approval and cases where it is necessary to maintain secrecy, for example, where surprise is essential to the operation or in the case of the deployment of Special Forces". One example that was provided, was non-combatant Evacuation Operations, which are always conducted at short notice. It was suggested that under these circumstances parliamentary involvement would compromise the necessary element of surprise. This respondent then suggested that for the purpose of this requirement, the proposed definition of 'Armed Forces' by the Government, is the right one.

306. Other respondents suggested that secret operations provide a particular challenge and a balance would need to be struck between the achievement of necessary objectives by use of secret operations and accountability and

transparency in the use of the Armed Forces. There were a variety of views about how this balance could be achieved.

307. One view was that in situations where there was a need for secrecy, approval should be obtained from the Prime Minister, as he or she should continue to hold de facto authority over the Armed Forces. It was suggested that in these instances, the circumstances in which the urgency procedure could be invoked should be carefully defined. One alternative presented was the creation of a new Parliamentary Committee with powers to look at the information available to the Prime Minister, on occasions when it may not be appropriate to disclose sensitive material to Parliament as a whole. It was proposed by at least one respondent that the Intelligence and Security Committee could take on this role, as they have *"shown to be trustworthy in handling extremely serious matters"*. This issue is dealt with in more detail under Question 10.

308. Another respondent suggested that the mechanism in the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill sponsored by Clare Short MP, under which the Prime Minister should be required to seek Parliament's approval as soon as possible, would be the most appropriate mechanism for dealing with this specific issue. It is suggested that in this instance legislation would increase accountability and provide the required checks and balances against excessive use of the 'urgency' power. The issue of whether legislation is the appropriate vehicle for creating a new procedure is examined further under question 11.

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

309. The majority of respondents provided a response this question. In almost every case, with one exception, the majority of people thought that the Government should seek retrospective approval from Parliament. The [majority] of respondents also thought that there should be some consequence for the Government if, after seeking retrospective approval, Parliament declined to give approval to a deployment.

310. One of these respondents proposed that a vote could be taken if the Houses so wished, but any failure to obtain Parliamentary approval should not result in legal liability for any member of the Armed Forces. It was suggested that Option B of the illustrative legislative proposals in the consultation document went some way to assuring that position (eg Section 6 (3) of Option B), but that the inclusion of the words "or otherwise", might result in some misunderstanding that this provision sought immunity from prosecution for war crimes.

311. On the other side of the spectrum, a larger proportion of respondents believed that retrospective parliamentary approval was essential. Some of these respondents were concerned that Parliament's involvement could be limited to approving the initial engagement. One preferred option was that in addition to keeping Parliament informed of the progress of deployments, the Government should be required to seek a renewal of parliamentary approval if a deployment's nature or objectives alter significantly. This was said by one respondent to be essential in order to ensure that 'mission creep' did not become a problem.

312. In terms of the consequences of failing to achieve retrospective approval, some respondents proposed that these should be of the most serious nature, resulting in the resignation of ministers and/or a vote of no confidence on the Government of the day. Others proposed a less severe sanction, but suggested that Parliament should determine what the final consequence should be and that in some circumstances a failure to approve a decision retrospectively should lead to immediate withdrawal from participation of an armed conflict.

313. One respondent suggested that a statutory crime of 'aggression' should be introduced within a provision in any new mechanism. It was proposed that this should be defined under two headings: 1) aggression in violation of international treaties and agreements (which would include violation of the Charter of the United Nations, but not where the Security Council had already authorised the deployment); and 2) aggression in violation of customary international law. Under this proposal it was suggested that the Prime Minister would be legally and politically responsible for determining the extent of the threat, so no definition of aggression would be provided, but the requirement could be set out in statute.

314. Several respondents proposed a specific time period in which the Government would be obliged to seek retrospective approval. One suggestion was that the Government should seek such approval within 48 hours. Another proposed that no more than five days should be allowed to pass, by which time the Prime Minister must report to Parliament and seek retrospective approval. Another respondent provided specific proposals for provisions in a resolution, that "the Government should provide retrospective information within seven days of [the deployment's] commencement or as soon as it is feasible", at which point parliamentary approval should be sought.

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

315. The majority of respondents agreed that Parliament should be recalled, if under an emergency procedure a deployment has already taken place. However,

two respondents said that this was unnecessary. One of the respondents suggested that there should be no reference to Parliament for any decisions during the conduct of a campaign. This was even if the initial deployment was not referred to Parliament and subsequent escalation or prolongation changed the nature of the operation to one for which, that if its development had been predicted, Parliamentary approval could have been sought. The other proposed that although recall of Parliament was unnecessary, this would not necessarily preclude a recall of Parliament if a major combat operation was anticipated such as that in the Falkands in 1982.

316. In another case it was stated that "it might be sensible to provide that such a recall is not necessary where the Prime minister, with the agreement of the Leader of the Opposition, so decides (…if the deployment is small or otherwise uncontroversial)", but that the matter could then be taken up as soon as Parliament returned.

317. Most of the respondents were very clear that Parliament should be recalled within a short period of time after a deployment or at the earliest opportunity. Others proposed that the requirement should be set out in statute and if because of extreme circumstances Parliament was unable to meet, then the oversight committee or the Joint Defence Committee, should be enabled to give provisional approval, or not, pending a full return of Parliament. One respondent suggested that Parliament should have the power to recall itself and that this could be triggered either by the Speaker or by a certain percentage of MPs contacting the Speaker to request a recall of Parliament.

318. Another suggestion for a recall procedure included that the Sovereign, on the advice that a significant deployment of Armed Forces was necessary, may request Parliament to reconvene at an elected time to consider the matter at hand. In this scenario, if an 'urgency' procedure is necessary, this decision could then be subject to the relevant Parliamentary Committee. Others agreed with the Government's proposals – "we support the suggestion put forward by the Government in paragraphs 63 and 64". [that either MPs themselves, under other reforms proposed by the Government could arrange a recall before the deployment of troops took place]. One respondent pointed out that Parliament should always be recalled within 48 hours and that if Parliament has been prorogued a procedure exists for recall as set out in Erskine May (23rd Edition).

319. There were a variety of different suggestions proposed for a procedure for when Parliament is dissolved. There was one suggestion that the same procedure should apply for when Parliament is adjourned and dissolved. Another respondent proposed that if dissolved, Parliament should take temporary charge of anything reserved to the House of Commons until the incoming Commons assembles. Another suggested that parliamentary approval should be sought as soon as the new Parliament is assembled. There was also a suggestion that in the event of the Government requiring approval for hostile action when

Parliament is dissolved, the dissolution should be temporarily suspended with the previous members reinstated to enable debate and a vote on the issues – and that in the circumstances of a General Election, whichever government is returned should then have to seek approval for the continuing deployment. There was also a proposal that the Supreme Court should have a role in the decision making process, if Parliament is dissolved.

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

320. Twelve responses were received to this question. One respondent expressed his belief that 'if there is a genuine concern with better decision making than this is the essential element in any new procedure'. Four respondents explicitly stated that the information provided to Parliament should go beyond the parameters suggested in the question, whilst only one respondent directly stated that they believed these parameters to be sufficient.

321. Other respondents believed that Parliament should have sufficient information to make an informed decision. A few respondents suggested it should be as full as possible and one provided a list including: circumstances, efforts made to reach a non-military solution, full legal basis, location and numbers of persons at risk, potential expenditure and duration, objectives and purpose of the deployment, UK interest being served, the measures taken to avoid civilian injuries and damage to non military infrastructure, the post conflict programme and a binding date for review. The need to assess the humanitarian implications of a deployment was also echoed by another respondent.

322. With regard to the specific areas of information that should be provided to Parliament, there were recurring suggestions such as the objectives, legal authority, timescale, projected costs and the reason for deployment. For instance, one respondent suggested that the information supplied to Parliament should include; "a) description of the situation in which the need for deployment is perceived b) the advice and intelligence on which the decisions are based c) the nature, extent and probable duration of the deployment to be laid down d) the outcome being sought or the fall-back strategy in the event of failure e) the date by which a report to Parliament or back to the Committee will be made on the deployment". One respondent was concerned with the quality of evidence, because he believed this had been one of the major causes of dissatisfaction with the decision-making process leading up to the recent Iraq conflict. He suggested that where evidence or information on the reasons for deployment was supplied it should be accompanied by an assessment of the quality of that information.

323. This respondent added that "unless there is more forthright willingness to put the information on which deployments are based into the public sphere and a frankness about its weight it is hard to see how the quality of decision-making is likely to be much improved". There was a general recognition amongst respondents that some of the information supplied would be sensitive and that there was a balance to be struck between protecting sensitive information and providing Parliament with sufficient information.

324. How this information was to be imparted was also discussed. One respondent suggested Parliament could if necessary go into secret session as it had done in the Second World War. Four respondents suggested that a Committee could be involved in some way, perhaps in determining if the information Government had decided to supply was sufficient or authorising the Government to withhold certain aspects of information, if it was sensitive. Two respondents suggested a role for the Information Commissioner in establishing working arrangements for deciding what information should be provided to Parliament, although neither elaborated on how this might work in practice. One respondent also expressed concerns about maintaining committee independence whilst allowing them to take decisions on secret information arguing that "means have to be found to provide Parliament with sufficient information on which to determine a course of action without compromising the independence of committee members by drawing them into a 'ring of secrecy'".

325. The availability of information on the legality of the conflict was considered important; one respondent thought that deployment should not go ahead unless it was clearly lawful according to the best international legal argument. Four respondents felt that the full opinion of the Attorney General should be made public with one of these stating that the Attorney serves the public interest so the Attorney's opinions should be accessible. A couple of respondents also suggested that further independent legal advice on the legality of the conflict should be obtained. Although there was no clear consensus on what legal advice should be provided it is clear that respondents wanted it to be informative and as full as possible.

326. As for who should decide what information should be disclosed, there was a fairly even split between those who believed that the Prime Minister should decide what information should be released (either in its entirety or in a few aspects such as the geographical extent of the deployment and the troops involved) and those who believed it was for Parliament to decide if information was sufficient or not.

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

327. Eleven responses were received to this question and opinions as to timing were mixed, ranging from 'before troops are deployed' to 'as soon as possible' and 'as soon as the government has decided on the deployment and its initial description and parameters'. One respondent believed it depended on the type of deployment and another that Parliament should vote only when forces are about to be actively deployed in order to avoid frequent parliamentary consultations about unlikely deployments.

328. One respondent thought that there was a balance to be struck in this decision between leaving it too late or starting it too early: "to seek approval too early might well exacerbate a situation – making armed conflict more rather than less likely". Another respondent cautioned that if government plans changed during the execution of a deployment re-approval should be sought. Not leaving it too late was probably the more strongly considered of the two scenarios. One response stressed the need to avoid confronting Parliament with a "loaded choice between support for their government and a considered judgement for or against military action; and so that members of all parties may be torn between the desire to support 'our' troops and the same considered judgement".

329. Echoing this 'not too late and not too early' consideration, one respondent suggested a trigger should be the decision to deploy troops into a situation where International Humanitarian Law would apply, but added that this situation should also permit the abandonment of the proposed deployment and the safe recall of any forces. This respondent wanted situations where there is a threat to use force, if the threatened party does not comply with a demand, specifically included, as "the movement from threat to execution of threat could easily fall within the emergency exception and thus pre-empt Parliamentary participation when it would have been possible at an earlier stage".

330. Three respondents thought the decision should be left to the discretion of the Prime Minister with one adding, "however if a Prime Minister misused this responsibility, we would hope that parliament would react appropriately". One respondent felt that Government should be able to bring a proposal to Parliament at any time even if it was one they have rejected previously. Another thought that, in common with UN Security Council practice, deployments should be time-limited and requests for renewal accompanied by a report assessing operations against original objectives and providing updated versions of information required for an initial deployment.

331. One respondent thought that Parliament should have a role in deciding the best timing and that Parliament and any committee should take on a more active and continuous role rather than sporadic and reactive. They suggested that the timing requirement be that Government should consult Parliament 'in good time' and that Parliament and the courts could then have the power to decide if they had done so in the circumstances.

332. Five of the respondents thought that a committee should have a role in determining the best timing; one thought this should be in consultation with government. Overall there was strong support for the role of a committee possibly because they would be best placed to have oversight of relevant information on an on-going basis and therefore be able to take finely balanced decisions on timing. This would echo the more general theme of the responses, which suggests because of the variability and complexity of the factors involved there will necessarily be a large element of discretion in deciding when Parliament should become involved and that this would depend on the circumstances of each case. This however raises other concerns about the availability of information to those exercising that discretion and their potential power to influence the course of Parliament's deliberations.

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

333. Eleven answers were provided to this question. Of these, seven suggested that there should be some form of re-approval processes, although the suggested triggers and timing for this mechanism differed. In addition one respondent thought that, "it ought always be open to parliament to withdraw its approval for a campaign", but did not suggest any regular process.

334. Where re-approval was considered the majority of respondents suggested this process could take place by a means of a debate and vote in the House of Commons. Three saw a role for a committee with an ongoing scrutiny role, which could inform debates in Parliament, or as one suggested, provide the trigger for a debate when they considered it necessary. One respondent suggested an alternative, that Parliament should specify a number of general objectives when authorising a deployment and this could be used by the Government to decide when the operation should be wound-up.

335. Where respondents gave reasons for suggesting a re-approval, the main concern was that it was vital to ensure that 'mission creep' does not become a problem. Some respondents felt that any significant change in the parameters of the conflict should require the Government to seek a fresh mandate from Parliament. Another respondent added that if the purpose of the mechanism is to trust Parliament to be involved in decisions to do with national security, military engagement and international obligations then it did not make sense for Parliament not to have an ongoing role in the decision. That '"Parliament

might reach a decision without due regard to the consequences of that decision is to question the efficacy of a representative democracy".

336. As to the consequences of Parliament withdrawing its support two respondents noted that this would put the Government in a politically untenable position. A few thought that the Government should be allowed to seek support for a new deployment under different terms 'presumably a new operation or withdraw'. However discussion of possible consequences was limited.

337. The majority of responses supported the idea of a reporting procedure even if they did not believe a re-approval process was necessary and a few added that Parliament should be able to force a vote if it felt mission parameters had been changed. Suggested reporting periods varied, one suggesting 60 days whilst others suggested an annual or six month process for re-approval. One respondent thought the content of the report should 'describe how initial objectives and projections had been met and what the prospects are for the future.' Four responses were less specific believing reporting should be on a 'regular' basis.

338. When answering this question two respondents detailed their concerns about the clause that would provide protection for those taking part in a deployment by stating that a deployment which had not received parliamentary approval was not unlawful. One stated that "Parliament should not be invited to exempt troops from the reach of the law – jurisdictional issues should be left to the courts". However another respondent gave consideration to the need to support troops engaged in the deployment. "Parliament has a responsibility to support our deployed Armed Forces; any departure from this principle would be entirely regrettable."

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

339. Of the eleven respondents who specifically addressed this question all 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'. Two respondents felt that were the composition of the House of Lords to change 'to become a democratically elected body', then the question could be reconsidered.

340. A few 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 Common's decision. Two respondents also suggested that peers could have a role in any committee that was formed to implement the new mechanism and in this way make use of the military expertise within the House of Lords. One respondent

felt that while they might sit on such a Committee they should not be able to cast a vote.

341. The House of Lords Select Committee on the Constitution, did not directly address this question. They welcomed the Government's view that it was 'entirely appropriate' that the House of Lords should have a role in the process but did not comment further on what this role should be.

Question 10: Is there a need for a new committee? How would a new regime governing decisions about deployments effect other parts of the system e.g. the Defence and Foreign Affairs Select Committee and the Intelligence and Security Committee? What role might these committees play?

342. Eleven responses were received for this question. Four believed there was a need for a new committee and four thought that there was not. The remaining three made a number of other suggestions. Of these, one felt that it was a "matter for Parliament to decide if there is a need for a new committee or if an existing one could fulfil the role described." One was content to leave the matter open as they felt it was a matter of "efficacy rather than principle". And one suggested a Committee composed of Privy Counsellors as an alternative: "Perhaps from both Houses, including former Chief of Defence and the diplomatic services to provide a professional input."

343. Of those that supported the idea of a new committee the reasons given were for clarity of function and to allow Parliament to dispose of its new responsibility appropriately.

344. Of those responses that did not support the creation of a new Committee, one respondent did not favour the idea in the present situation but felt it might be appropriate if committees' independence was enhanced and the committee process was more robust than is presently the case. Two simply stated that they did not see the need for a new committee and one suggested an extension by statute of the role, composition availability and responsibilities of the Intelligence and Security Committee.

345. In addition to the four responses that favoured the creation of a new committee two felt that there was a place for committee involvement in this proposed mechanism, but did not specify that this should be a new committee.

346. About half of the responses provided additional information about the role of the committee. Of these, all felt that the role should be to examine sensitive information and a few felt it should have the specific role of approving urgent and secret operations; one of these respondents stated that any committee should 'be able to act as a committee of enquiry and meet in camera along the lines of the Defence Committee in Germany'. One suggested a committee could have a role in authorising the executive to withhold information from the

house or delay making a statement for reasons of urgency and secrecy as well as to guide parliament.

Question 11: Is it better to proceed simply by way of a free-standing convention, or a resolution of the House of Commons or both Houses, or should the new arrangements have a legislative backing? If so should that be on the lines of the hybrid option or of the full legislative option?

347. Eleven responses were received to this question. General comments on the resolution were that it was more flexible and could stem the possibility of the courts becoming involved in this process. However it was also suggested that "conventions are vague and only exist as long as all parties concerned accept them". One respondent also expressed doubts as to whether a convention could be suddenly created.

348. There were concerns that a convention or a resolution might not put sufficient checks and balances on the Government, "conventions can be ignored and resolutions of the House are not always watertight in their application." One respondent however, believed that while in principle this new power should be put on a legislative footing he could also "see the advantages of a pragmatic approach though parliamentary procedure," and suggested the establishment of such a procedure along the lines of the Ponsonby Rule. He hoped this would be the start of an evolutionary process, "a convention would develop from this and ultimately legislation would become a viable option."

349. Whilst three respondents supported the idea of a convention, eight preferred a legislative approach. Where reasons were given they expressed the idea that "Legislation would be hard for the government to modify and be more consistent with the objective of transferring power to parliament."

350. The distinction between full legislation and the hybrid option was not specifically discussed other than one respondent noting that "it would seem to have the disadvantages of both with none of the advantages.'" Another thought that full legislative backing should provide "reasonable discretion for Government as to when the process is set in motion and provide for urgent and secret operations."

351. Part of the reason for some favouring a statue instead of a resolution, was the clarity it could provide, for example "A statute should make clear consequences of breach and not extend any kind of impunity to the executive". One respondent added that an Act of Parliament would make it clear that if Government acts without its legislative authority there could be a possibility of Judicial Review.

Flag Flying

352. *The Governance of Britain* Green Paper committed the Government to consult on altering the current guidance on flying the Union Flag from United Kingdom Government buildings.

353. The consultation period ran from 26 July 2007 to 9 November 2007. There were 305 responses to the consultation. The majority of responses (287) came from members of the public with the remaining (18) responses coming from local authorities and other organisations. These included English Heritage, Westminster City Council, The Flag Institute, the Welsh Language Board and the Wessex Society.

354. The consultation document contained three questions; a summary is set out below. Respondents answered the questions in a variety of ways and some also raised their own questions.

Question 1. Do you think the Union Flag should be flown on Government buildings?

355. Of those who answered this question, 60 percent favoured the Union Flag being flown on Government buildings all of the time; four percent favoured flying the Flag on working days only; two percent thought it should be flown on an increased number of fixed days; 13 percent favoured the status quo of flying the Flag on the current 18 days; and three percent thought that Government departments should be able to choose when to fly the Flag. The remaining 18 per cent who responded favoured a variety of measures outside of the five options offered or were unclear.

Question 2. If only the current fixed flag flying days is increased (option 3) which extra days should be included?

The following additional days were suggested by respondents.

Date	Significance
1 January	Introduction of the current Union Flag – New Years' Day
16 January	Anniversary of the signing of the Act of Union
13 February	Coronation of William and Mary and Proclamation of the Bill of Rights
1 March	St David's Day
8 March	International Women's Day
2nd Monday in March	Commonwealth Day
17 March	St Patrick's Day
March/April	Good Friday
March/April	Easter Monday
12 April	Introduction of the first Union Flag
23 April	St George's Day
1 May	Formation of the United Kingdom
1st Monday in May	Bank holiday
7 May	Victory in Europe (VE) Day
12 May	Florence Nightingale's Birthday
Last Monday in May	Bank holiday
29 May	The restoration of the Monarchy
6 June	The Normandy landings (D Day)
14 June	Liberation Day Falkland Islands
15 June	Signing of the Magna Carta
18 June	Waterloo Day
27 June	Veteran's Day
2 July	The Act of Universal Suffrage
14 July	Union Flag became the National flag
2 August	Battle of Blenheim

Date	Significance
10 August	Defeat of the Spanish Armada
13 August	Anniversary of Florence Nightingale's death
15 August	Victory over Japan (VJ) Day
Last Monday in August	Bank holiday
3 September	Merchant Navy Day
15 September	Battle of Britain Day
21 October	Trafalgar Day
24 October	UN Day
3 November	Convening of the Long Parliament
5 November	The Gunpowder plot
11 November	Remembrance Day (in addition to the nearest Sunday)
30 November	St. Andrew's Day
10 December	International Human Rights Day
16 December	Bill of Rights
25 December	Christmas Day
26 December	Boxing Day

356. The above suggestions are for days on which the Union Flag should be flown throughout the United Kingdom. A very small number of respondents suggested that the constituent nations should be encouraged to adopt additional days – for example:

England	25 October	Battle of Agincourt
Scotland	25 January	Burns Night
Northern Ireland	12 July	Battle of the Boyne
Wales	2 August (or as appropriate)	National Eisteddfod

357. A very small number of respondents also suggested that the Union Flag should be flown to mark opening and prorogation of sessions of Parliament throughout the UK and not restricted to London as is now the case.

Question 3: Do you have any other comments on flying the Union Flag on Government buildings?

358. Some respondents who commented on this question reiterated their support for flying the Union Flag more often on Government buildings. Some went on to discuss the symbolism behind the Flag and the values it represents.

> *"As a former senior Army officer and diplomat, spending two thirds of my career abroad, I strongly support the display of visible symbols representing our nationhood, such as the Union Flag. I remember very well the importance and positive, uplifting, effects of those symbols in some difficult times and places." – Member of the public.*

> *"My opinion is that we should be proud of our flag and the history attached to it. It is a physical demonstration of our democratic status and a reminder of those who have gone before to ensure our rights and privileges"* – Member of the public

359. However, some respondents thought that it was not appropriate to fly the Flag more often. Of those who commented on this, a number thought that flying the Flag more often was symptomatic of a nation struggling with its own identity.

> *"Flag flying is for people and states with a weak sense of personal worth and personal identity........The UK does not fall into that category".* – Member of the public.

> *"Let's keep it as we are please. Part of being British is an understatement and not feeling we need to prove our patriotism by flag waving and the like...."* – Member of the public

360. Others thought that flying the Flag more regularly would not be appropriate and it would detract from the significance of the days when the Flag is flown.

> *"I am deeply opposed to the proposal to alter the current arrangements since it removes the marking of these special days and is deeply disrespectful of our widely admired Monarch" –*
> Member of the Public.

361. A number of respondents commented on the design of the Flag. Some respondents were in favour of retaining the current design, while others argued against it on the basis that it was an outdated symbol.

> *"Our ever more diverse nation needs to reinforce its sense of identity, the Union Flag represents our unity, it should be flown at all times and on all public buildings as a matter of course."* – Member of the public.

> *"The Union Flag is a symbol, not of unity but of fragmentation and of an unequal union."* – Member of the public.

362. Some respondents also expressed opposition to flying the Flag within the four nations and viewed such a move as an attempt to suppress the individual identity of the nations that constitute the Union.

> *"It seems a bit late to consider this now that the Welsh, the Scots and Northern Irish have their own assemblies. They will no doubt propose to fly their own flags – the Cornish will certainly prefer St Pirrans flag and that just leaves the English flying the Union Flag and they would probably prefer to fly St George's."* – Member of the Public.

363. Other respondents thought that

> *"I believe, as in France, the national flag (Union Jack) should be flown on all national government, local government and town hall buildings at all times.*
>
> *Alongside the national flag should be flown a second flag. This should be the Scottish Saltire in Scotland, Welsh Dragon in Wales, Cross of St George in England and Cross of St Patrick in Northern Ireland."* – Member of the public.

364. Some respondents thought that there should be rules governing the use of the Flag to prevent situations arising in which it can be used or displayed in a disrespectful manner.

> *"Before any other decision is made regarding the display of the Union Flag, its dignity must be restored and reinforced by legislation prohibiting any use of the design other than as a flag."* – Member of the public

365. Other comments made by respondents touched on the following matters:

- Proper maintenance and display of the Flag including the illumination of the Flag at night:

> *More care should be taken by Departments to ensure that all flags flown from Government buildings are in immaculate condition and properly hoisted. Departments should also be encouraged to floodlight their flags at night where they are not hauled down"* – Member of the public

- Where the Flag should be flown, for example, schools and other seats of learning, all public buildings and spaces, and places of religious worship.

> *"The definition of Government buildings should be widened to Public buildings… and include all educational establishments, City and Town Halls, Local Authority Offices, Hospitals,…Offices of Public Utilities and organisations,… Public transport buildings… (and) Places of religious worship…"* – Member of the public.

- Educating the public about the history and meaning of the Flag:

  > *"The government should consider an education programme for citizens to learn the meaning of the Flag…. (possibly through) the National Curriculum and possibly with a government publication along the lines of the booklet produced by the Australian Government."* – The Flag Institute.

366. The consultation responses provided general support for the Government's limited flag flying proposal, and also generated a wide range of other comments and suggestions about the use of the Union Flag. While considering some of these further, the flag flying guidance will be revised to

- make permanent the freedom for UK Government departments to fly the Union Flag on their buildings when they wish, and
- allow Whitehall UK Government buildings with two or more flag poles to fly the flags of Scotland and Wales on their patron saints' days.

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