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The Governance of Britain Green Paper

The Government's July 2007 Green Paper, *The Governance of Britain* made a number of proposals for constitutional reform which are intended to shift power from the executive to Parliament and the public, make the executive more accountable, and reinvigorate democracy. The Green Paper also emphasised the need to involve the public in constitutional change.

This paper sets out the government proposals, their context, and initial responses to them. It also looks at the mechanisms by which the Green Paper, dubbed as "the first step in a national conversation", will involve Parliament and the public in further reform.

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Summary of main points

The *Governance of Britain* Green Paper was published by the Government a matter of days after Gordon Brown became Prime Minister. The Labour administrations of 1997-2007 oversaw major changes to the constitutional structures and systems of the United Kingdom including the establishment of devolved administrations in Scotland Wales and Northern Ireland and the incorporation of the European Convention on Human Rights into UK law. However, despite the catalogue of reforms, the Government was subjected to criticism that their approach was piecemeal, that it was imposed from above, and that no overall vision for the future was presented to the public. The Green Paper can therefore be seen as a change of approach – it aims to set out a wide-ranging programme for reform within a narrative which emphasises Britishness, citizenship and civic participation. The Government's proposals are set out under four headings:

- Limiting the powers of the executive – proposals include reforming several aspects of the Royal Prerogative, increasing parliamentary scrutiny of public appointments and reviewing the role of the Attorney General.

- Making the executive more accountable – this includes proposals publish a draft legislative programme and revise the Ministerial Code.

- Reinvigorating our democracy – the Green Paper considers increasing public participation in local government and services, to consult on moving election day to the weekend for general and local elections, and reviewing the right to protest in the vicinity of Parliament.

- Britain's Future: the Citizen and the State – this includes a discussion of the need to develop a British Statement of Values, and perhaps a British Bill of Rights.

The Green Paper echoes several proposals for constitutional change by the Liberal Democrats in their 2007 paper *Real Democracy for Britain,* and by the Conservative Party's Democracy Task Force, chaired by Kenneth Clarke. It also reflects the work of several parliamentary committees, most including the work of the House of Commons Constitutional Affairs Committee and the Public Administration Select Committee, and the House of Lords Constitution Committee. These three Committees have indicated that they will take an interest in any forthcoming proposals. The House of Commons Modernisation Committee, chaired by the Leader of the House, has also announced that it will undertake an inquiry on aspects of the reforms which involve affect Parliament, such the proposal for annual debates on departmental objectives and annual reports.

Rather than setting out a detailed programme for change, the Paper described itself as the "the first step in a national conversation". Along with traditional written consultation papers, a number of other ways of involving politicians, experts and the public have been announced. These include a 'Citizens' Summit' on its proposals for a British Statement of Values, a Speaker's Conference on electoral matters, further cross-party talks on House of Lords Reform, and review of citizenship to be carried out by Lord Goldsmith. Public involvement in policy making was also emphasised, with announcements on a series of citizens' juries during the summer of 2007.

The Government has indicated that there will be a constitutional reform bill in the 2007-08 Session of Parliament to, “take forward the initial legislative elements of the Constitutional Renewal package to be set out in the Government’s Green Paper”, although any bill is likely to be published first in draft.

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I Introduction

On 3 July 2007, less than a week after he became Prime Minister, Gordon Brown, published his proposals for constitutional reform in a Green Paper, *The Governance of Britain*.[1] Mr Brown's intention to initiate a new raft of constitutional changes had become evident in the weeks before he took office. When he accepted his nomination as leader of the Labour Party Mr Brown said that he would, "bring forward reform proposals to renew our constitution with the first draft constitutional reform bill later this year".[2]

The Green Paper stated the Government's intention to "forge a new relationship between government and the citizen, and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power".[3] Some of its proposals have already been put into effect (such as the vote of the House on the appointment of the Chair of the new Statistics Board). However, the Paper states that it is not a "final blueprint", but "the first step in a national conversation".[4]

The Government's proposals fell under four main headings. The first three were defined by the Government's *Draft Legislative Programme* also published in July 2007 as:

> **Limiting the powers of the executive** – the Government will seek to surrender or limit the 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, these will include, among others, powers to deploy troops abroad, request the dissolution and recall of Parliament and the power to choose bishops in the Church of England and appoint judges.
>
> **Making the executive more accountable** – the Government will act to enhance its accountability to Parliament. The Government has proposed changes to the Intelligence and Security committee. It will simplify the reporting of expenditure to Parliament, give Parliament greater powers in relation to certain public appointments and will invite Parliament to hold annual debates on the objectives and plans of Government Departments. The Government has also published a revised Ministerial Code with new arrangements for independent advice to Ministers and more transparency around Ministers' interests and travel.
>
> **Reinvigorating our democracy** – the Government will continue to develop plans for substantially or wholly elected second chamber; better enable local people to hold service providers to account and place a duty on public bodies to involve local people in major decisions.[5]

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1 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170

2 Gordon Brown, *Acceptance Speech: the nomination as Leader of the Labour Party,* 17 May 2007, http://www.labour.org.uk/leadership/gordon_brown (last viewed 4 October 2007)

3 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, p5

4 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, p5

5 Office of the Leader of the House of Commons, *The Government's Draft Legislative Programme,* July 2007, Cm 7175

The last section is titled 'Britain's future: the Citizen and the State', and considered citizenship, 'Britishness', rights and responsibilities.

The current proposals follow ten years of constitutional developments; these included:

- the removal of all but 92 of the hereditary peers from the House of Lords;
- referendums on proposals for a Scottish Parliament, a National Assembly for Wales, and a Greater London Assembly and Mayor, and their consequent establishment;
- the incorporation of the European Convention on Human Rights into UK law by means of the *Human Rights Act* 1998;
- the introduction of freedom of information legislation in 2000;
- the establishment of the Electoral Commission and other measures within the *Political Parties Elections and Referendums Act* 2000; and
- the reform of the office of Lord Chancellor, the removal of the Law Lords from the House of Lords and the establishment of a supreme court in 2009 (under the *Constitutional Reform Act* 2005).

The Governance of Britain appeared to have marked a departure from previous constitutional reform initiatives in three ways. First, its very nature as a single document outlining the rationale for a wide range of constitutional change was widely considered to have been missing from Tony Blair's constitutional reform agenda. Second, it has put an emphasis on the need for widespread consultation – a national conversation – both on policy making in general, and on constitutional reform in particular. And third, the proposals within the Green Paper have, to some extent, been greeted as a departure from the policy of the 1997-2007 Labour Governments. Proposals on parliamentary involvement in public appointments, for example, follow several negative responses to similar proposals by select committees in the House of Commons. Civil service legislation, hitherto not seen as a priority for the Government, is now likely to be introduced in the 2007-08 session of Parliament.

This paper sets out the reforms proposed in the Green Paper, their context, and the responses to them. It makes reference to several Library Standard Notes which contain detailed background information relevant to the content of the *Governance of Britain.* It reproduces the Lord Chancellor's 25 October 2007 statement to the House of Commons in full in the Appendix. As matters develop, and further consultation papers and processes are announced, the Library's Standard Notes will be updated.

II Limiting the powers of the executive

In this, the first section of the Green Paper, the Government explained why it believes that the Prime Minister and the Executive "should surrender or limit" some of its powers:

> For centuries the executive has, in certain areas, been able to exercise authority in the name of the Monarch without the people and their elected

> representatives being consulted. This is no longer appropriate in a modern democracy. The Government believes that the executive should draw its power from the people, through Parliament.[6]

The prerogative powers of the monarch date back to medieval times. However, following the Glorious Revolution and the growth of the constitutional monarchy, it became established that the majority of prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Ministers continue to rely on prerogative powers for a variety of governmental tasks such as deploying troops, signing international treaties, appointing ministers and changing the machinery of government. Detailed information setting out the origin and operation of prerogative powers is included in the Library Standard Note, *The Royal Prerogative.*[7]

There has been recent parliamentary interest in the exercise and scrutiny of prerogative powers, largely in connection with the role of parliament in the deployment of troops, but also in relation to the powers of the Prime Minister. In 2004 the Public Administration Select Committee began a wide-ranging review of the prerogative. Their report concluded:

> …that a different approach is needed, and that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers exercised by Ministers. The list would then be considered by a parliamentary committee and appropriate legislation would be framed to put in place statutory safeguards where necessary. A paper and draft Bill appended to the Report, prepared by Professor Rodney Brazier, the specialist adviser to the inquiry, contain these provisions as well as proposals for early legislative action in the case of three of the most important specific areas covered by prerogative powers: decisions on armed conflict, treaties and passports. The Report recommends that the Government should, before the end of the current session, initiate a public consultation exercise on the prerogative powers of Ministers.[8]

The Government's response to this report, in July 2004, was as follows:

> …The Government accepts and welcomes scrutiny of any of its actions, including those taken under the prerogative. However, it is not persuaded that the Committee's proposal to replace prerogative powers with a statutory framework would improve the present position.
>
> Ministers are already accountable to Parliament for action taken under prerogative powers, as for anything else. The use of prerogative powers is subject to scrutiny by Departmental Select Committees. Additionally the Prime Minister is subject to twice yearly questioning by the Liaison

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6 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, p15

7 House of Commons Library Standard Note SN/PC/03861, *The Royal Prerogative*

> Committee. It is for Ministers to account for and to justify their actions to Parliament and for Parliament to hold Ministers to account. Such accountability is in itself a form of control exercised by Parliament over the executive.
>
> It is long established law that Parliament can override and replace the prerogative by statute, where the individual circumstances make that appropriate. There have been a number of examples in recent years where such a change has been made, for example in the Regulation of Investigatory Powers Act. Parliamentary scrutiny and accountability can also be increased without statutory provision. The rules on scrutiny of EU proposals and the recent developments in parliamentary debate on armed conflict are examples of this.
>
> The Government therefore agrees that it is often possible to make out a case for either the transfer of prerogative powers to a statutory basis, or for an increase in the level of non-statutory parliamentary scrutiny. It continues to believe, however, that these changes are best made on a case-by-case basis, as circumstances change. It does not therefore agree with the recommendation for a wide-ranging consultation exercise. This could only result in a snapshot at a fixed moment of what is inevitably a fluid and evolving situation.[9]

In 2005 the House of Lords Constitution Committee began a separate inquiry into the use of the royal prerogative to deploy the UK's armed forces, recommending an approach based on convention rather than statute; this is considered below.

The Prime Minister has therefore departed from previous attitudes towards the prerogative by government. The *Governance of Britain* listed twelve areas where he intends to limit prerogative powers. These are:

- the power of the executive to declare war;
- the power to request the dissolution of Parliament;
- the power over recall of Parliament;
- the power of the Executive to ratify treaties without decision by Parliament;
- the power to make key public appointments without effective scrutiny;
- the power to restrict parliamentary oversight of our intelligence services;
- power to choose bishops;

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8 Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, 16 March 2004, HC 422 2003-04

9 Department for Constitutional Affairs, *Government Response to the Public Administration Select Committee's Fourth Report of the 2003-4 Session Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (HC422)*, July 2004

- power in the appointment of judges;
- power to direct prosecutors in individual criminal cases;
- power over the civil service itself; and,
- the executive powers to determine the rules governing entitled to passports and the granting of pardons.

A consultation on a wider review of the prerogative powers of the executive is also planned.[10]

A. War making powers and ratifying treaties

The power of the government to deploy troops has been subject to a large amount of debate and discussion. More detailed background information on this, as well as on parliament's role in previous conflicts and the issues raised, is available in the Library Standard Note *Parliamentary Approval for Deployment of the Armed Forces: An Introduction to the Issues.*[11] There have been several attempts at private members legislation on the issue, with bills introduced on different occasions by Neil Gerrard, Clare Short and Michael Meacher. The House of Lords Constitution Committee conducted an inquiry into the matter and the Public Administration Select Committee also considered it during their inquiry into the Royal Prerogative.

The Lords Constitution Committee's report, published in July 2006, set out their view that:

> Under the Royal prerogative powers, the Government can declare war and deploy armed forces to conflicts abroad without the backing or consent of Parliament. However, the Government agreed to a parliamentary vote before the Iraq war in 2003. Subsequently, there have been calls for a requirement that Government should always seek Parliament's approval when taking action in future conflicts.

The Committee recommended that:

> …there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict.
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> …

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10 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, paras 49-51

11 House of Commons Library Standard Note SN/IA/4335, *Parliamentary Approval for Deployment of the Armed Forces: An Introduction to the Issues*

> While not seeking to be prescriptive, we recommend that the convention should encompass the following characteristics:
>
> (1) Government should seek Parliamentary approval (for example, in the House of Commons, by the laying of a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;
>
> (2) In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;
>
> (3) If, for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days of its commencement or as soon as it is feasible, at which point the process in (1) should be followed;
>
> (4) The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly should seek a renewal of the approval.[12]

In a follow-up report, the Committee expressed their disappointment with the Government's response, calling it "inadequate". They continued:

> The response states that "the Government is not presently persuaded of the case for … establishing a new convention determining the role of Parliament in the deployment of the armed forces", arguing that "it must be the Government which takes the decision" because "that is one of the key responsibilities for which it has been elected". This underplays the fact that Parliament was also elected—indeed, the executive draws its strength and legitimacy from a democratic Parliament—and does not address our conclusion that "Parliament's ability to challenge the executive must be protected and strengthened". It is not sufficient simply to assert, as the Government do, that "adequate mechanisms for intense parliamentary scrutiny of executive actions are already in place". Moreover, when we voiced our discontent about the response during an oral evidence session with the Lord Chancellor on 22 November 2006, he declined to throw any further light on the Government's position and told us "I am not sure that there is much more that we can do".[13]

In their report, however, the Constitution Committee noted that Gordon Brown had stated his view on war making powers shortly before the 2005 General Election to a national newspaper. He was quoted as saying:

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[12] Constitution Committee, *Waging war: Parliament's role and responsibility*, 27 July 2006, HL 236 2005-06

[13] Constitution Committee, *Waging war: Parliament's role and responsibility Follow-up*, 20 February 2007, HL 51 2006-07

> Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely that except in the most exceptional circumstances a government would choose not to have a vote in Parliament. I think Tony Blair would join me in saying that, having put this decision to Parliament, people would expect these kinds of decisions to go before Parliament.[14]

The *Governance of Britain* set out the new administration's view that:

> …On an issue of such fundamental importance to the nation, the Government should seek the approval of the representatives of the people in the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible. This needs to be done without prejudicing the Government's ability to take swift action to protect our national security, or undermining operational security or effectiveness. The Government will therefore consult Parliament and the public on how best to achieve this.[15]

On 25 October 2007 the Ministry of Justice, together with the Ministry of Defence and Foreign and Commonwealth Office, published a consultation paper *War Powers and Treaties: Limiting Executive Powers.*[16] In relation to war making powers, the paper asked "whether any mechanism for obtaining Parliamentary approval should take the form of a Parliamentary convention, perhaps embodied in a resolution of the House of Commons, or whether it should be made statutory". The Paper continued:

> A Parliamentary convention in the form of a resolution has the advantages of being more flexible and adaptable. The interpretation of the resolution would lie clearly in the hands of Parliament rather than the courts. It could be framed in more general terms than is possible with statute. It is therefore less likely to interfere with the operational freedoms and responsibilities of commanders in the field.
>
> Legislation might be seen as providing a stronger incentive for the government of the day to comply with an approval requirement as the need to obtain approval could only be resolved by further primary legislation. Legislation would also allow Parliament to make clear that failure to comply with the procedure was not intended to make the conflict unlawful nor expose any individuals to civil or criminal liability. It might be possible to combine the respective advantages of convention and legislation in a "hybrid" approach in the form of a short Act which requires the approval of Parliament or the House of Commons to deploying armed forces into armed conflict abroad, and provides very clear legal protection

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14 Daily Telegraph, 30 April 2005, as quoted by the Constitution Committee, *Waging war: Parliament's role and responsibility,* 27 July 2006, HL 236 2005-06, para 87

15 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, para 26

16 Ministry of Justice, *The Governance of Britain: War powers and treaties: Limiting executive powers,* Cm 7239, October 2007
http://www.justice.gov.uk/publications/cp2607.htm

> for individuals, while leaving the detailed Resolution arrangements to procedures that would be determined later.[17]

Other questions raised included whether a definition would be needed for armed conflict, what information should be provided to Parliament, and the role of the House of Lords in any new parliamentary procedures.

On the process for ratifying treaties, the consultation paper asked whether the current process known as the 'Ponsonby Rule' (which involves treaties being published as Command Papers, laid before Parliament for 21 days before ratification, and a Government undertaking to provide time for debate if one is requested) could be replaced by formal arrangements or statutory provisions.

B. Dissolution and recall of Parliament

Dissolution of Parliament is a prerogative power held by the Monarch. In recent years, however, Parliament has been dissolved only at the request of the Prime Minister, who can therefore decide the timing of a general election within the five year period required by the *Parliament Act 1911*. The announcement that a general election is to take place has, since 1945, normally been made to the press rather than to Parliament. Earlier in the century it was customary to make the statement to the Commons (when not in recess). More information about the timing of general elections, along with proposals made to introduce fixed term parliaments, is available in the Library Standard Note on *Fixed Term Parliaments.*[18] Fixed term Parliaments were most recently called for by the Liberal Democrats in their 2007 paper *Real Democracy for Britain* and their 2007 autumn party conference paper *For the People, By the People*.[19] A cross-party campaign group, The Campaign for Fixed Term Parliaments, has also recently been established.[20]

The Governance of Britain proposed that, rather than the dissolution of Parliament occurring only at the request of the Prime Minister, or at the end of a five-year period, that the Prime Minister should have to seek the approval of the House of Commons before asking the Monarch to dissolve Parliament. Any new arrangements would have to provide for the situation in which it proves impossible to form a government which commands the support of the House of Commons yet Parliament refuses to dissolve itself. The Government announced that it will consult on these proposals and any change would be announced to Parliament and would become through precedent, a new convention.[21]

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17 *Ibid.,* paras 6-8

18 Library Standard Note SN/PC/831, *Fixed Term Parliaments*

19 Liberal Democrats, *Real Democracy for Britain,* 2007, http://www.libdems.org.uk/media/documents/parliament/Real%20Democracy%20for%20Britain1.pdf (last viewed 5 October 2007); Liberal Democrats, *For the People, by the people,* Autumn 2007, http://www.libdems.org.uk/media/documents/policies/PP83_constitutional_Sep07.pdf (last viewed 12 October 2007)

20 See http://www.fixedterm.org.uk/ (last viewed 24 October 2007)

21 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, paras 34-36

Currently, the recall of Parliament is determined by the House's Standing Orders (it is not, in fact, a prerogative power). Standing Order 13 (Earlier meeting of House in certain circumstances) allows the Speaker to decide whether Parliament should be recalled, but only once Ministers have made representations to him that the public interest requires this. In recent Sessions, motions to amend the relevant Standing Order have been tabled and appeared in the "Remaining Orders and Notices" section of the Order Paper, leaving the Speaker free to recall the House without the initial approach from the Government.[22] Recent recalls have included September 2002 when the House was recalled to discuss Iraq and Weapons of Mass Destruction and on 14 September 2001 to debate international terrorism and the attacks on the USA. More detailed information is available in the Library Standard Note, *Recall of Parliament.*[23]

The Governance of Britain announced that the government would consult the Modernisation Committee on how to change to Standing Order 13 to effect their belief that "where a majority of members of Parliament request a recall, the Speaker should consider the request, including cases where the government itself has not sought a recall".[24] On 11 October 2007 the Modernisation Committee announced an inquiry into the recall and dissolution of Parliament.[25]

The significance of these two reforms has been questioned. *The Times* leader suggested that they may be "merely symbolic":

> Allowing a majority of MPs to demand a recall of the House of Commons during a recess and asking for their approval before Parliament is dissolved and an election is called sound like sizeable concessions, but would the majority party ever go against the edict of its leader on such matters?...[26]

C. Civil Service Bill

The 1854 Northcote Trevelyan Report which established the modern civil service recommended that the core values and principles of the Civil Service should be enshrined in legislation. Over 150 years later, this recommendation has not yet been implemented.

There have been a number of calls for a Civil Service Act. The Committee on Standards in Public Life recommended the introduction of legislation in 2003.[27] The Public Administration Select Committee produced a Civil Service Bill in 2004 and has

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22 For example, see "Remaining Orders and Notices", tabled for 10 October 2005; and "Remaining Orders and Notices", tabled for 16 July 2007.

23 House of Commons Library Standard Note SN/PC/1186, *Recall of Parliament*

24 Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, paras 37-39

25 Modernisation Committee Press Notice, 11 October 2007; full terms of reference were published in a Press Notice on 24 October 2007

26 'The Commons Touch: Brown needs to ensure constitutional change is not too fadish', *The Times,* Leading Article, 4 July 2007

27 Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service,* Cm 5775, 8 April 2003

repeatedly called for its introduction.[28] There have also been several attempts at introducing private Members' legislation.[29] A bill has also been recommended by the Conservative Party's Democracy Task Force (which was established at the beginning of the 2005 Parliament under the chairmanship of Kenneth Clarke and includes Conservative Party Parliamentarians and party members, and is advised by Lord Butler of Brockwell, a former Cabinet Secretary, and Sir Christopher Foster).[30]

The Government itself issued a draft Civil Service Bill as a consultation paper in November 2004.[31] Its contents differed from the Public Administration Select Committee Bill. In particular, the government consultation did not propose that the Civil Service Commissioners should have the power to undertake inquiries into the operation of the Civil Service Code and the Code of Conduct for Special Advisers.[32] No summary of responses has yet been published despite pressure from the Public Administration Select Committee.[33] The Government's response to the report of the Committee on Standards in Public Life in 2003 stated that, "The Government accepts the case in principle for legislation but any legislation has to compete for its place alongside many other priorities. The Government also believes that much more can be done to implement most of the Committee's concerns without or in advance of legislation".[34]

The *Governance of Britain* stated that, "The Government believes that, as part of the legislation it intends to bring forward in the next Session, it is right to include measures which will enshrine the core principles and values of the Civil Service in law".[35] The legislation is intended, according to the Green Paper, to:

- place the independent Civil Service Commissioners on a statutory footing;
- make the principle of appointment by merit following fair and open competition a legal reality;
- clarify the "legitimate and constructive role" of Special Advisers within government; and
- make permanent the new administration's belief that "it is inappropriate for even a limited number of Special Advisers" to be allowed to give orders to civil servants.

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28 Public Administration Select Committee, *A Draft Civil Service Bill: Completing the Reform*, 5 January 2004, HC 128 2003-04; Public Administration Select Committee, *Response to the Government's Consultation on the Civil Service Bill*, 22 February 2005, HC 336 2004-05

29 Oliver Heald, the then Shadow Leader of the House, published a Bill on 12 January 2004 identical to the wording of the PASC bill. It was a presentation bill only and made no further progress. Lord Lester introduced a Bill, The *Executive Powers and Civil Service Bill 2003-04*. For more details see Library Standard Note SN/PC/2863 *The Civil Service Bill 2003-04.*

30 Conservative Party Democracy Task Force, *An End to Sofa Government,* 2007, http://www.conservatives.com/pdf/DTF_Sofa_Government.pdf (last viewed 4 October 2007)

31 Cabinet Office, *A Draft Civil Service Bill: A consultation document,* Cm 6373, November 2004

32 Other differences were set out in the Public Administration Committee's own response to the Bill, published as HC 336 2004-05.

33 Public Administration Select Committee, *Politics and Administration: Ministers and Civil Servants,* HC 901 2006-07, para 135.

34 Cm 5964

35 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 40-48

Previously, Article 3(3) of the Civil Service Order in Council 1995 (as amended in 1997) had given the Prime Minister the ability to appoint up to three such advisers.

It is not clear, however, how closely it will be based on the Public Administration Select Committee Bill, the Bills introduced as Private Members' Bills, or the Government's own draft bill from 2004.

Further background information on proposals for civil service legislation is available in the Library Standard Note *The Civil Service Bill* and the Research Paper *Whither the Civil Service.*[36]

D. Role of the Attorney General

The office of the Attorney General originated in 1315, with the office of Solicitor General dating back to 1461. The Attorney General's Office website states that the offices of the Attorney General and Solicitor General attained their modern 'shape' in the seventeenth century when they became legal advisers of the Crown. Professor Edwards records that a Law Officers' Department was established in 1893, with a small secretarial staff and that another 40 years were to pass before the "nucleolus of a small professional staff was authorised."[37] That office now has 53 staff and a budget of £5m.[38] The Attorney also "superintends" several other offices (including the Crown Prosecution Service) with total combined staff numbers of 9,743 and outturn of £778m in 2006/7.[39] In 1997, the *Law Officers Act* granted the Solicitor General new powers to exercise "any functions" exercised by the Attorney.

The role of the Attorney General was described by Sir Francis Bacon as "the painfullest task in the realm" and many holders of the office have suffered from controversy. Examples include Rt Hon Sam Silkin for declining to prosecute the Clay Cross Councillors and the Post Office Union (for its unlawful boycott of mail to South Africa during apartheid), Sir Michael Havers (who consented to the prosecution of a civil servant following disclosure of information relating to the sinking of the Belgrano) and Sir Nicholas Lyell who was Attorney during the collapse of the Matrix Churchill trial.[40] Following Lord Goldsmith's appointment in 2001, a number of issues arose regarding the role of the Attorney General, including his advice on the legality of the war in Iraq, the question of possible charges over allegations of "cash for peerages" and the discontinuance by the Serious Fraud Office of an investigation into allegations of corruption against BAe systems on "public interest grounds". In December 2006 the Constitutional Affairs Select Committee issued a press notice which announced an inquiry into the constitutional role of the Attorney General.

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36 Library Standard Note SN/PC/2863, *The Civil Service Bill*, and Research Paper 03/49, *Whither the Civil Service?*

37 J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p5

38 Figures relate to 2006/7, from *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192, Annex C

39 *Ibid.*

40 For further examples, see the evidence of Lord Goldsmith QC to the Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, Ev 61

The Attorney General's Office has published a list of his functions, following a request to attend the Constitutional Affairs Committee in February 2007 to examine his role.[41] The list separates the functions into those which are wholly or partly statutory (such as the superintendence of the prosecution agencies (CPS, Serious Fraud Office and Revenue and Customs Prosecutions Office)), the consent to bring certain prosecutions, refer points of law in criminal cases to the Court of Appeal[42], refer unduly lenient sentences to the Court of Appeal[43] and the appointment of special advocates in England and Wales[44]) from those which result from a convention or other authority. Many of the Attorney's functions seem to stem from practice or convention. For example, Professor Edwards traces his recognition as the titular head of the English Bar to 1814[45] and also makes reference to the practice of the Attorney General to attend, but not be a member of the Cabinet.[46]

a. Membership of the Cabinet

In *The Law Officers of the Crown*, Professor Edwards records that whilst historically, some Attorneys have gained membership of the Cabinet, this practice was initially discontinued in 1922. [47] When Sir Douglas Hogg was appointed Attorney in 1924, and accorded Cabinet rank, this move was subject to criticism in legal journals and the House of Commons.[48] Edwards states that "the outcry appears to have had some effect, for the next Attorney General, Sir Thomas Inskip, appointed in March 1928, was not included in the list of Cabinet Ministers, and this policy has been followed without exception ever since."[49] In the *Attorney General, Politics and the Public Interest*, Edwards surmised that the policy had "served to reinforce the tradition that the subject of criminal prosecutions is outside the purview of the Cabinet's decision-making functions."[50] The Constitutional Affairs Committee inquiry into the role of the Attorney

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41 Available at: http://www.attorneygeneral.gov.uk/attachments/Constitutional%20Affairs%20Committee%20-%20Functions%20of%20the%20Attorney%20General.pdf (last viewed 9 August 2007)

42 Under Section 36 of the *Criminal Justice Act 1972*, where a person tried on indictment has been acquitted, the Attorney General may seek the opinion of the Court of Appeal on a point of law which has arisen in the case. It is usual, but not essential, that the point of law should have been crucial to the outcome of the case. The ruling by the Court of Appeal does not affect the acquittal and the procedure is not used as an appeal.

43 Under s36 of the *Criminal Justice Act 1988*, if it appears to the Attorney General that the sentence imposed by the Crown Court is unduly lenient, and is an offence to which s36 applies, the Attorney may, with leave of the Court, refer the case to the Court of Appeal, which is empowered to quash any sentence passed and impose any sentence it thinks appropriate. See http://www.attorneygeneral.gov.uk/attachments/ULS%20-%20FAQ%20-%202007%20edition.pdf for further information.

44 By virtue of s6 of the *Special Immigration Appeals Commission Act 1997*, however in Scotland this power is granted to the Lord Advocate.

45 J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p3 and p276-277

46 *Ibid*, pp174-175, which in particular records the observation of AB Keith that "there are advantages in excluding from the Cabinet officers charged with the impartial and non-political administration of the law" – a view apparently echoed in an early edition of Wade and Phillips' *Constitutional Law* (5th Edition)

47 Citing the example of FE Smith and Sir Gordon Hewart, who was made a member on his appointment in 1919, J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p173

48 *Ibid.*

49 *Ibid.*, p174

50 J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984, p322-333

General concluded that the Attorney should only attend Cabinet by invitation and then "only for the consideration of specific relevant agenda items".[51]

b. Role in bringing prosecutions

The Attorney has published some guidance about his role in bringing certain prosecutions, indicating that:

> Law Officer consent is required to prosecute certain offences. At the last count, there were over five hundred such offences. In practice, consents work tends to be limited to applications to prosecute under: the Explosive Substances Act 1883; the Terrorism Act 2000; Part III of the Public Order Act 1986 (Inciting Racial Hatred); the Law Reform (Year and a Day Rule) Act 1996 and corruption offences. Law Officers may also receive applications for consent to prosecute under the Official Secrets Act. The Law Officers Act 1997 empowers both Law Officers to grant consent to prosecute.
>
> The criteria for the grant of consent are the twin tests contained in the Code for Crown Prosecutors. First, there must be a realistic prospect of conviction. Second, a prosecution must be in the public interest.[52]

The issue was given detailed consideration by the Law Commission in its Consultation Paper *Criminal Law: Consents to Prosecution*.[53] Published in 1997, the Law Commission said that:

> Although the use of consent provisions is not a recent development, their proliferation is […] It was not until the Second World War that consent provisions became widely used. We believe that the consents regime is a pressing and important subject for review.[54]

c. Recent developments

The Constitutional Affairs Select Committee twice took evidence from the former Attorney, Lord Goldsmith QC and whilst the original intention of the Committee may have been to inquire into his constitutional position following the *Constitutional Reform Act 2005* and the difficulties caused by the "cash for peerages" affair, the Committee subsequently considered the issue of the Saudi/BAe case and "public confidence in the role of the Attorney General".[55]

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51 *Ibid.,* paras 85-86

52 http://www.attorneygeneral.gov.uk/attachments/Consents.doc (last viewed 9 August 2007)

53 Law Commission Consultation Paper No 149, 1997, available at: http://www.lawcom.gov.uk/docs/cp149.pdf (last viewed 9 August 2007)

54 *Ibid.*, para 1.2

55 Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, p22-24

The Committee acknowledged that its report had not provided a "detailed blueprint for reform".[56] It said:

> On balance we have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government. The Attorney General's ministerial functions should be exercised by a minister in the Ministry of Justice. Where Ministers instruct the independent head of the prosecution service on public interest grounds, whether national security or other grounds, the Secretary of State for Justice would be accountable to Parliament for the instruction.[57]

Jeffrey Jowell QC has recently written that the simple solution would appear to be the Indian, South African or Israeli model, where the Attorney is not a serving politician. He noted that in Israel, the government is obliged to follow the Attorney's advice – and that an Attorney can refuse to defend a Government which fails to do so. However, he acknowledged that the "issue is more complex because even in those countries the Attorney-General is appointed by the Government (normally the Justice Minister) and is therefore still often perceived as being inclined to support those who appointed him."[58] He also stated that if the Attorney is "depoliticised", following the changes to the role of Lord Chancellor, there may no longer be any lawyers serving as Government ministers.

The Governance of Britain Green Paper, published by the Ministry of Justice, clearly indicated that changes would be made to the role of the Attorney General. The paper stated that the Government would "review the role of the Attorney General to ensure that the office retains the public's confidence."[59] It went on to add that:

> 54. The Government is fully committed to enhancing public confidence and trust in the office of Attorney General and is keen to encourage public debate on how best to ensure this and will listen to the views of all those with an interest. We will therefore publish a consultation document before the summer recess which considers possible ways of alleviating these conflicts (or the appearance of them) and invites comments. The Government looks forward in particular to the report of the Constitutional Affairs Select Committee of the House of Commons, and will study the Committee's report carefully [...]

When the announcement was made, the Prime Minister stated on 3 July 2007 that "while we consult on reform, the Attorney General has herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual criminal cases."[60]

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56 *Ibid.*, p41
57 *Ibid.*, p42
58 "Should the office of Attorney-General be reformed?", *The Times*, 3 April 2007
59 Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170, p7
60 HC Deb 3 July 2007 c817

It is not clear what practical effect this will have, since as noted above, the consent of the Law Officers is required to prosecute certain offences. At the last count, there were several hundred of these.[61] Furthermore, the former Attorney (Lord Goldsmith QC) cited national security as the reason for the Serious Fraud Office discontinuing the investigation into the BAe "Al Yamamah" deal, writing in a letter to Sir Menzies Campbell MP that "the judgment was that UK co-operation with Saudi Arabia in the counter-terrorism field is of crucial importance."[62]

In late July 2007, the Government published its *Consultation on the Role of the Attorney General*, allowing respondents until 30 November 2007 to answer a series of questions about possible reforms.[63] These included:

- Whether the role of chief legal adviser to the Government should be separated from that of a political Government Minister, and if so, who should exercise the role?
- If the Attorney should continue to attend Cabinet meetings and be involved in Cabinet Committees in the current way, or whether these practices should be reviewed?
- Whether the Attorney should be made subject to an express statutory duty to uphold the rule of law?
- If a commitment should be given that the Attorney should exercise his public interest functions in a way which is clearly institutionally separate from the Government?
- Whether legal advice to the Government should be published (and if so, in what circumstances?
- If the legal basis for key Government decisions should be made publicly available?
- Whether any changes are necessary to the Attorney General's public interest functions other than those relating to individual criminal prosecutions?

The consultation paper included a list of international comparisons in an Annex. Different (and more detailed) information on the role of Attorneys in other jurisdictions (including India and Israel, mentioned above) had previously been made available to the Constitutional Affairs Committee, which reproduced the information in its report.[64] The Committee was also provided with written evidence from the Scottish Lord Advocate and

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61 http://www.attorneygeneral.gov.uk/attachments/Consents.doc (last viewed 9 August 2007)

62 See http://www.attorneygeneral.gov.uk/attachments/AG%20letter%20to%20Sir%20Menzies%20Campbell%20MP.pdf (last viewed 9 August 2007)

63 The Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney* General, July 2007, CM 7192, available at: http://www.attorneygeneral.gov.uk/attachments/Consultation%20on%20the%20Role%20of%20the%20AGO.pdf (last viewed 9 August 2007)

64 Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC, Ev 62-68

the Director of Public Prosecutions in Ireland on their respective systems.[65] For further information please see the Library Standard Note *The Law Officers.*[66]

E. Parliamentary involvement in public appointments

Gordon Brown set out his views on parliamentary involvement in public appointments as far back as 1992 when, in his speech to Charter 88 (an organisation which campaigns for constitutional reform in the UK) he stated that:

> There must be proper accountability for all those who exercise power in the public's name. I favour certain appointments made subject to the scrutiny of a House of Commons committee, so reducing the prime ministerial power of patronage.[67]

Fifteen years later, in July 2007, Gordon Brown told the House of Commons that, "The House of Commons should also have a bigger role in the selection of key public officials".[68] His proposals, as set out in the *Governance of Britain*, stated that:

> …the Government nominee for key positions such as those listed below should be subject to a pre-appointment hearing with the relevant select committee. The hearing would be non-binding, but in the light of the report from the committee, Ministers would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection.[69]

The Government announced that it would, in consultation with the Liaison Committee, prepare a list of appointments for which confirmation-type hearings will apply. The examples given of appointments which might be subject to confirmation hearings were:

- the First Civil Service Commissioner (following the announcement by the Government that it is to legislate to place the Civil Service and its independent Commissioners on a statutory footing, it is right that Parliament should have a role in this appointment);
- the Commissioner for Public Appointments (who is responsible for ensuring public confidence in several thousand other appointments);
- the Parliamentary Commissioner for Administration and Health Service Commissioner for England (who is responsible for investigating maladministration in central government and the NHS);

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65 *Ibid*., Ev 92-109
66 Library Standard Note SN/HA/4485, *The Law Officers*
67 Gordon Brown, 1992
68 HC Deb 3 July 2007 c816
69 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 72

- the Local Government Ombudsman for England; and

- independent inspectors such as the Chief Inspector of Prisons and the Chief Inspector of Probation for England and Wales.[70]

For 'market-sensitive' posts such as the Chairman of the Financial Services Authority, the Government proposed that hearings should take place after the appointment but before the nominee takes up post. The Green Paper also announced that the new Chairman of the Statistics Board would be subject to a vote in the House of Commons.[71] This took place in July 2007; the appointment of Sir Michael Scholar was subject to an evidence session with the Treasury Select Committee[72] and a vote in the House of Commons.[73]

The Public Administration Select Committee[74] and the Liaison Committee[75] have both made the case for greater parliamentary involvement in a range of public appointments. The 'core tasks of select committees', agreed by the Liaison Committee in 2002, included task number 8: "to scrutinize major appointments made by the department". The practice of select committees on this matter has been varied. Some have attempted to assert themselves into the appointments process. For example:

- The Foreign Affairs Committee called for non-diplomatic service ambassadorial candidates to appear before them;[76]

- Treasury Committee called for confirmation hearings for the senior posts at the Financial Services Authority, and has held hearings with every appointee to the Monetary Policy Committee of the Bank of England;[77]

- The Education and Skills Committee has proposed confirmation hearings for Her Majesty's Chief Inspector of Schools.[78]

Proposals for select committee hearings on public appointments have been made by the Conservative Party Democracy Task Force chaired by Kenneth Clarke.[79] The Liberal

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70 Ministry of Justice, *The Governance of Britain,* Cm 7170, para 77

71 House of Commons Library Standard Note SN/SG/4396, *Chair of the Statistics Board*

72 Treasury Select Committee, *The appointment of the Chair of the Statistics Board,* 23 July 2007, HC 934-I 2006-07

73 HC Deb 25 July 2007 cc902-914

74 Public Administration Select Committee, *Government by Appointment: Opening up the patronage state,* 10 July 2003, HC 165-I, paras 105-106

75 Liaison Committee, *Shifting the Balance: Select Committees and the Executive,* 3 March 2000, HC 300

76 Foreign Affairs Committee, *Foreign and Commonwealth Office Annual Report,* 8 March 2005, HC 522 para 142

77 Treasury Select Committee, *Accountability of the Bank of England,* 29 October 1997, HC 282, paras 47-49. The Treasury Select Committee has taken evidence from every appointee to the MPC of the Bank of England. They have only once reported that a candidate was unsuitable. The appointment was not reversed by the Treasury.

78 Education and Employment Select Committee, *The Work of OFSTED,* HC 62-I, Session 1998-99, Overview

79 Conservative Party Democracy Task Force, Power to the People: Rebuilding parliament, June 2007, p4

Democrats have recommended confirmation hearings in their 2007 document *Real Democracy for Britain*[80] and they were also a recommendation of the Power Inquiry (an independent inquiry into Britain's democracy chaired by Baroness Kennedy QC).[81] However, the precise nature of parliamentary involvement proposed by these groups has differed. The Democracy Task Force recommended that:

> …there should be an interview procedure to cover a small number of 'peak' appointments (the scope for this to be agreed between ministers and the relevant select committee). Ministers would inform the committee of a proposed appointee for a post; the committee would then have the right to hold a hearing before the candidate's appointment was confirmed. The committee would be able to express its reservations over an appointment that it felt to be unsuitable, but would have no right of veto. However, a minister who insisted on an appointment over the committee's reservations would bear very public responsibility for poor performance by the candidate once in post.

In contrast, Power Inquiry argued that select committees should:

> …have the power to initiate their own formal scrutiny and approval process for the most senior appointments made by the Prime Minister or government ministers and which appear on a list approved annually by Parliament and drawn up by the House of Commons Liaison Committee.

It continued:

> …the appointment would be required to be approved or vetoed within 28 days, or else the appointment would be deemed to have been approved. In this way Select Committees would only scrutinize appointments about which it had concerns. It is likely that the great majority of appointments to bodies on the list would go ahead without any scrutiny process.

Such hearings would be held for a wide range of appointments, including:

> The most senior officials in the military, the diplomatic corps and uniformed civilian services since considerable policy and decision-making power and influence are invested in these posts which may have a deep impact on the everyday lives of British citizens.[82]

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80 Liberal Democrats, *Real Democracy for Britain,* 29 June 2007. Available at http://www.libdems.org.uk/media/documents/parliament/Real%20Democracy%20for%20Britain1.pdf (last viewed on 4 October 2007)

81 Library Standard Note SN/PC/3948, *Power to the People: the report of Power, an Independent Inquiry into Britain's Democracy*

82 The Power Commission, *Power to the People,* February 2006, pp 39-142

Although confirmation hearings had been proposed by Mr Brown in opposition, they were consistently rejected by the Blair administration.[83] The 1997-2007 Government's concerns included that such hearings would:

- break the clear line of accountability of ministers for appointments;
- risk the appointment of 'lame duck' appointees – appointed by the minister but without select committee approval; and
- would contravene the role of select committees as scrutiny bodies rather than decision-making bodies.

Concerns have also been raised by the Commissioner for Public Appointments about the impact of such hearings on attracting candidates, and on human rights grounds.[84]

More detailed information and analysis is available in the Library Standard Note *Parliamentary Involvement in Public Appointments.*[85]

F. Judicial appointments

The system for appointing judges in the UK has undergone substantial changes over the past few years. Proposals to reform the system of judicial appointments were suggested in a Department for Constitutional Affairs consultation paper *Constitutional Reform: A new way of appointing judges*, published in July 2003.[86] Those proposals coincided with the Government's attempt to abolish the office of Lord Chancellor. The reforms were first considered by the Constitutional Affairs Select Committee, which produced the report *Judicial appointments and a Supreme Court (final court of appeal)*.[87]

In October 2004, the Department for Constitutional Affairs published a further consultation paper entitled *Increasing diversity in the judiciary.*[88] The paper invited views as to whether the current statutory eligibility requirements constituted an obstacle to greater diversity in the judiciary.

Following the enactment of the *Constitutional Reform Act 2005* the Judicial Appointments Commission (JAC) was officially launched on 3 April 2006. The Commission is an independent Non Departmental Public Body (a "quango") set up to

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83 Liaison Committee, *Independence or Control? The Government's Response to the First Report from the Liaison Committee: Shifting the Balance,* 25 July 2000, HC 748 and Cabinet Office, *Government Response to the Public Administration Select Committee's Fourth Report of Session 2002-2003 "Government by Appointment: Opening Up the Patronage State",* December 2003, Cm 6056, p6

84 Uncorrected minutes of evidence taken before the Public Administration Select Committee, *Public appointments: confirmation hearings,* 19 June 2007, HC 731-i

85 Library Standard Note SN/PC/4387, *Parliamentary Involvement in Public Appointments*

86 Department for Constitutional Affairs (DCA) Consultation Paper CP 10/03, *Constitutional reform: a new way of appointing judges*, July 2003

87 Constitutional Affairs Committee, Judicial Appointments and a Supreme Court (final court of appeal) First Report Session 2003-4 HC 48-I, http://pubs1.tso.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf (last viewed 3 September 2007)

88 Department for Constitutional Affairs Consultation Paper CP 25/04, *Increasing diversity in the judiciary*, October 2004

select judicial office holders. It selects candidates for office on merit, independently of government through fair and open competition. It is expected to encourage a wide range of applicants. There are 15 members who serve on the JAC. The JAC website indicates that:

> Our 15 commissioners are drawn from the judiciary, the legal professions, tribunals, the lay magistracy and the lay public. 12 commissioners, including the Chairman are appointed through open competition with the other three selected by the Judges' Council. The Chairman of the Commission must always be a lay member. Of the 14 other Commissioners:
>
> • 5 must be judicial members
> • 2 must be professional members (1 barrister and 1 solicitor)
> • 5 must be lay members
> • 1 must be a tribunal member
> • 1 must be a lay justice member.[89]

Baroness Usha Prashar CBE was appointed Chairman of the JAC in October 2005. In January 2006, Rt Hon Lord Justice Auld was appointed Vice-Chairman of the JAC. In October 2006, the JAC indicated that it had set out its new processes for selecting judges, and a new definition of merit by which judicial applicants will be assessed.[90]

The eligibility requirements for holding a judicial appointment did not change at the same time as reforms were made to the appointments system. However, changes were made by the *Tribunals, Courts and Enforcement Act 2007*, resulting in less onerous eligibility requirements including a reduction in the qualifying periods for appointment to certain judicial offices from ten and seven years "experience in law" to seven and five years respectively.

Different rules apply to appointments to the House of Lords (which is due to become the Supreme Court in 2009). On 24 October 2007, the Lord Chancellor made a statement indicating that he would voluntarily adopt Sections 25-31 of Part 3 and Schedule 8 of the *Constitutional Reform Act* (which makes provision for a new appointments process for Justices of the United Kingdom Supreme Court) "as new appointments made would determine the character of the court." In particular, he indicated that "a selection commission will be formed when vacancies arise. This will be composed of the President and Deputy President of the Supreme Court and members of the appointment bodies for England and Wales, Scotland and Northern Ireland. All new judges appointed to the Supreme Court after its creation will not be members of the House of Lords; they will become Justices of the Supreme Court".[91]

The Government has now indicated that it is:

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89 http://www.judicialappointments.gov.uk/about/chair.htm (last viewed 3 September 2007)

90 http://www.judicialappointments.gov.uk/press_release_high_ct_judges_311006.htm (last viewed 3 September 2007)

> Willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public, if it is felt that there is a need.[92]

Previously, there had been little appetite for greater Parliamentary involvement in the selection of judges. In the consultation paper *Constitutional Reform: A Supreme Court for the United Kingdom* the Department for Constitutional Affairs said:

> It has been suggested that one way of enhancing the status of the members of the [Supreme] Court would be for them to be subject to confirmation hearings before one or other of the Houses of Parliament. This could, it is argued, help ensure that Parliament has confidence in the Judiciary. The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills. If the intention was to assess their more general approach to issues of public importance, this would be inconsistent with the move to take the Supreme Court out of the potential political arena. One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be the members of the Court would cut right across that objective.[93]

In evidence to the Constitutional Affairs Committee, the Department for Constitutional Affairs continued to express a degree of scepticism towards a move toward confirmation hearings for the judiciary, saying that:

> The Government is aware of the MPC confirmation hearings model. The Government has reservations that membership of the MPC and the Supreme Court is analogous. Candidates for Supreme Court appointment are "known quantities" with substantial, verifiable and reasonably public careers. Their independence and competence will have been matters of record and will have been tested in a judicial environment. Questionnaires and hearings are unlikely to elicit any information not already available and demonstrable in the candidate's professional and judicial career. Supreme Court appointments, unlike those envisaged in the MPC process, are subject to appointments commission scrutiny and Secretary of State consideration, before passing to the Prime Minister.
>
> Moreover, the Government does not believe there is a justification for making individual judicial appointments subject to Parliamentary scrutiny. The system is subject to scrutiny through this Committee and others in the other place. That provides sufficient safeguards, in the Government's

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91 HC Deb 24 October 2007 c12WS

92 Ministry of Justice, *The Governance of Britain*, Cm7170, July 2007

93 Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03, July 2003

> view, without requiring individual judges to submit themselves to confirmation or other scrutiny hearings.[94]

When it considered the issue of confirmation hearings, the Constitutional Affairs Committee concluded that it had "heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges", although there was support for judicial attendance at Select Committee evidence sessions more generally.[95] At the time it took evidence, the Committee's view was backed by the Law Society, the Bar Council and the Sir Colin Campbell, the First Commissioner for Judicial Appointment.[96]

This view also appeared to be echoed by the House of Lords Select Committee on the Constitutional Reform Bill which stated that:

> The Committee agrees that it is desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary, particularly in the event of the senior judges being excluded from the House. Such a committee should not seek to hold individual judges to account.[97]

In January 2005, the Commons Committee published a second report entitled *Constitutional Reform Bill [Lords]: the Government's proposals* which gave some further consideration to the issue of judicial appointments.[98] It concluded that:

> It is necessary for the operation of the courts in England and Wales and the new Supreme Court of the United Kingdom to be accountable to the public and Parliament in appropriate ways. Well-designed mechanisms of accountability need in no way impinge on the important principle of judicial independence. On the contrary, public confidence in the administration of justice is likely to be increased by parliamentary scrutiny and requirements that the courts provide timely and useful information to the public about their work. **We welcome the continued use of evidence sessions of our Committee as an opportunity for members of the judiciary at all levels to advise Parliament on the workings of the judicial system and on issues of policy […]**

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94 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, HC 48-II 2003-4

95 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)* HC 48-I 2003-4, para 87. For more information on the nature of the judicial role in law making see M. Zander, *The Law-Making Process*, Sixth Edition, 2004 pp 330-388. For further information about the relationship between the judiciary and select committees, see A Horne, *Parliamentary Scrutiny: an assessment of the work of the constitutional affairs committee*, JUSTICE Journal, Vol 3 No 2, December 2006, p 70

96 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)* First Report Session 2003-4 HC 48-II, Sir Colin Campbell, Q 56ff; and the Law Society and Bar Council Q 137ff

97 House of Lords, *Report of the Select Committee on the Constitutional Reform Bill [HL],* Session 2003–04, HL Paper 125, para 485

98 Constitutional Affairs Committee, *Constitutional Reform Bill [Lords]: the Government's proposals*, Third Report of Session 2004–05, HC 275-I

> **In general we agree with the House of Lords Select Committee [on the Constitutional Reform Bill] on the importance of a continuing Committee with responsibility for judicial matters. We think that this Committee serves this function. It would be appropriate for both Houses to have their own Committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit.** [99]

The Lord Chief Justice, Lord Phillips, has strongly criticised any plans to introduce "confirmation" style hearings. He is reported as having indicated that:

> There is a growing tendency to challenge the mandate of the judge. Some say that our decisions are not legitimate, because we have not been elected. They point to the United States where some judges are elected and where, at the highest level in the federal system, candidates are subjected to confirmation hearings. I am only aware of one Commonwealth country where Parliament is involved in judicial appointments, and that is Mozambique. I, for one, can see no need for such an innovation in the United Kingdom.[100]

The Lord Chancellor, Jack Straw, has been reported as being ready to "shake up" the system of judicial appointments due to "concern at every level of the judiciary" about delays and bureaucracy. He has also indicated to the Constitutional Affairs Committee that he does not favour American-style confirmation hearings, with prospective candidates being questioned in Parliament.[101]

On 25 October 2007, the Government published a further consultation paper entitled *The Governance of Britain: Judicial Appointments*.[102] That paper set out in detail the recent changes mentioned above, but nonetheless stated that the programme of wider constitutional renewal "provides an opportunity to revisit our system for judicial appointments" adding that "the Government would welcome views on whether further reform should be considered."[103] The Government set out the following argument in favour of further reform:

> 4.19 Under the existing arrangements, the final decision in making judicial appointments or recommendations for appointments rests in the hands of the Lord Chancellor, who is a member of the executive and, since the CRA, no longer a judge. While the Lord Chancellor cannot substitute a different name for the one put forward by the JAC or selection panel, and has to give reasons for rejecting a name, there is still scope for him or her to turn down a recommended name. He or she therefore retains a degree of control over who is appointed.

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[99] *Ibid.*, paras 77-83
[100] "Judges warn ministers of threat to constitution", *The Independent*, 3 October 2007
[101] http://business.timesonline.co.uk/tol/business/law/public_law/article2633851.ece
[102] Ministry of Justice, *The Governance of Britain: Judicial Appointments*, Cm 7210, CP 25/07, available at: http://www.justice.gov.uk/publications/cp2507.htm (last accessed 25 October 2007)
[103] Ibid, para 4.2

The paper posed a number of questions, including whether there should be any changes to the role of the executive in the process and, if so, whether a greater role could be found for the legislature (for example by holding post appointment confirmation hearings). The paper also provides a number of international comparisons. The consultation will end on 17 January 2007.

G. Ecclesiastical appointments

The Governance of Britain also argued for the removal of Prime Ministerial choice over the appointment of diocesan bishops of the Church of England.[104] Whereas previously the Church's Crown Nomination Committee passed two names in order of preference to the Prime Minister, who then would recommend one to the Queen, the Prime Minister will now only receive one name. The Constitution Unit, University College London, has explained that:

> The Prime Minister will henceforth act merely as a postbox. In 1976 the then Prime Minister (Callaghan) justified the Prime Minister's more active involvement on two grounds: the need to the Sovereign to act on the advice of a responsible minister; and the need for political involvement because 26 bishops sat in the House of Lords. This latter argument seems now to have been abandoned.

The proposals were welcome by the Archbishop of York, Dr John Sentamu, who stated that "The Prime Minister and the Secretary of State for Justice consulted me about his intentions which I believe accord with the declared wish of the Church of England. I welcome the prospect of the Church being the decisive voice in the appointment of bishops which the General Synod called for 33 years ago…"[105] The Constitution Unit, however, have suggested that advice should be given directly to the Crown without Prime Ministerial involvement at all:

> [The Government] should take further steps to produce a more complete and honest ministerial disengagement which would also protect the position of the sovereign. No significant change would be made to the established position of the Church. On the contrary, whilst the Church would become free of dependence on the *government,* it would remain a special part of the *state.*[106]

Further information is available in the Library Standard Note *Prime Ministerial Involvement in Ecclesiastical Appointments.*[107]

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[104] Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, para 57-66
[105] As quoted in 'Brown gives up control over church and judicial appointments', *The Times,* 4 July 2007, p22
[106] Robert Hazell, *Constitution Unit Response to CM 7170: The Governance of Britain*, July 2007 pp9-10
[107] Library Standard Note SN/PC/4403, *Prime Ministerial involvement in Ecclesiastical appointments*

III Making the executive more accountable

The *Governance of Britain* explained the Government's view that:

> …At all times the people's elected representatives play the crucial role of holding government to account, and every five years, the UK electorate has the opportunity to vote to elect a government. The British system affords strength to the executive, enabling it to pursue the public's wishes. But that strength must not be unfettered. If a political system is to be trusted by the public it serves, it is vital that the power of the executive is held to account.[108]

The accountability of the executive has been the focus of many attempts to reform governance in the UK. A view emerged amongst many groups that the executive was too strong at the expense of Parliament and the people. For example, the Conservative Party under William Hague established a Commission to Strengthen Parliament, chaired by Lord Norton, which reported in 2000.[109] The Hansard Society produced a report in 2001 entitled *The Challenge for Parliament: Making Government Accountable.*[110] More recently, the Conservative Party's Democracy Task Force made a series of proposals for reform.[111] The Better Government Initiative (a group of retired civil servants, academics and politicians which formed as a response to widespread concerns about the practical difficulties which government today faces as it seeks to run the country against a background of rapid change), has also made a raft of proposals in this area.[112]

A. Parliamentary scrutiny of government

The Governance of Britain announced that for the first time, a 'draft legislative programme' for the coming year would be published.[113] This was done by the Leader of the House of Commons on 11 July 2007. *The Government's Draft Legislative Programme* explained that:

> The Government wants to open up what has until now been a traditionally closed process, giving both Parliament and the public advance sight of what the Government is planning to bring forward in a forthcoming session. The Government believes that Parliament, as the body that will be asked to give its assent to legislation, should have the opportunity to comment on the legislative programme as a whole in advance…[114]

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108 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 87
109 The Commission to Strengthen Parliament, *Strengthening Parliament,* 2000
110 Hansard Society, *The Challenge for Parliament: Making government accountable – Report of the Hansard Society Commision on Parliamentary Scrutiny,* 2001
111 See http://www.conservatives.com/tile.do?def=democracy.taskforce.page (last viewed 4 October 2007)
112 The Better Government Initiative, *Parliament and the Executive,* http://www.bettergovernmentinitiative.co.uk/da/57700 (last viewed 4 October 2007)
113 Library Standard Note SN/PC/4398, *Draft Queen's Speech*
114 Office of the Leader of the House of Commons, *The Governance of Britain – The Government's Draft Legislative Programme,* Cm 7175, July 2007, p10

The Paper gave the details of 23 bills to be included in the Queen's speech in autumn 2007, including a Constitutional Reform Bill.[115] It was issued in the form of a consultation paper which was debated in the Commons Chamber on 25 July 2007.[116] When published, the paper included an invitation to the Liaison Committee to take evidence on it, and invited the public to comment on it. The website of the Office of the Leader of the House of Commons includes an email address where responses can be sent, and comments can also be posted and viewed on the Cabinet Office website.[117]

The Green Paper asked the Modernisation Committee to consider ways in which departmental annual objectives and plans of the major government departments may be guaranteed an opportunity to be debated on the floor of the House.[118] It also stated that it will "simplify its [financial] reporting to Parliament, ensuring that it reports in a more consistent fashion, in line with the fiscal rules, at all three stages in the process; on plans, Estimates and actual expenditure outturns".[119] The government plans to consult on how best to affect these plans.

The Modernisation Committee has launched an inquiry into parliamentary debate of departmental objectives and annual reports, and "a short inquiry into Parliament's role in scrutinising the proposed legislative programme, including how it is published, and when it should be debated by the House", along with two other inquiries about the matters relating to Parliament from the Government's constitutional reform proposals.[120]

The Governance of Britain included a long section on the accountability of the Government's national security work. It proposed that the Government would consult on the statutory basis of the Intelligence and Security committee and interim changes which would not require legislative change. The Green Paper further states that "The Government will publish a National Security Strategy setting out our approach to the range of security challenges and the opportunities we face, now and in the future both at home and overseas".[121]

The Green Paper is, however, silent on the role of departmental select committees in the scrutiny of the executive. Strengthening select committees had been a focus for House of Commons modernisation since 1997. A number of reforms were made in 2002, such as term limits and extra pay for committee chairmen. However, proposals to reform the nomination procedure to lessen the involvement of party whips were rejected by the Commons. Select Committee reform remained an important issue for those proposing to strengthen Parliament. The Conservative Party's Democracy Task Force made a number of proposals for the reform to select committees, including:

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115 Office of the Leader of the House of Commons, *The Governance of Britain – The Government's Draft Legislative Programme,* Cm 7175, July 2007, p28

116 HC Deb 25 July 2007 cc968-1011

117 The Cabinet Office, *The Governance of Britain: The government's draft legislative programme – you're your say*, http://haveyoursay.cabinetoffice.gov.uk/co/topic.aspx?topic=governance (last viewed 4 October 2007)

118 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 103-108

119 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 111

120 Modernisation Committee Press Notice 24 October 2007

121 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 89-99

- select committee chairman to be selected by secret ballot of the whole house, rather than selection by the committee itself from amongst its members and reducing the power of the whips in selecting select committee members themselves; and that

- more should be made of the launch of select committee reports, with key reports presented by Committee chairmen on the floor of the House in statements, with opportunities for questions.

The absence of proposals for reforming select committees was picked up in the debate following the Prime Minister's statement, including by David Cameron and Sir Menzies Campbell.[122] In response the Prime Minister stated that: "…of course there is a debate to be had about the future of Select Committees, and it can be led from within the House".[123] Reform of the select committee system is considered in more detail in the Library Research Paper, *Modernisation of the House of Commons 1997-2005.*[124]

In a later section in the Green Paper on 'Reinventing our Democracy', the Government did welcome the recent report from the Modernisation Committee on the role of backbench Members, which made proposals for more opportunities for topical questions and debates in the Commons (see below). The Government have since responded to the Modernisation Committee report, and rejected a proposal for a weekly half hour debate in Westminster Hall on select committee reports.[125]

B. Regions and responsibility

On 29 June 2007 the Prime Minister announced the appointment of 'regional ministers'. The *Governance of Britain* explained that they would be "responsible for providing a clear sense of strategic direction for their region. Regional ministers also give citizens a voice in central government, ensuring that government policy takes account of the different needs of the nine English regions. Regional Ministers will make central government more visible in the regions, helping to raise its profile and generate an awareness of the political system".[126] For example, *The Government's Draft Legislative Programme* has given a role to regional ministers to engage members of the public on the proposed legislative programme.[127]

The *Governance of Britain* went on to make the case for a system of regional select committees in order to make both regional ministers and regional policy subject to "formal and consistent parliamentary scrutiny".[128] Also, in July 2007, the results of the Government's *Review of sub-national economic development and regeneration* were published. This announced that the current system of regional assemblies (which are voluntary associations of local authority members and other 'stakeholders' in the region)

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[122] HC Deb 3 July 2007 c820; HC Deb 3 July 2007 c824
[123] HC Deb 3 July 2007 c825
[124] See House of Commons Library Research Paper 05/46, *Modernisation of the House of Commons*
[125] Office of the Leader of the House of Commons, *Revitalising the Chamber – The Role of the Backbench Member,* Cm 7231, October 2007
[126] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 116
[127] Office of the Leader of the House of Commons, *The Governance of Britain – The Government's Draft Legislative Programme,* Cm 7175, July 2007, p21

would, in their current form and function, no longer continue.[129] These proposals follow the decisive vote against an assembly for the North East in the referendum of November 2004.

Regional select committees had been proposed by the Communities and Local Government Select Committee in their 2007 report *Is there a future for regional government?* However, their proposals stated that increased scrutiny of regional policy at Westminster was not "a substitute for the scrutiny carried out by the Regional Assemblies, but as an adjunct to it, making use of the different powers which Westminster committees hold for examining central government activity and linking it to the realisation of policy at the regional level".[130]

It had been thought that the motions to establish the regional select committees would be included on the Order Paper for debate and decision before the House rose for the summer adjournment in July 2007, however, no motion was forthcoming. As a result, a number of details about the committees are not fully clear. These include their size, their membership, their political composition, where they will meet, and how often. The Modernisation Committee, chaired by the Leader of the House of Commons Harriet Harman, announced on 11 October 2007 that they will be considering regional accountability as part of their future work on issues arising from the *Governance of Britain Green Paper*.[131]

More information is available in the Library Standard Note, *The proposed regional select committees and the future of regional assemblies*.[132]

C. Reforming the Ministerial Code

The chapter ended with the announcement of changes made to the Ministerial Code. A new Independent Adviser will be appointed to advise on Ministers' interests, who would also be able to investigate alleged breaches of the Ministerial Code. This had been a key recommendation of the Public Administration Select Committee in their 2006 report *The Ministerial Code: the case for independent investigation*.[133] The Green Paper also states that the Code also makes the advice given to former ministers who take up business appointments by the Advisory Committee on Business Appointment Rules obligatory to follow. This had previously been voluntary. Failure to seek the advice of the Advisory Committee had led to the resignation of David Blunkett as Secretary of State for Work and Pensions in November 2005.[134] This too had been subject to an inquiry and report by the Public Administration Select Committee.[135] More information on these issues can be

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128 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007

129 *Review of sub-national economic development and regeneration,* July 2007, Foreword

130 Communities and Local Government Select Committee, *Is there a future for regional government in England,* 14 March 2007, HC 352-I 2006-07, paras 112-114

131 See Modernisation Committee Press Notice 11 October 2007. More details were announced in a further press notice on 24 October 2007.

132 Library Standard Note SN/PC/4411, *The proposed regional select committees and the future of regional assemblies*

133 Public Administration Select Committee, The Ministerial Code: the case for independent investigation, 6 September 2006, HC 1457 2005-06

134 "I am not resigning, says Blunkett" 1 November 2005 *BBC News*

135 Public Administration Select Committee, *The Business Appointment Rules,* 14 June 2007, HC 651 2006-07

found in Library Standard Notes on *The Ministerial Code,* [136] and the *Business Appointment Rules.* [137]

IV Re-invigorating our democracy

In recent years there has been a great deal of concern about falling turnout in general elections and low levels of trust in politicians and political institutions. In 2006 the Power Inquiry described this concern as a "democratic malaise that has spread far beyond some disappointing turnouts, and which is a cause of grave concern".[138] Although the extent of disengagement and diminished trust, and whether this is part of a trend of decline, is disputed, the *Governance of Britain* explained that:[139]

> …action is needed across the political system to promote and restore trust in politics and in our political institutions: Parliament is at the core of this effort. Low levels of public confidence, concentrated power in the executive and the growth of alternative centres of political power mean that further reforms are required to help Parliament reassert itself and establish a clearer identity.
>
> The way to overcome these fundamental challenges is to strengthen Parliament and renew its accountability.[140]

A. Renewing the accountability of Parliament

This section raised two major pieces of unfinished business from the 1997 Labour Party manifesto: House of Lords reform and electoral reform. However, perhaps as these remain controversial and complicated issues, *The Governance of Britain* did not offer concrete proposals on either of these matters, but described how the new administration would seek a way forward.

1. Electoral reform

The 1997 Labour Party manifesto had stated that the party was "committed to a referendum on the voting system for the House of Commons".[141] During the 1997 Parliament the Government appointed an Independent Commission on the Electoral System under the chairmanship of Lord Jenkins of Hillhead. Its terms of reference were that it should be free to consider and recommend any appropriate system or combination of systems in recommending an alternative to the present system for Parliamentary elections to be put before the people in the Government's referendum. It was to observe the requirement for broad proportionality, the need for stable government, an extension of voter choice and the maintenance of a link between MPs and geographical

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[136] Library Standard Note SN/PC/3750, *The Ministerial Code*
[137] Library Standard Note SN/PC/3745, *Business Appointment Rules*
[138] Power Inquiry, *Power to the People,* 2006, p27
[139] Catherine Bromley, John Curtice, Ben Seyd, *Is there a crisis of Democracy,* June 2004
[140] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 123-124
[141] New Labour, *New Labour: because Britain deserves better,* 1997

constituencies. It reported in October 1998, recommending a two vote mixed system described as AV Top-up, where the majority of MPs (80 to 85%) would continue to be elected on an individual constituency basis and the remainder would be elected on a corrective top-up to reduce any disproportionality inherent in first past the post.

Despite the publication of the report, no referendum was forthcoming. The Government argued that it would need to consider the operation of the new voting systems used for the elections to the Scottish Parliament and National Assembly for Wales. Commitments were then made in the Labour Party's 2001 and 2005 manifestos to conduct and publish a review of the use the new proportional systems in use in the UK. This review is yet to be published. The *Governance of Britain* stated that "the review will be published later this year".[142] The results of the review have since appeared in *The Times* newspaper, who reported that:

> Moves to reengage voters by introducing proportional representation for Westminster elections have been dismissed by officials, who fear that it could lead to political instability and confusion. Changing the voting system would increase the likelihood of minority governments and coalitions, which can be a "drag on effective government", officials investigating voting systems found.[143]

The *Governance of Britain* also stated that the Government wished "to consider further measures to make voting more convenient and therefore proposes to examine the case for moving the voting to the weekend for both general and, potentially, local elections".[144]

The Liberal Democrats have been critical of the Government's failure to move towards a referendum on proportional representation. The Electoral Reform Society has also commented that:

> There is much to celebrate in today's proposals. Debates on the voting age and the timing of elections are long overdue. And we welcome the promise of the publication of the government's review of electoral systems, a mere six years after Labour made it a manifesto commitment.[145]

2. House of Lords reform

The 1997 Labour Party manifesto stated that:

> The House of Lords must be reformed. As an initial, self-contained reform, not dependent on further reform in the future, the right of hereditary peers to sit and vote in the House of Lords will be ended by statute. This will be the first stage in a process of reform to make the House of Lords more

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142 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 155
143 'Brown's plans for voting reforms shelved over fears of confusion', *The Times,* 20 August 2007, p4
144 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 149-154
145 Electoral Reform Society Press Notice, *The Brown roadmap: promise but few* signposts, 3 July 2007

> democratic and representative. The legislative powers of the House of Lords will remain unaltered.

After the removal of all but 92 hereditary peers in 1999, the Government's attempts to reach agreement on further reform including some element of elections have not yet succeeded. A Royal Commission was established in 1999 under the chairmanship of Lord Wakeham which recommended that the House of Lords should have around 550 members of which 67, 87 or 195 should be elected. In 2001, the Government published a White Paper which proposed a twenty per cent elected element. Once it appeared that no consensus had been built around its proposals, a joint Parliamentary Committee was established to consider ways forward. In February 2003 a series of free votes were held in both the Commons and Lords on the percentage of elected members preferred for a reformed House. No proposal received a majority in the House of Commons. Most recently, free votes were held on 7 March 2007 in which Members of the House of Commons overwhelmingly voted for either majority and wholly elected chambers. However, it has been disputed whether the majorities were in part due to scuppering attempts by those opposed to election.

The *Governance of Britain* explained that the Government would continue to seek a way forward, based on the outcome of the most recent votes in the House of Commons:

> The Secretary of State and Lord Chancellor will continue to lead cross-party discussions with a view to bringing forward a comprehensive package to complete House of Lords reform. The Government will develop reforms for a substantially or wholly elected second chamber and will explore how the existing powers of the chamber should apply to the reformed chamber.
>
> As part of this package, the Government is committed to removing the anomaly of the remaining hereditary peers. This will be in line with the wishes of the House of Commons, which voted by a majority of 280 to remove the hereditary peers in the free votes in March 2007.[146]

More detailed information is provided in the Library Research Paper *House of Lords Reform – Developments since January 2004*.[147]

B. The House of Commons

The *Governance of Britain* included very little on further modernisation of the House of Commons. It welcomed the recent report of the Modernisation Committee *Revitalising the Chamber: the role of the back bench Member*,[148] stating that "It is for Parliament to decide whether to implement the report's recommendations and the Government will support Parliament's wishes".[149] The House of Commons is to debate issues relating to

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[146] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 137-138
[147] Forthcoming
[148] Select Committee on Modernisation of the House of Commons, *Revitalising the Chamber: the role of the back bench Member,* 20 June 2007, HC 337 2006-07
[149] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 139-140

House business, including the Modernisation Report and the Government response, on 25 October 2007. Details of the programme of House of Commons modernisation from 1997-2005 are available in the Library Research Paper, *Modernisation of the House of Commons 1997-2005.*[150]

The Green Paper included a section on making parliament more representative, both in terms of gender, and ethnic minorities. On the former it declared that it would keep "the law under review, and will in necessary extend the provisions in the *Sex Discrimination (Electoral Candidates) Act 2002* beyond 2015 (as the Act allows) to allow all-women shortlists to continue to be used".[151] The Government is also currently consulting on whether to allow wider scope for positive action than is currently allowed to increase ethnic minority representation in Parliament.[152]

Also mentioned is the continued application of the *Freedom of Information Act* 2000 to Parliament, following the failure of the Private Members Bill, *The Freedom of Information [Amendment] Bill* to progress through the House of Lords during the 2006-07 Session. This Bill, introduced by David Maclean would have created a new exemption in the *Freedom of Information Act* for communications between Members and public authorities and exempted both Houses of Parliament from the legislation. In the *Governance of Britain* the Government stated that, "it is right that Parliament should be covered by the [Freedom of Information] Act" although they welcomed the recent debate about the confidentiality of MPs' correspondence with constituents. The Paper announced that the Government would work with the Information Commissioner on this matter. The Information Commissioner's Office has since published guidance for dealing for requests for MPs' correspondence relating to constituents.[153] Background information is available in the Library Standard Note, *Freedom of Information (Amendment) Bill 2006-07: Progress of the Bill.* [154]

C. Direct democracy

1. Petitions

The procedure to petition Parliament has been the subject of recent work of the Procedure Committee of the House of Commons. The current proceedings in Parliament for public petitions are described by a House of Commons Information Office Factsheet as follows:

> Since 1842 the action taken by the House on Petitions has usually been minimal. Petitions are currently sent to the relevant Government department. The department will generally investigate the case that the

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150 See House of Commons Library Research Paper 05/46, *Modernisation of the House of Commons*

151 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras145-147

152 Department of Communities and Local Government, *Discrimination Law Review: A framework for fairness,* June 2007

153 Information Commissioner's Office, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/guidance_on_dealing_with_requests_for_mps_6_august_version1.pdf (last viewed 4 October 2007)

154 Library Standard Note SN/PC/4354, *The Freedom of Information (Amendment) Bill 2006-07: Progress of the Bill*

> petitioners have made and a Minister may lay a reply to the petitioners' case before the House. However, the House has no power to compel the Government to make any observations on a petition. Petitions presented to the House and any observations the Government has subsequently made on them are printed. They appear as supplements to the Votes and Proceedings on unnumbered pages; petitions are typically published with the issue on the Thursday following presentation… These supplements are not available in the version of Votes and Proceedings made available on the Parliament Internet site.
>
> Before 1974, petitions were sent to a Select Committee on Public Petitions. The Committee sorted and classified them, and could report on whether they were in order under the rules of the House. The Committee had no power to look into the merits of any Petition, nor could it recommend remedies. The Committee was abolished on 4 April 1974. The Procedure Select Committee in 2004 recommended that petitions, when they were sent to Government departments should also be sent to the relevant select committee. They also recommended that Government observations, or notifications received by the Journal Office that no observations are to be made, should also be passed on to the relevant committee. The Procedure committee commented that 'On occasions, committees may wish to press for observations to be made when then they have not been forthcoming'. The House approved that recommendation on 19 January 2005.[155]

The Governance of Britain stated that the Government "believes that people should be able to petition the House of Commons with as much ease as they are currently able to petition the Prime Minister, and that there should be a procedure for handling petitions which considers whether each merits a debate in Parliament". However, it is left to the Procedure Committee which has been considering this issue to come forward with proposals.[156]

In their 2007 Report, the Procedure Committee reported that:

> In looking at the procedures for public petitions, we have chosen to build on the strengths of existing practice. We have therefore made a series of recommendations intended to make the procedures more effective and to make them more accessible to, and comprehensible by, the public. These recommendations include:
> • A requirement on the Government to respond formally to all petitions within two months of their presentation;
> • Publication of the texts of petitions and responses to them in Hansard;
> • Easier access to petitions on the parliamentary website; and
> • Opportunities for debates on petitions in Westminster Hall.

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[155] House of Commons Information Office, *Public Petitions,* Factsheet P7, http://www.parliament.uk/documents/upload/p07.pdf

[156] The Procedure Committee recently issued a report on Petitions: Procedure Committee, *Petitions and Early Day Motions,* 22 May 2007, HC 541 2006-07

> We have also expressed our support in principle for the introduction of an e-petitions system. We aim to come forward with a proposal for a worked-up and practicable system in due course.
>
> As a consequence of these recommendations, we do not recommend that the link between petitioners and the Member (often their constituency Member) who presents the petition should be broken. Therefore we conclude that members of the public should not be able to petition Parliament directly. Neither do we recommend the establishment of a Petitions Committee.[157]

The Government has responded to the Procedure Committee in broadly positive terms.[158] The Committee is now considering how to introduce e-petitioning to the House of Commons.

These proposals are not as radical as some campaigners wish. The Power Inquiry had made proposals for the introduction of citizens' initiatives, where citizens can petition for referenda questions to appear on ballot papers with a threshold of signatures needed. Such citizens' initiatives exist in Switzerland and in many states of the USA, as well as in New Zealand. A campaign associated with the Power Inquiry has been launched, called Our Say, which has argued that:

> There is a serious problem with politics in Britain. Fewer and fewer people are voting in elections, there is widespread cynicism and opinion surveys show that, increasingly, mistrust is directed not just at politicians as individuals but towards representative government as a whole.

They propose that:

> The only way to restore trust and credibility to British politics is to give people a real and direct say over issues that matter most to them and their lives. That means allowing them to decide on national and local issues, on a case by case basis, by voting in a referendum instead of simply electing a government once every five years to make all the key decisions on their behalf.[159]

Others have argued against the adoption of such direct democracy mechanisms raising concerns about the influence of wealthy interests and the dangers of 'the tyranny of the majority'. The Library Standard Note *Citizens Initiatives* includes further information. [160]

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157 Procedure Committee, *Public Petitions and Early Day Motions,* 22 May 2007, HC 513 2006-07

158 Office of the Leader of the House of Commons, *The governance of Britain - petitions: the Government's response to the Procedure Committee's first report, session 2006-07, on public petitions and early day motions*, Cm 7193, July 2007

159 See http://www.our-say.org/Why-Our-Say.aspx (last viewed 24 October 2007)

160 Library Standard Note SN/PC/4483, *Citizens Initiatives*

2. Charities

In 2006, the Blair administration brought together responsibility for policy regarding charities into a new Office of the Third Sector which is housed by the Cabinet Office. The inclusion policy related to charities in a Green Paper largely concerned with traditional constitutional issues is unusual, but has been done in speeches given by Mr Brown in the past. For example, in a 2005 speech he stated that:

> …alongside the idea of liberty are the equally powerful ideas of responsibility and duty. So that people are not just individual islands entire of themselves, but citizens where identity, loyalty and indeed a moral sense determine the sense of responsibility we feel to each other.
>
> And because this comes alive not only in families, but through voluntary associations, churches and faith groups and then on into public service we, the British people, have consistently regarded a strong civic society as fundamental to a sense of ourselves…[161]

The Green Paper acknowledges the importance of charities such as Make Poverty History in driving "social, economic and environmental change". It also notes the growth in participation in charity work and campaigning. It stated, therefore, that "The Government will therefore work with the Charity Commission, *Capacitybuilders* and sector leaders to explore the options for enabling charities and other sector organizations to better campaign on issues that are likely to advance the cause of the purposes for which they have been established".[162]

3. Protest

Demonstrations and marches outside Parliament are subject to Sessional Orders, which instruct that the Metropolitan Police Commissioner are to make sure that the passageways to and from Parliament are kept free from obstruction. In 2003, the Procedure Committee conducted an inquiry into whether this Order was appropriate in light of recent experience of demonstrations. The Committee recommended that legislation should be introduced to prohibit long-term demonstrations and to ensure access to the House. The *Serious and Organised Crime Act 2005* created a new offence of demonstrating without authorisation in a "designated area". The area is defined by order, but must be within one kilometre of Parliament Square. The provisions require notice to be given of such demonstrations.

Recent court action over the right of the campaigner Brian Haw to continue his protest in Parliament Square has been subject to wide media coverage. Mr Haw has occupied a spot within Parliament Square, outside the main gates to Parliament, since 2001. In July 2005 Mr Haw's solicitors successfully argued in the High Court that the new law did not apply to him as the offence of demonstrating without authorisation applies "if, when the demonstration starts, authorisation for the demonstration has not been given". Further

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[161] Gordon Brown, *The Hugo Young Memorial Lecture 2005,* 13 December 2005
[162] Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, paras 167-168

litigation has taken place, and Mr Haw remains in Parliament Square, albeit with fewer placards permitted. More information is available in the Library Standard Note *Protests around Parliament*. [163]

This provides a backdrop to the Government's statement that they will "consult widely on the provisions in the *Serious Organised Crime and Police Act* with a view to ensuring the people's right to protest is not subject to unnecessary restrictions".[164] A consultation paper, *Managing Protest around Parliament* was published by the Home Office on 25 October 2007.[165]

4. Local democracy

Mr Brown has spoken previously about the importance of devolving power to local communities. In his 2005 Hugo Young Memorial Lecture he stated that:

> My own view is that new politics cannot be a reality unless we make local accountability work by reinvigorating the democratically elected mechanisms of local areas – local government. And I believe it is in the same spirit that we explore a new pluralism in our politics, searching for not just consensus but for a shared vision of national purpose, seeking new ways of involving people in shaping the decisions that affect them – from citizens' juries to local citizen forums – where the evidence is that participation does not just enthuse those directly involved, but makes the public feel generally more engaged.[166]

In relation to local communities, *The Governance of Britain* stated that:

> Much of this paper focuses on how government and Parliament interact, and how power should be shared between them. But power should not just be devolved from the national government to the national Parliament: power must also rest with local communities. In the past individuals and communities have been tended to be seen as passive recipients of services provided by the state. However, in recent years people have demonstrated that they are willing to take a more active role, and that this can help improve services and create stronger communities. The Government believes that it must find new ways to enable people to become active citizens, empowered and fully engaged by devolving more power directly to the people. It will consult on the following areas:
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> - Extending the right of people to intervene with their elected representatives through community rights to call for action;
> - Duties to consult on major decisions through mechanisms such as citizens' juries;

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[163] Library Standard Note SN/HA/3658, *Protests near Parliament*
[164] Ministry of Justice, *The Governance of Britain,* July 2007, Cm 7170, paras 164-166
[165] Home Office, *The Governance of Britain: Managing Protest around Parliament,* Cm 7235, October 2007 http://www.homeoffice.gov.uk/about-us/news/protesting-at-parliament
[166] Gordon Brown, *The Hugo Young Memorial Lecture 2005,* 13 December 2005

- Powers of redress to scrutinise and improve the delivery of local services; and
- Powers to ballot on spending decisions.

The Governance of Britain referred to the 2006 White Paper *Strong and Prosperous Communities – The Local Government White Paper.* They stated that it had set out a range of proposals for devolving power to citizens and revitalising local democracy including:

- Giving people a new right to an answer from their local authorities when they demand action on any issue they want to raise through a new community Call for Action;
- Increasing opportunities for communities to take on the management and ownership of local assets and facilities such as under-used community centres or empty schools;
- Simplifying and extending the scope of tenant management housing;
- Encouraging local charters between communities and service providers which set out what local people can expect from their services and how they can take action if standards are not being met;
- Providing a new power of well-being for the best parish councils to improve the development and coordination of support for citizens, communities groups and local authorities; and
- Changing the "Best Value" duty to ensure that authorities inform, consult, involve and devolve to citizens and communities.

The Government has also announced that some participatory budgeting initiatives will be piloted in some local authorities.[167]

V Britain's future: the citizen and the state

This section of the Green Paper begins with some considerations about the nature of British citizenship before going on to consider the introduction of a British Statement of Values and possibly a British Bill of Rights.

1. Citizenship and national identity

Gordon Brown has often spoken on the theme of 'Britishness', both as Chancellor of the Exchequer and as Prime Minister. He addressed the Fabian Society's 2006 annual conference on the theme of 'The Future of Britishness'[168] and during his 2006 autumn Labour Party conference speech he stated that:

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[167] Department for Communities and Local Government Press Notice, *Local Communities to have greater say on spending,* 5 July 2007

[168] Gordon Brown, *The future of Britishness – Keynote speech to the Fabian Society Annual Conference,* 14 January 2006

> We the British people must be far more explicit about the common ground on which we stand, the shared values which bring us together, the habits of citizenship around which we can and must unite. Expect all who are in our country to play by our rules. And while we do not today have a written constitution it comes back to being sure about and secure in the values that matter: freedom, democracy and fairness… And let us reaffirm the truth, that as individual citizens of Britain we must act upon the responsibilities we own each other as well as our rights.[169]

This focus on Britishness can be ascribed to a number of factors including:

- the impact of multi-culturalism on society;
- the threat of 'home grown' terrorism following the 7 July 2005 bombings and continuing security concerns;
- pressure for Scottish independence and the electoral success of nationalist parties in Scotland and Wales elections;
- the continued political salience of the West Lothian question (as highlighted by the Shadow Cabinet); and
- the selection of a Scottish Prime Minister (representing a Scottish constituency) for the United Kingdom.

The Green Paper made the case that only a Britain confident of its identity will be able to face the challenges of the twenty-first century:

> Only a confident UK will be able to adapt to the economic challenges of globalization. Only a country sure of its identity will be able to come together to ensure our mutual security: common inclusive values can help to overcome the threat from extremism of all kinds. Only a nation certain of its national purpose will be able to pull together to meet the common challenges of global climate change. And only by coming together as a diverse country and debating our common values, our citizenship and our constitution can we begin to forge the sense of purpose and renew the common bonds that will allow us to meet these challenges together.[170]

The Green Paper notes that "Our relative stability as a nation is reflected in a relative lack of precision about what we mean to be British". The Paper continues:

> However, there is a common ground between British citizens, and many cultural traits and traditions that we can all recognize as distinctively British. The Government believes that a clearer definition of citizenship would give people a better sense of the British identity in a globalised

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[169] Gordon Brown, *Speech to the Labour Party Conference,* Autumn 2006
[170] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 11

> world. British citizenship – and the rights and responsibilities that accompany it – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves.[171]

The commentator Henry Porter has previously written in the *Observer* about Mr Brown's speeches on Britishness; he pointed to the politics involved:

> Brown is a canny politician and he wasn't saying all this to give us a warm glow inside. As an Observer poll today makes clear, England and Scotland appear to be drifting apart, heading perhaps for divorce. I would regret this as much as Mr Brown, who evidently is trying to renew the Union's vows with concepts of Britishness and shared values. He also has an acute need to establish that he has the right to be a British Prime Minister in the eyes of the English, who seem to have woken up to certain disparities in the power of English and Scottish MPs. Britishness helps his case.[172]

The *Governance of Britain* stated that the Government was considering how to ensure that new arrivals are well integrated into their local communities, and would consider the recent report of the Commission on Integration and Cohesion which reported earlier this year.[173] The Green Paper also considered the different rights that are accorded to British Citizens, European Citizens, and Commonwealth Citizens for the purpose of voting. The Paper announced that Lord Goldsmith, the former Attorney General, has been asked "to carry out a review of citizenship, looking both at legal aspects and other issues including civic participation and social responsibility".[174]

Following further discussion of falling voter turnout, this time amongst the young, the Government announced that it will launch a "Youth Citizenship Commission" which will:

> …examine ways to invigorate young people's understanding of the historical narrative of our country and of what it means to be a British citizen, and to increase participation in the political sphere. … It will look at how citizenship education can be connected to both a possible citizenship ceremony when young people reach adulthood and to the acquisition of voting rights. In that context, the Commission will also examine, including in debate with young people, whether reducing the voting age will increase participation in the political process.[175]

The Green Paper made proposals to increase the number of days that the Union Jack can be flown from Government buildings. A consultation paper was issued by the

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171 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 185

172 Henry Porter, 'The British, thank goodness, don't talk about their values: By foisting bogus notions of Britishness on us, the Chancellor merely reinforces our healthy contempt for political leaders', *The Observer,* 9 July 2006

173 Commission on Integration and Cohesion, *Our shared future,* 2007

174 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 193

175 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 190

Department for Culture Media and Sport on 25 July 2007 which sought views on whether the Union flag should be flown on Government buildings all of the time, on working days only, on an increased number of fixed flag flying days or if departments should be able to choose when to fly the Union flag.[176] More information is available in the Library Standard Note *The Union Flag and Flags of the United Kingdom.*[177]

2. A British Statement of Values and a British Bill of Rights and Duties

The discussion of the need for a British Statement of Values and perhaps a British Bill of Rights must be set in the context of the *Human Rights Act 1998* and the subsequent interpretation of the rights afforded under the legislation by both politicians and the press. The Constitution Unit has noted that:

> It was Labour Party policy in 1997 first to incorporate the European Convention on Human Rights (ECHR) into domestic law, and then to move to a British bill of rights as a second stage. The second stage was dropped once the ECHR had been incorporated into the Human Rights Act in 1998, and the human rights legislation became the subject of a sustained onslaught from the tabloid press. This reached crescendo in summer 2006, when the Labour and the Conservative leaders sought to outdo each other in attacking the Human Rights Act, echoing tabloid outrage at a court decision about deportation. Tony Blair ordered a review of the operation of the Act, and David Cameron went one stage further and promised to scrap the Act and replace it with a British bill of rights. The new Prime Minister must decide at the outset whether he is willing to defend the Human Rights Act…

The previous Home Secretary and the Prime Minister had been critical of the way that the judiciary had interpreted the law. For example the Prime Minister is quoted as having said:

> We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense, frankly, to be in a position where we can't do this.[178]

In July 2006 the Department for Constitutional Affairs published a paper entitled *Review of the Implementation of the Human Rights Act,* which considered the impact of the Act and concluded that it had been dogged by public misconceptions, urban myths and misapprehensions.[179] A Library Standard Note, *The Human Rights Act, Myths, Misconceptions and Realities* is also available on the intranet.[180]

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176 The Department for Culture, Media and Sport, *The governance of Britain: Flag flying,* July 2007
177 Library Standard Note SN/PC/4474, *The Union Flag and Flags of the United Kingdom*
178 "Victory for Afgan Hijackers fighting to remain in Britain" *The Times*, 5 August 2006
179 See http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf
180 Library Standard Note SN/HA/4363, *The Human Rights Act, Myths, Misconceptions and Realities*

Following the departure of the former Prime Minister and key Cabinet colleagues the tone of government language regarding Human Rights has appeared to soften. The Green Paper appeared to mount a defence of the Human Rights Act:

> the effect of repealing the Human Rights Act would be to prevent British citizens from exercising their fundamental rights in British courts and lead to lengthy delays for British citizens who would need to appeal to Strasbourg to assert their rights. In addition, the European Court of Human Rights would be less likely to take into account the specific British context in making its decisions.

Indeed, the Government went on to state that "the *Human Rights Act* should not necessarily be regarded as the last word on the subject". During his statement to Parliament on 3 July 2007, Mr Brown explained that there was a case for a statement of rights and responsibilities, perhaps incorporated into a Bill of Rights and Duties:

> What constitutes citizens' rights, beyond voting, and citizens' responsibilities, such as jury service, should itself be a matter for public deliberation. As we focus on the challenges that we face and what unites and integrates our country, our starting point should be to discuss together and then, as other countries do, agree and set down the values, founded in liberty, which define our citizenship and help to define our country. And there is a case that we should go further still than this statement of values to codify either in concordats or in a single document both the duties and rights of citizens and the balance of power between Government, Parliament and the people. [181]

The *Governance of Britain* suggested that:

> A Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations… However, a framework of civic responsibilities – were it to be given legislative force – would need to avoid encroaching upon personal freedoms and civil liberties which have been hard won over centuries of our history.[182]

In a speech made on 3 September 2007 to the National Council of Voluntary Organisations, Mr Brown announced that there would be a Citizens' Summit on a British Statement of Values:

> …a Citizens Summit, composed of a representative sample of the British people, will be asked to formulate the British statement of values that was proposed in our Green Paper on the future government of Britain, a living

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[181] HC Deb 3 July 2007 cc819-820
[182] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 209-210

> statement of rights and responsibilities for the British people. It won't take root anyway unless there is a real sense that it has been brought forward by people themselves, and this will be part of the wider programme on consultation led by Jack Straw and Michael Wills on the British statement of values, the idea of a British Bill of Rights and Responsibilities, rights and duties, the components of the Constitutional Reform Bill. Jack Straw will announce the details of this programme shortly.[183]

In a speech on liberty at the University of Westminster on 25 October Gordon Brown said that the discussion would focus on how to "entrench and enhance" individual freedoms while also detailing the responsibilities "that flow from British citizenship". Mr Brown expressed his hope that the debate be informed by all people and all viewpoints regardless of any political affiliation. He said that:

> The debate about a Bill of Rights and Duties will be of fundamental importance to our liberties and to our constitutional settlement and opens a new chapter in the British story of liberty. So it is right that the discussion should engage those of all parties and none who believe in our democracy and the importance of liberty within it in a constructive dialogue. And this debate is not just for one party or one year but for all parties and for this generation. I hope other political parties will join in this dialogue.[184]

It appears that the Citizens' Summit will put together the statement of values, and also have some say over how such a statement might be used – for example, whether it should be on display in all public buildings or placed inside passports. The precise details have not yet been announced. Plans to involve citizens in constitutional reform are discussed in more detail below.

JUSTICE, the law reform and human rights organization, has been working on a project *a Bill of Rights for Britain?* The final report is due to be published in the autumn of 2007. They published an interim report in February 2007 which stated that they saw the sources for the content of any British bill of rights as including:

- Rights protected in the European Convention on Human Rights (ECHR);
- Common law constitutional rights which strengthen ECHR rights, such as the right to a trial by jury, or to access the courts, which have developed within a specifically British context;
- Rights 'additional' to those in the ECHR: e.g. rights protected in domestic legislation in relation to equality; economic and social rights; rights in international treaties and rights identified in other countries' bills of rights.[185]

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[183] Gordon Brown, *Speech to the National Council of Voluntary Organisations,* 3 September 2007, http://www.number-10.gov.uk/output/Page13008.asp (last viewed 4 October 2007)
[184] See http://www.number-10.gov.uk/output/Page13630.asp (last viewed 26 October 2007)
[185] JUSTICE, *A bill of rights for Britain? A Justice discussion paper,* February 2007

In their initial response to the Green Paper JUSTICE stated that "consideration of such a bill needs to focus on its content, amendability, enforcement and the process by which agreement is build up on its content".[186]

B. Constitution

The relationship between Bills of Rights and written constitutions is explained by JUSTICE which has written that:

> The question arises whether Britain can work towards adopting a strong version of a bill of rights without at the same time making a decisive step towards a written constitution. While there is a logical connection here, there is no necessary tie between a bill of rights and a written constitution, since several jurisdictions have a bill of rights instrument without a written constitution (such as Israel and New Zealand) and vice-versa (Australia, at the national level). That said, a bill of rights would clearly be one of the centrepieces of any written constitution and could undoubtedly be a major step towards one. In the context of rights protection, an important value of a written constitution is that it enables citizens to understand the rights and duties of citizenship and service important aims in terms of national identity and understanding of basic constitutional rights. The debate on a written constitution will therefore merit scrutiny as ideas on a bill of rights are developed.[187]

The Governance of Britain appears to acknowledge this relationship, but is cautious in its approach:

> …there is now a growing recognition of the need to clarify not just what it means to be British, but what it means to be the United Kingdom. This might in time lead to a concordat between the executive and Parliament or a written constitution.
>
> It is clear that neither a Bill or Rights or Duties nor a written constitution could come into being except over an extended period of time, through extensive and wide consultation, and not without broad consensus upon the values upon which they were based and the rights and responsibilities which derived from them…[188]

In his statement to Parliament, Gordon Brown explained that any move towards a written constitution:

> …would represent a fundamental and historic shift in our constitutional arrangements. So it is right to involve the public in a sustained debate

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[186] JUSTICE, *The Governance of Britain: A preliminary Justice response,* 5 July 2007
[187] JUSTICE, *A Bill of rights for Britain? A Justice consultation paper,* February 2007, para 65
[188] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 212-213

> about whether there is a case for the United Kingdom moving towards a written constitution. Because such fundamental change should happen only when there is a settled consensus on whether to proceed, I have asked my right hon. Friend the Secretary of State for Justice to lead a dialogue within Parliament and with people across the United Kingdom, by holding a series of hearings, starting in the autumn, in all regions and nations of the country, and we will consult with all the other parties on this process.[189]

VI Parliamentary responses to the Green Paper

A. Debate in the House of Commons

David Cameron, Leader of the Opposition, responded to the Prime Minister's Parliamentary statement by welcoming some of the proposals:

> The British system of government and politics needs real and lasting change. The country is too centralised, Parliament is too weak, Ministers do not give straight answers and people feel shut out of decision making. That is why we need change. We welcome much of what is in the statement: the national security council was in our policy review; confirmation hearings – one of our proposals; and neighbourhood budgets are in the Sustainable Communities Bill being taken through the House by my hon. Friend the Member for Ruislip-Northwood (Mr Hurd)…

However, he also called for a number of further reforms, including giving more powers to select committees, giving Parliament control over its own timetable. His main criticisms were about the failure of the paper, in his view, to address the West Lothian question, his criticism of proposals on a British Bill of Rights and the government's failure to promise a referendum on the European Reform treaty. On the first he stated:

> …Today, the situation is that neither he, nor I, nor any Member of the House has the right to vote on hospitals, schools or housing in his constituency or in other parts of Scotland, yet he is able to vote on hospitals, schools and housing in my constituency. We already have two classes of MP. It is not the case that the only effective way to solve that problem is to give MPs in English constituencies the decisive say in the House on issues that affect only England. The Prime Minister has had 30 years to come up with answers to the West Lothian question, and I have to tell him that Question Time for regional Ministers just does not cut it. Does he not see that the failure to answer that question is actually putting the Union at risk?

On proposals for a British Bill of Rights he said:

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[189] HC Deb 3 July 2007 cc819-820

> Now let us look at the… most important relationship – that between politics and people. Part of the Prime Minister's answer will clearly be the Bill of Rights and duties, but surely at this most serious of times we need greater clarity about the Human Rights Act 1998. Is it not the case that it is now almost impossible to deport foreign nationals who may do this country harm? That is why we believe in a proper British Bill of Rights should mean replacing the Human Rights Act.

And on the European Treaty referendum issue he asked:

> …how can the Prime Minister possibly restore trust in politics if he will not give the people the final say on one of the biggest constitutional questions of all – whether to sign up to what is in effect the European constitution? He talks about citizens' juries. Why not have a jury of all our citizens and ask them to give their verdict on that issue.

Mr Cameron summed up:

> Four vital questions go to the heart of this statement. Does the right hon. Gentleman accept that real decentralisation must mean scrapping top-down targets? Does he accept that when there is constitutional change – transferring power from Westminster to Brussels – it should be put to the people in a referendum? Does he accept that real power for Parliament means the House of Commons – not the Government of the day – determining its own agenda? Does he not understand that real reform must mean answering the West Lothian question, which he failed to do today?[190]

Responding to Mr Cameron, Mr Brown stated that:

> First, he mentioned a British Bill of Rights and the question of whether we can deport people from this country. I can do not better on this matter than quote the chairman of his democracy commission… who said that the Conservative proposals for a British Bill of Rights were "xenophobic and legal nonsense"…

On the European Reform Treaty he replied:

> …there is no other country but Ireland that is putting forward a proposal to have a referendum. The last Conservative Government did not have a referendum on Maastricht; they never had a referendum on previous treaties. I believe that the Conservative leader is making a grave mistake if he believes that this constitutional debate about the future of the country and the relationships between legislature, Executive and judiciary should be overshadowed simply by a debate on an issue that we will investigate

[190] HC Deb 3 July 2007 cc820-822

> in detail in the House of Commons when the legislation comes before the House in the next few months.

And on the West Lothian Question he said:

> As for the third point of difference – again, I believe that we should seek consensus in the House on this matter – I have said that although I look forward to a discussion about the implications of devolution for our constitution, I do not believe that English votes for English laws is the answer. If the Conservative party wishes to continue to push that, it has to take into account the fact that the Executive would owe their authority to two different groups of people: on one occasion, to all Members of the House and on another occasion, simply to some Members of the House…
>
> Yes, we are prepared to look at proposals that will strengthen the United Kingdom in the light of devolution, but no, I do not believe we will have a sensible debate if it is purely about English votes for English laws – something that would create two categories of Members in the House of Commons.[191]

Sir Menzies Campbell, Leader of the Liberal Democrats, asked:

> The Prime Minister did not mention in any detail a strengthened Committee system. Does he have any proposals to strengthen the powers of Select Committees? He did not mention electoral reform – other than in the context of fulfilling a previous manifesto commitment. Does he understand that, for many people, the reform of the constitution in essence requires electoral reform? There should be fixed terms of Parliament. The best way in which to deal with those matters is through a written constitution.
>
> On the issue of English votes on English laws, does the Prime Minister accept that once devolution is properly established in Northern Ireland, Scotland and Wales, it will be impossible to ignore the role of Members of Parliament from those three nations in Westminster? That is an issue that simply cannot be dismissed. Finally, will the Prime Minister accept that if the public are to be properly engaged in the matters that he has outlined so comprehensively today, a constitutional convention would be the best and most effective way of ensuring it?[192]

Mr Brown responded:

> On the questions on which we do are not wholly in agreement, of course there is a debate to be had about the future of Select Committees, and it can be led from within the House. Of course I am open to discussion the

[191] HC Deb 3 July 2007 cc822-823
[192] HC Deb 3 July 2007 cc823-833

> implications of devolution for our constitution, but I think that the right hon. And learned Gentleman would agree that English votes for English laws would mean that we would no longer have one United Kingdom. As for the constitutional convention that he proposes, let me tell him that a constitutional convention of the great and the good is not as good as hearings that will be held in all parts of the country, that will involve people in different communities of the country, and that will be led by the Secretary of State for Justice after consultation with the other parties. I hope that the right hon. And learned Gentleman will join us in supporting the nationwide debate on the future of the constitution.[193]

Pressed on electoral reform again by David Howath (Liberal Democrat), Mr Brown stated that "the first stage of any future discussion will be the publication, soon, of the review of electoral systems…".[194] As mentioned above, the review has since been leaked to *The Times.* Other questions raised during the debate covered issues as wide as making history compulsory to under 16 year olds, fixed term parliaments, reform of the select committee system and the appointment of NHS boards.

A further Parliamentary statement was made to the House of Commons on 25 October 2007 by the Lord Chancellor, Jack Straw. This is reproduced in full in the Appendix.

B. Responses of the relevant select committees

The Government's proposals cover ground laid out by the Public Administration Select Committee and the Constitutional Affairs Select Committee in the Commons, and the Constitution Committee in the Lords. The Public Administration Select Committee has issued a Special Report on the Green Paper, which explains that:

> This Committee has long been and advocate of rebalancing the relationship between Government, Parliament and the public. We are pleased to see so many of our recommendations being acted on by the Government. A Civil Service Bill is crucial to protecting the permanence and impartiality of our public administration. In 2003, we took the unprecedented step (for a Select Committee) of drafting such a Bill; we are now told the Government will introduce a Bill of its own in the next session. We welcome too the acknowledgement of our 2004 report into the Royal Prerogative; we noted then that this was "unfinished constitutional business". We will work with the Government to ensure a full and sensible review of the prerogative powers.
>
> Much more of our work has been relevant to the debate on constitutional reform in this country. Since 2001 we have produced reports on public appointments; on the relationship between Ministers and Civil Servants; on the role of Special Advisers; on the Ministerial Code of Conduct; on the rules for business appointments; on changes to the machinery of

[193] HC Deb 3 July 2007 c825
[194] HC Deb 3 July 2007 c831

> government; on changes to the honours system; and on the regulation of standards in public life. All these pieces of work, and the inquiries which led to them, could and should contribute to the discussion and debate on a new constitutional settlement. All are relevant to the proposals set out by the Prime Minister. We expect to revisit some or all of these topics as we respond to the Government's Green Paper.[195]

The Constitutional Affairs Select Committee has reported that:

> We welcome this wide ranging and comprehensive statement of the Government's proposals for constitutional reform and the Ministry of Justice's commitment to deliver this "encyclopaedia" of reforms and the fact that it reflects a deliberative approach to constitutional reform. We have been critical of the lack of prior consultation on recent changes, such as relation to the creation of the Ministry of Justice and the reforms implemented by the Constitutional Reform Act 2005. Since its creation in 2003, the Constitutional Affairs Committee has contributed extensively to the continuing debate on constitutional reform in this country; not least in two recent major Reports on Party Funding and The Constitutional Role of the Attorney General as well as the establishment of a new system for appointing judges, House of Lords reform, human rights legislation and its impact on Government policy-making, the creation of the new Supreme Court, the change in the role of Lord Chancellor and the introduction of freedom of information… The Committee will take responsibility for scrutiny of the overall process of constitutional reform.
>
> We have already announced our inquiry into Devolution and its impact on the UK's constitution, which will also address some of the issues raised in this document. We will wish to consider the proposal of a written constitution and the broad constitutional issues such as direct democracy. We recognise the contribution of other Select Committees and of the House of Lords Constitution Committee and Joint Committees to the further development of many of the proposed reforms identified in the Green Paper. The Devil is in the detail in relation to many of these proposals. Select Committees are an ideal forum to explore complex issues. We look forward, in cooperation with colleagues on other Committees, to playing a full role in taking forward consideration of the proposed constitutional reforms.[196]

The Lords Constitution Committee has also published a brief report on the Green Paper which stated that:

> This Committee has a central role to play in the development of these proposals. We shall keep under close review the nature of the

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[195] Public Administration Select Committee, *Special Report: The Governance of Britain,* 11 July 2007, HC 901 2006-07

[196] Constitutional Affairs Select Committee, *Special Report: The Governance of Britain,* 23 July 2007, HC 907 2006-07

> consultation process. Each particular reform proposal will also require detailed analysis. In addition, we shall consider the broader themes of accountability and citizens' rights and responsibilities which the Green Paper offers as an over-arching framework for this ambitious programme of change…[197]

The Joint Committee on Human Rights is already holding evidence sessions on a Bill of Rights.[198]

On 11 October 2007 the Modernisation Committee, which is chaired by the Leader of the House, announced that it would be considering issues arising from the Green Paper. They stated that:

> …The green paper set out proposals for taking forward constitutional reform and many of these directly or indirectly affect Parliament. The Modernisation Committee plans to look, initially, at four specific aspects of the Governance of Britain agenda:
>
> - how the draft legislative programme should be handled within Parliament when it is next published;
> - the role of the House in any decisions to recall the House during a recess or dissolve Parliament;
> - Annual debates on departmental objectives and annual reports; and
> - Regional accountability.[199]

On 24 October they published the terms of reference for these four inquiries.[200]

VII Emerging themes

A. A narrative for reform

The *Governance of Britain* Green Paper can be seen as an attempt to provide a narrative for constitution reform which some reformers seem as largely missing from the reforms of the 1997-2007 administrations. Professor Robert Hazell of the Constitution Unit has written that:

> It is commonplace amongst critics to say that the first wave of reforms were introduced in a disconnected, piecemeal fashion, and with no overarching explanation or vision. It is not too late to provide that, and it is vital to sustain a relaunch of the reform programme.[201]

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197 House of Lords Constitution Committee, *The Governance of Britain,* 20 July 2007, HL 158 2006-07
198 Joint Committee on Human Rights Press Notice, 22 May 2007.
199 Modernisation Select Committee Press Notice, 11 October 2007
200 Modernisation Select Committee Press Notice, 24 October 2007
201 Robert Hazell, *Towards a new constitutional settlement,* June 2007

In a 1998 Constitution Unit lecture, the then Lord Chancellor Lord Irvine of Lairg who was responsible for much of the programme of reform in the 1998-2003 period, rejected the suggestion the programme for reform was piecemeal in its approach:

> I dispute any proposition that our programme lacks coherence. We made conscious choices about precisely which aspects of our constitution needed earliest attention and on what basis. We are conscious of the way different elements of any constitutional settlement can impact on each other. Nonetheless many elements of the package are not inter-dependent. Nor is there any reason why they should be. Many of the measures are responses to particular problems which are the product of lengthy and complex pre-histories of their own.
>
> Each strand of our constitutional reform programme is well justified on its own merits. The strands do not spring from a single master plan, however, much that might appeal to purists. *Non sequitur* that they are incoherent. There are uniting themes and objectives – modernisation, decentralisation, openness, accountability, the protection of fundamental human rights, the sharing of authority within a framework of law – all of which will fundamentally change the fabric of our political and administrative culture. In a sentence: our objective is to put in place an integrated programme of measures to decentralise power in the United Kingdom, and to enhance the rights of individuals within a more open society.[202]

At the time when the government was facing criticism about the manner in which they announced changes to the role of the Lord Chancellor, Lord Irvine's successor, Lord Falconer of Thoronton, attempted to articulate unifying themes of the constitutional reform agenda. In a speech to the Constitution Unit in 2003 Lord Falconer stated that:

> Since 1997 this Government has been involved in a sustained attempt to revive and redefine that relationship for the twenty-first century. Three progressive values have underpinned our approach to constitutional reforms:
>
> - The first has been to enhance the **credibility and effectiveness** of our public institutions;
> - The second has been to strengthen our **democracy and public engagement** with decision making;
> - The third has been to increase **trust and accountability** in public bodies.
>
> These are not abstract values, but values that have an impact in everyday lives. But they are also necessary political values. They reflect our broader belief in the virtue of the public sphere. In contrast to those who would prefer the state to wither on the vine, this government believes passionately in the necessity of reform in order to preserve and enhance

[202] The Rt Hon. Lord Irvine of Lairg, Annual Constitution Unit Lecture, December 1998, paras 16-17

> our public services and our political institutions. And it is equally important that we succeed in establishing the success and merit of these changes in the eyes of citizens. Our public institutions must be, and must be seen to be, relevant to the needs of our society in the twenty-first century.[203]

The *Governance of Britain* Green Paper sets out goals for future constitutional change:

- to invigorate our democracy, with people proud to participate in decision-making at every level;
- to clarify the role of government, both central and local;
- to rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account; and
- to work with the British people to achieve a stronger sense of what it means to be British, and to launch and inclusive debate on the future of the country's constitution.

Peter Riddell's assessment of the Blair reforms was that "Constitutional reform will undoubtedly be one of the enduring legacies of the governments he has led – but it has been delivered in the face of the Prime Minister's ambivalence". In contrast, much of the narrative for the current constitutional reform has been articulated by Gordon Brown. Constitutional reform was the subject of Mr Brown's first statement to Parliament as Prime Minister, and as the Secretary of State for Justice explained to the Justice Select Committee that:

> The Ministry of Justice is our lead departmentally; the Prime Minister is leading for the Government on this as you will have noted from his statement on July 3. I chair a Cabinet committee which is now called the CN, which is on constitutional affairs, and that will be co-ordinating the overall approach. Of course, Chairman, depending on the subject, different members of the Cabinet will have a different interest… my job is to try and ensure that collective Cabinet government operates so that we have an agreed position on that.[204]

B. Involving the public

1. …in constitutional reform

A criticism of the Blair reforms had been the lack of connection between what was happening in Whitehall and the public. Professor Hazell and Dr Andrew McDonald have explained that:

> Nine years on there is, inevitably, a new emphasis on implementation: it is one thing to establish new institutions and create new rights, but it is quite

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[203] Lord Falconer of Thoronton, *Constitutional Reform Speech,* University College London, 8 December 2003

[204] Uncorrected transcript of oral evidence to be published as HC987-i 2006-07, Q1

> another to foster a new relationship between state and citizen. Lord Irvine's vision of empowered citizens living in an open, decentralised society cannot be realised by statutory draftsmen and policy makers in Whitehall. Citizens have to understand to use their rights…[205]

The Power Inquiry reported in 2006 that constitutional reform had previously neglected the relationship between the state and the citizen:

> The constitutional reform agenda was chiefly about imbalances and injustices in the relationship between different elements of the polity but there is also a vital need to address, more directly and radically, the relationship between that polity and the citizen.

Mr Brown has talked about building "a shared national consensus for a programme of constitutional reform".[206] In his 3 September 2007 speech to the National Council of Voluntary Organisations, Mr Brown announced that there would be a Citizens' Summit on a British Statement of Values. He explained his view that:

> I think we are being held back by three great failings in our political system: the political parties themselves have not reached out enough to people so we have to rise to the challenge of forging a better party politics; that the political system too often ignores or neglects new ideas that flow from outside in Westminster and often in the past have failed to listen and learn, so we have to rise to the challenge of opening up our political system to recognise and to take on board new ideas; and our participatory democracy is too weak at a local level so we have to rise to the new challenge of encouraging engagement. Indeed the power of progressive politics rests in the empowerment of people it serves and that is our purpose and I believe progressive politics in this country will only truly succeed in shaping a better Britain if we actively reach out to new ideas, if we find new ways of engaging people in their communities and then build a consensus for change. So I don't want to carry on with politics as usual.

In their response to the Green Paper, the Constitution Unit commented that:

> The Green Paper very sensibly suggests that new and varied forms of consultation should be set up to discuss some of the major proposals included within it. This could be extremely important in building trust. If the aim of the exercise is to increase democracy and accountability, a democratic and accountable process must be established to agree the measures introduced. However, there are also other pragmatic reasons for the government to embark on consultation, and in particular for it to experiment with genuine deliberative processes such as citizens' juries or citizens' assemblies. After 10 years of constitutional reform, many of the

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[205] Andrew McDonald, *Reinventing Britain,* 2007, p27
[206] Gordon Brown, 17 May 2007

> items remaining on the agenda are highly contested. This applies to Lords reform and electoral reform, and will also apply to any attempts to draft a British Bill of Rights of a British statement of values. The danger with traditional forms of consultation is that numerous competing voices are aired, and then whatever government proposes is rubbished by one side or the other. The benefit of mechanisms such as citizens' juries is that the citizens with competing visions are forced to reason with each other. This confronts citizens with some of the difficult choices generally left to politicians, and ensure that the outcome – even if this is that no agreement can be reached – has greater legitimacy…[207]

The main arguments for involving citizens in constitutional reform in general, and in proposals around rights and citizenship in particular, can be summarised as follows:

- If the purpose of constitutional reform is in part to reconnect the citizen with the state, the process of constitutional reform must itself involve citizens;
- Public participation increases knowledge and interest in politics both within the group of citizens taking part in the exercise, and amongst the wider general public;
- Involving citizens in discussions about what it means to be British is particularly important if assertions about citizenship are to have resonance across different sections of British society.
- If human rights are to be fully accepted and understood from the public, arguably unlike those within the *Human Rights Act 1998*, they have to have come from the public and been subject to debate and discussion across society;
- Some of the government's proposals are highly controversial and contested. By involving citizens in hard choices the government may neutralise some criticism of proposals.

Professor Anthony King of Essex University has been more sceptical of the 'involve the people' approach. In an article in *Prospect Magazine* he stated his view that:

> At some points this trust-the-people approach evinces naivety bordering on the comic. In his statement, Brown announced that he had asked Jack Straw "to lead a dialogue within parliament and with people across the United Kingdom by holding a series of hearings, starting in the autumn, in all regions and nations of this country". Brown insisted in parliament that "a constitutional convention of the great and the good is not as good as hearings that will be held in all parts of the country". The trust is that hearings of this kind invariably attract the elderly, the male, the white, the middle-class and the people with both bees in their bonnets and time on their hands. Well-considered and durable constitutions do actually emerge from gatherings of the great and the good – and from nowhere else.

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[207] Robert Hazell, *Constitution Unit response to Cm 7170: The Governance of Britain July 2007,* July 2007, http://www.ucl.ac.uk/constitution-unit/files/publications/GovernanceResponse.pdf

> George Washington, Benjamin Franklin, James Madison and Alexander Hamilton – the men who met in Philadelphia in the summer of 1787 – were certainly great and arguably good. It is true that they won the consent of the people in a series of state by state conventions, but the people were asked to ratify or refuse a document that had already been carefully thought through, the outcome of months of behind-the-scenes deliberation.[208]

Citizens' forums have been used in other jurisdictions to consider aspects of constitutional reform. British Columbia established a Citizens' Assembly on Electoral Reform,[209] as have Ontario,[210] and the Netherlands set up a Civic Forum which also considered electoral matters. The British Columbia Citizens Assembly made proposals which were put directly to referendum, where they were narrowly defeated. A referendum on the proposals made by the Ontario Assembly were also defeated, but by a much wider margin. The Netherlands Civic Forum had a more advisory role and it is not yet clear what will happen as a result of their findings.

Campaigns have been launched for a Citizens' Assembly on wider constitutional issues in the UK by the groups Make It An Issue and Unlock Democracy, with the Liberal Democrats also calling for a Constitutional Convention.[211] A private members bill (The Citizens' Convention Bill) has also been introduced by Julia Goldsworthy MP and an Early Day Motion tabled in support of the Bill. More information on this, and on the operation of Citizens Assemblies overseas, can be found in the Library Standard Note *Citizens' Assemblies.*[212]

2. …in Human Rights

There are particular arguments made for involving citizens in proposals for changing the rights regime in the United Kingdom. The Constitution Unit have stated that:

> The main aim should be to repatriate and repackage the ECHR and put a British label on it, in order to gain public acceptance of a catalogue of rights. As the Green Paper points out, there was significant British input into drafting the ECHR, but sections of the press will continue to portray it as an undesirable European import, and many of its readers will believe them. This negative perception is unlikely to change until the rights have been discussed by the British people and adopted as a Bill of Rights. [213]

JUSTICE, the legal and human rights organisation, has been working on a project on a Bill of Rights for Britain. In their consultation paper published in February 2007 they state that:

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[208] Anthony King, 'Constitutional Fiddling', in *Prospect,* September 2007
[209] See http://www.citizensassembly.bc.ca/public (last viewed 24 October 2007)
[210] See http://www.citizensassembly.gov.on.ca/en/default.asp (last viewed 24 October 2007)
[211] See Liberal Democrats, *For the People, By the People,* 6 September 2007
[212] Library Standard Note, *Citizens' Assemblies*
[213] Robert Hazell, *Constitution Unit response to Cm 7170: The Governance of Britain July 2007,* July 2007, http://www.ucl.ac.uk/constitution-unit/files/publications/GovernanceResponse.pdf

> Any move to introduce a British bill of rights must start with a comprehensive public education campaign and a major consultation process, as has happened in Northern Ireland. This is essential to obtain sufficient public awareness and consensus over its content. We consider that the bill in its final form should also be confirmed by a referendum.[214]

3. …and in policy making more generally

In a speech to the Fabian Society, the Cabinet Office minister Ed Miliband has argued in favour of more involving people to a greater extent in policy and decision making:

> An American academic, Archon Fung, has talked about three ways in which representative democracy is necessary but not sufficient.
>
> First and most obviously, different forms of engagement can provide a richer and more textured conversation between and with people about their preferences which we may only get periodically, if at all, from debates at elections. And it can make for better policy-making as a result.
>
> Second, sometimes mechanisms of representative democracy provide insufficient accountability – for example over local decisions about public services, such as local policing priorities. Part of the solution may lie in direct local public accountability on these issues.
>
> Thirdly, and most critically, there are many issues we face in our society that cannot be solved without people's involvement. So, for example, we can't address the issues of young people feeling they have nowhere to go if the services are designed by adults.
>
> These are timeless reasons why representative democracy on its own is not enough. But there is an additional reason why this agenda is right for our time.
>
> Because while twenty, thirty, forty years ago, our society was characterized by the deference that meant people would accept representative democracy on its own, today they don't. People want and demand more power over their own lives, people are less likely to trust those in authority, whether they be politicians, public service professionals or business…[215]

In his 3 September 2007 speech to the National Council of Voluntary Organisations the Prime Minister set out proposals for a series of Citizens' Juries:

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[214] JUSTICE, *A Bill of Rights for Britain: Discussion paper,* February 2007, http://www.justice.org.uk/publications/listofpublications/index.html

[215] Ed Miliband, *Speech to Fabian Conference on Democracy,* 8 September 2007

> …if we are to meet the challenge of engagement the old models of consultation need radical renewal. While they have been useful in shaping policies we have come nowhere near realising the potential of the public to make better policies. I am determined that the wisdom and experience that resides within the British people will be better put to use in the future. Now in the old days when politicians went round the country the principal method of communication was political party speeches from platforms. More recently this country opened up to question and answer sessions where politicians went round the country offering to do questions and then answers, and often, I admit at least in my case, the answers from the politicians were far longer than the questions. Now we need new ways and means to bring together citizens to discuss both specific challenges that need addressing, and concrete proposals that we can discuss for change…
>
> … starting this week we will hold Citizens Juries round the country. The members of these juries will be chosen independently. Participants will be given facts and figures that are independently verified, they can look at real issues and solutions, just as a jury examines a case. And where these citizens juries are held the intention is to bring people together to explore where common ground exists.

Citizens' juries have since taken place on issues related to children, and crime and communities. Nine simultaneous citizens' juries have also taken place on the future of the National Health Service, one in each region, linked by video.

However, arguments have also been made against too great an expansion of direct democracy. Writing for the Hansard Society, Declan McHugh and Phil Parvin have argued that:

> It is not immediately obvious that opening up more channels of communication – either direct or indirect – would successfully engage more of the people than it does already. Recent research by MORI suggests that the majority of public policy debates and political activity in Britain is driven by around 6% of the population – whether it is in the form of voting, marching, signing petitions, or whatever. The claim that direct democracy would automatically empower the 'silent majority' to contribute to political debates is therefore at best questionable.[216]

Involving the public in decision making through citizens' juries is not a new concept. Citizens' juries have been used on many occasions by local authorities to inform their decision making. In central government, the Labour government established a People's Panel in 1998. The Panel was made up of 5,000 members of the public. It had a profile that was representative of the UK population in terms of age, gender, region and other demographic indicators. Extra members were recruited to replace those who had left and

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[216] Phil Parvin and Declan McHugh, *Neglecting Democracy,* February 2006, p15, http://www.hansardsociety.org.uk/publications/recent/neglecting_democracy

to ensure the continuing representative nature of the panel over time. An additional 830 members were recruited from ethnic minority groups to make the sample large enough to ensure that the group could be used for quantitative research. The panel was used for a variety of purpose, from leaflets on GM food to perceptions of ministerial involvement in the appointments process. Focus groups, in dept interviews and surveys of the Panel or of distinct groups from with the panel were possible. The Panel was wound up in 2002.

VIII Implementation

A. A series of consultations

The Green Paper announced that the government would consult on a large number of proposals. Remarkably for a Green Paper, however, no details were given for how to respond to the proposals as an overall package. Individual consultations announced in the Paper included:

- Consulting Parliament, interested bodies and the public on the requirement of a vote on the dissolution of Parliament;
- Consulting the Modernisation Committee on amending Standing Orders to allow for the majority of Members to call for a recall of Parliament;
- Preparing, in consultation with the Liaison Committee, a list of appointments for which confirmatory hearings will apply; and
- A consultation paper published on the flying of flags from government buildings;
- A consultation on the role of the Attorney General;
- The Government has also begun to consult on the *Draft Legislative Programme,* with the public able to comment online at on the Cabinet Office website, and email responses to the Office of the Leader of the House.

On 25 October 2007, following a statement in the House of Commons by the Lord Chancellor which is reproduced in full in the Appendix, the Government launched three separate consultation papers:

- *Judicial Appointments;*
- *Managing Protest around Parliament; and*
- *War powers and treaties: Limiting Executive Powers.*

B. Cross-party talks and the Speaker's conference

Both reforms to the electoral system and to the House of Lords appear to require the development of a cross-party consensus to progress. Both are issues considered as 'unfinished business' from previous waves of constitutional reform (see above).

The *Governance of Britain* announced that cross-party talks on House of Lords reform would continue under the chairmanship of Jack Straw:

> The Secretary of State for Justice and Lord Chancellor will continue to lead cross-party discussions with a view to bring forward a comprehensive package to complete House of Lords reform. The Government will develop reforms for a substantially or wholly elected second chamber and will explore how the existing powers of the chamber should apply to the reformed chamber.[217]

In their briefing paper published before the *Governance of Britain* green paper, the Constitution Unit explained that:

> The past century has seen several attempts to secure consensus on constitutional measures through cross-party talks, both private talks on Privy Councillor terms and more formal interparty talks. Cross-party talks have repeatedly been used to try to progress reform of the House of Lords from 1910 onwards (mostly without much success). Recent examples of cross-party
> talks include:
>
> • Joint Labour/Liberal Democrat Committee on Constitutional Reform: These talks chaired by Robin Cook and Robert Maclennan (and serviced by the Constitution Unit) ran for six months in the run up to the 1997 election, and resulted in publication in March 1997 of an agreed programme for constitutional reform. The new Labour government received strong Lib Dem support for its constitutional reforms, and set up a joint Cabinet committee to seek continued cooperation from the Lib Dems.
>
> • House of Lords reform: Jack Straw initiated cross-party talks in June 2006. The crossparty group met eight times, and agreed that a reformed House should be part appointed, part elected, that the remaining hereditary peers should come to an end, and that reform should be introduced over a long transition period. The group could not agree on the proportion of elected and appointed members, nor on the precise method and timing of any elections. The February 2007 White Paper was a compromise which attempted to build on the limited amount of cross-party agreement. But its proposals were immediately denounced by the Conservatives.
>
> • Review of party funding: These cross-party talks are unusual in being chaired by a neutral third party, Sir Hayden Phillips. In March 2006 he was asked to consider the case for increased state

[217] Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, para 137

> funding of political parties alongside tighter caps on donations and campaign expenditure. Alongside a process of public consultation he has held intensive talks with the political parties, with a deadline of trying to reach agreement of July 2007. (see http://www.partyfundingreview.gov.uk)

On 3 September 2007 the Prime Minister announced that he would establish a Speaker's Conference on matters relating to elections. This mechanism was not mentioned in the Green Paper itself. Mr Brown stated that:

> … in order to address the problems of the political system itself, I want to revive the idea of a Speaker's Conference. A Speaker's Conference brings together all the parties at Westminster to look at issues that can only be dealt with on a cross- party basis. In the last century there were five Speaker's Conferences and each looked at different aspects of the political and electoral system - reform of the franchise, distribution of parliamentary seats, registration of electors and other matters. Today I am proposing to the Speaker that he calls a conference to consider against the backdrop of a decline in turnout, a number of other important issues such as registration, weekend voting, the representation of women and ethnic minorities in the House of Commons, and that he should also examine in parallel with the Youth Citizenship Commission whether we should lower the voting age to 16 so that we build upon citizenship education in schools and combine the right to vote with the legal recognition of when young adults become citizens of our country.[218]

The mechanism of the Speaker's Conference was a manifestation of the constitutional convention that changes to the electoral system should be agreed as far as possible on an all-party basis. (This convention is not universally observed, since there were serious inter-party disagreements in 1931 over attempts to bring in proportional representation; in 1948 over the abolition of the business vote and university representation; in 1970 when the Labour Government engineered a vote against parliamentary boundary reorganisations in England, and in the 1980s over Conservative extensions to voting rights by overseas citizens). Until the mid 1970s Speaker's Conferences dealt with a variety of issues of electoral administration, such as the registration of service personnel and the redistribution of seats. The last Conference was in 1978, which recommended an increase in the number of parliamentary constituencies in Northern Ireland. This was the fifth Conference of the twentieth century. For further information see the Library Standard Note *Speaker's Conferences.*[219]

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[218] Speech to the NCVO, 3 September 2007. Available at http://www.number-10.gov.uk/output/Page13008.asp

[219] Library Standard Note SN/PC/4426, *Speaker's Conferences*

C. A Constitutional Reform Bill in the 2007-08 Session?

A Constitutional Reform Bill was one of the 23 Bills outlined in the Government's *Draft Legislative Programme* published in July 2007. The Draft Programme stated that the purpose of the Bill would be to:

> Take forward the initial legislative elements of the Constitutional Renewal package to be set out in the Government's Green Paper 'The Governance of Britain' published on 3 July. Following the Green Paper, the shape of future legislation will be determined by a process which will include consultation and discussion.

The Paper goes on to explain that:

> the main elements of the bill are in many cases dependent on subsequent consultation exercises they could include:
>
> - placing on a statutory footing the role of parliament in the process for ratifying treaties;
> - implementation of any changes arising from the consultation on the role of the Attorney General;
> - placing the Civil Service on a statutory footing.[220]

The Secretary of State for Justice was asked by the Constitutional Affairs Committee in July 2007 whether any legislation would be introduced first in draft. He stated:

> Almost certainly. There is always an issue about the speed at which people want to hear consensus. I ask not to be held on this exact timetable, but what we are looking at is producing a drat bill around the turn of the year. My own sense about this is that there is a broad consensus that the royal prerogative needs to be abolished in almost every particular and replaced by an effective parliamentary system, in some cases by statute and in some cases it can be done by resolution… however, in order that we maintain that consensus colleagues in Parliament, the public and interest groups will want to see some of the key detail on this. It will probably lead to a swifter passage for the Bill when it is in final form if we can have a degree of pre-legislative scrutiny, but I have not formed final views about this…[221]

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[220] Office of the Leader of the House of Commons, *The Governance of Britain – The Government's Draft Legislative Programme,* Cm 7175, July 2007

[221] Uncorrected evidence taken by the Constitutional Affairs Committee, *The work of the Ministry of Justice,* 24 July 2007, Q2

Appendix: Statement to the House of Commons by the Lord Chancellor, 25 October 2007

The Secretary of State for Justice and Lord Chancellor (Mr. Jack Straw): With permission, Mr. Speaker, I should like to make a statement about our programme of constitutional renewal. With this statement, three consultation documents are being published. The first, jointly by my right hon. Friends the Foreign and Defence Secretaries and myself, is in respect of parliamentary approval for war powers and treaties; the second, by me, is in respect of judicial appointments; and the third, by my right hon. Friend the Home Secretary, is in respect of protests in Parliament square. Copies of the documents are available in the Vote Office and on my Department's website.

In his statement to the House on 3 July to launch the Green Paper entitled "The Governance of Britain", my right hon. Friend the Prime Minister set out his vision of a renewed relationship between Government and citizen. Among other things, he identified 12 areas in which

"the Prime Minister and Executive should surrender or limit their powers, the exclusive exercise of which by the Government should have no place in a modern democracy."—[*Official Report*, 3 July 2007; Vol. 462, c. 815.]

Two of the most important prerogative powers are the power to deploy the armed forces overseas and the power to commit the nation to international legal obligations through the ratification of treaties.

I turn first to war powers. On 15 May, the Government supported a motion in this House that declared that it was "inconceivable" that the precedents set in 2002 and 2003, when the Government sought the approval of this House for military action in Iraq, would not be followed in the future. The same motion called on the Government

"to come forward with...detailed proposals"

on how that convention should be entrenched. Today's consultation paper therefore explores a range of options, each aimed at formalising Parliament's role. It suggests that that might be achieved through a convention or legislation, or a combination of both. The consultation paper discusses the critical issues that any system would have to accommodate. It is essential that any new arrangements should not damage morale or hinder us in meeting our international obligations. They should not inhibit operational flexibility and the need for secrecy, nor inhibit our need to act in emergencies. In addition, of course, no members of our armed forces should be placed under any legal liability as a result of any new arrangements.

The Government welcome views on how those objectives can best be achieved, and also on related questions. For instance, what is the role of the House of Lords in contributing to decisions by this place? How should we define "armed conflict" and "armed forces"? What information ought to be supplied to Parliament, and at what stage?

I turn now to the ratification of treaties, which is already subject to a parliamentary convention introduced—I am pleased to say—by the first Labour Government, in

1924. For the cognoscenti, it is known as the Ponsonby rule, after the man who introduced it. According to the convention, and with certain

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exceptions, the Government must lay a treaty as a Command Paper before Parliament for a minimum of 21 sitting days before ratification. It is then for Parliament to determine which treaties it wishes to debate.

The Government believe that there may be value in putting the convention on a statutory footing, to establish better Parliament's right to decide and to show that the actions of the Government are subject to the will of the people's representatives. The paper seeks views on how that can best be done, including on the detailed and important questions of exceptions to the existing convention, which include bilateral double taxation agreements, how a debate and vote on a treaty should be triggered, and how the 21-day period could be extended in special circumstances.

As Lord Chancellor, I am responsible for upholding and defending the independence and integrity of the judiciary, which is essential to the functioning of a free and democratic society. Our system of appointing judges must be, as I believe it is, wholly devoid of party politics; it must be transparent, accountable and capable of inspiring public confidence. Under the Constitutional Reform Act 2005, with the establishment of the Lord Chief Justice, not myself, as head of the judiciary, we have already made significant reforms to the way in which judges are appointed in England and Wales. The most fundamental was the creation of an independent Judicial Appointments Commission. The consultation paper published today outlines other possible options for additional reform, on which the Government would welcome views.

The final consultation document published today concerns protest in Parliament square. The framework in the Serious Organised Crime and Police Act 2005 in respect of such protests raised concerns from campaigners and other citizens and, separately, from Members of the House. The purpose of the consultation is to listen to those concerns and review the provisions, to see whether there is a better way to both uphold the right to protest and manage individual protest appropriately.

Holding the Government to account for the way in which they spend public money is one of the most important functions of the House. I and my colleagues pay tribute to the work of the Public Accounts Committee and the National Audit Office in supporting the House in that task. The House will be pleased to know that following a joint request to my right hon. Friend the Prime Minister from my right hon. Friend the Member for Swansea, West (Mr. Williams), the Father of the House, and the Chairman of the Public Accounts Committee, the hon. Member for Gainsborough (Mr. Leigh), space will be made available in the forthcoming constitutional reform Bill for any agreed changes to the governance of the National Audit Office emerging from the review that they have announced.

It is right to consider the circumstances in which we open up more information for debate before the House. Even in the most sensitive sphere—national security—where everyone agrees that some safeguards have to be in place to respect confidentiality, we should always consider where we can do more, so starting next month, the Government will publish annually, for parliamentary debate and

public scrutiny, our national security strategy setting out for the British people the threats we face and the objectives we pursue.

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Additionally, new rules will govern a more open approach to the working of the Intelligence and Security Committee. My right hon. Friend the Prime Minister has agreed with the Chair of the ISC that Parliament should have a clear role in the appointment of members to the Committee. More details about the new rules and that role will be announced in due course.

In keeping with the Government's commitment to ensure that the public can access the information they need, my right hon. Friend the Prime Minister will make a speech later today announcing that we will not tighten the charging arrangements for freedom of information requests. A consultation on whether to extend the Freedom of Information Act to a range of organisations that perform public functions, although theoretically some of them may legally be in the private sector, and a review of the 30-year rule will be established.

These days, huge amounts of personal data are held by the public and private sector. The scale of those holdings has moved on significantly since the passage of the Data Protection Act 1998. My right hon. Friend the Prime Minister and I have therefore asked the Information Commissioner, Richard Thomas, and Professor Mark Walport, the director of the Wellcome Trust, to review the way in which we share and protect personal information in the public and private sector.

The freedom of the media to investigate and report is a key issue in the use of information. We consulted last year on restricting media access to the coroners' courts. In the light of the responses to that consultation, I can now confirm that we will not be proceeding with any proposals to limit such access.

Proposals to ban media payments to criminals have been under consideration for some time. None of us wants to see criminals profiting from publishing books about their crimes. While ensuring that the freedom of the press to investigate and report is maintained, we will bring forward proposals to make sure that criminals cannot benefit in that way.

As provisions in the Criminal Justice and Immigration Bill make clear, we are also concerned about the misuse of personal data. However, the new rules proposed in the Bill have raised concerns that they might impede legitimate investigative journalism, so the Information Commissioner, in consultation with the Press Complaints Commission, will produce clear guidance to ensure that rights to investigate are not impeded.

There is often a lack of clarity in the balance between an individual's freedom and the role of the state. My right hon. Friend the Home Secretary has been examining this issue in relation to existing police powers of entry to consider whether there should be a single readily understandable code. My right hon. Friend will widen the scope of the review to include all powers of entry available to other public authorities. She will also lead a consultative review to consider whether improved guidance is needed for police officers in the exercise of section 44 of the Terrorism Act 2000—stop-and-search powers—to ensure that trust is preserved in the use of the powers.

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For the sake of completeness, may I tell the House that in respect of reform of the House of Lords, discussions are proceeding inside the all-party talks? We are arranging for two meetings of the working group before Christmas.

These consultation documents and the other measures are all in part concerned with the right to freedom of expression and its facilitation. The right is specifically protected by the Human Rights Act 1998, but it has existed in the UK for a very long time. Because of its fundamental importance in our democracy, I shall be considering how, as all future legislation is developed, it can be carefully audited for any explicit or unforeseen restrictions that that might unnecessarily place on that freedom of expression.

I hope and believe that the House will agree that the matters that I have raised go to the heart of exactly where power should lie in our country and how it should be exercised. We now look forward to hearing the views of both parliamentarians and citizens on the proposals. I commend the statement to the House.