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Rt Hon. the Lord Goodlad KCMG
Chair of the Select Committee on the Constitution
House of Lords
SW1A 0PW

23 March 2010

Dear Alastair

Constitutional Reform and Governance Bill

The Government is grateful to the Committee for their report on the Constitutional Reform and Governance Bill (CRaG Bill) of 18 March. I have given consideration to the points you raise, and have responded promptly so that the Government's reply can inform the second reading debate on the Bill on 24 March.

A number of the points throughout your report relate to the time made available for the scrutiny of the CRaG Bill. I propose to address those together in conclusion. Before that, I will address points raised in relation to specific policies.

The Governance of Britain

In paragraph 7 of your report you mention a number of policy proposals made as part of the Governance of Britain programme – on war powers, flag flying, reform of the Intelligence and Security Committee, a wider review of the royal prerogative, the granting of passports, senior public appointments, and Church of England appointments – and note that the CRaG Bill does not contain provisions pertaining to these matters.

Although the Committee makes no substantive comment on most of these, save to suggest that in some cases this may mean reform does not require legislation, while in other cases it may mean that the Government no longer intends to introduce further reform, it is important to note that these proposals have not been left unresolved. To illustrate, I would like to draw the Committee's attention to the fact that the Government has issued a consultation on flag flying and changed the instructions so that the Union flag is flown from Government buildings at all times; changed the arrangements for the ISC including enhancing the involvement of Parliament in the appointment of the committee; conducted a review and issued a report on the review of the royal prerogative; introduced arrangements for select committees to hold hearings into the nominations for a variety of public appointments. We have also changed the rules on Church appointments so that the appointment of Bishops and Deans is now managed by the Church, and the PM receives only one name to forward to the Queen for the appointment of Diocesan Bishops, instead of two as previously.

In paragraph 8, however, you do comment on the war powers proposals, calling on the Government to publish a draft resolution as soon as possible. As the Justice Secretary told your Committee on 24 February, the draft resolution has been through a number of iterations. It is important to ensure that the resolution strikes the right balance between democratic accountability and operational effectiveness and that UK armed forces are not put at unnecessary risk. It has also been necessary to ensure that the resolution is properly framed in terms of the procedures of the Commons and, in particular, takes into account the views of the House authorities expressed to the Joint Committee on the Draft Constitutional Renewal Bill (which appears as Ev 65 in Volume II of the Joint Committee's report). I can reassure the Committee that the Government intends to publish the resolution as soon as possible.

The civil service

Moving on to matters in the Bill, the Government welcomes the Committee's comments on the importance of the provisions placing the civil service on a statutory footing, and the Committee's own welcome in broad terms for the provisions.

As the Committee's report says, the provisions concerning the civil service were subjected to detailed pre-legislative scrutiny by the Joint Committee on the Draft Constitutional Renewal Bill and by the House of Commons Public Administration Select Committee (PASC). The Government responded in July 2009 to the detailed recommendations of both the Joint Committee and PASC, some of which are reproduced in the House of Lords Select Committee on the Constitution's own report, and continues to listen to, and carefully consider, the issues raised as the Bill progresses. In relation to the civil service provisions, the Committee's report notes that the Bill now contains provision for certain restrictions on special advisers' functions to be included in the code of conduct for special advisers. This was an issue which was widely raised at earlier stages of the Bill, and incorporated following a Government amendment at Report Stage in the House of Commons.

The ratification of treaties

On the ratification of treaties, paragraph 16 raises points of interest in relation to the scrutiny of treaties, but which are largely a matter for either House. Although many treaties deal with topics which are of only passing interest to the House, the Government of course remains willing to work with Parliament to improve its mechanisms for scrutiny.

The Government fully respects the convention that the laying of a treaty should be accompanied by the publication of an Explanatory Memorandum (EM), and has laid an EM at the same time as laying a copy of every treaty under the Ponsonby Rule since January 1997. We fully intend to continue with this practice, and indeed it is all the more important that we do so in the event that the consequences of a vote will have legal effect. It is of course in the Government's own interest to set out the case for ratification clearly and effectively. Nevertheless, the Government sees no reason to set out the requirement in legislation.

In relation to scrutiny by select committees, again the Government stands ready to work with Parliament and with whatever select and joint committees it wishes to establish.

National Audit

Paragraph 24 raises questions about the relationship between the National Audit Office and the Comptroller and Auditor General, and consequently about the Comptroller's accountability to Parliament under the arrangements proposed in the CRaG Bill.

The relationship between the National Audit Office chair and the Comptroller and Auditor General is clearly set out in the Bill; they will jointly have to submit the National Audit Office's strategy and estimate to the Public Accounts Commission for approval. If there were a disagreement between the two, it would be for the Commission to arbitrate. The Comptroller, however, retains complete discretion in carrying out his statutory responsibilities. That discretion cannot be overridden by either the Chair or the Commission.

I note an unintended factual error in the report: the Comptroller and Auditor General's accountability to Parliament is through the Public Accounts Commission, not the Public Accounts Committee. The provisions in the Bill do not alter the relationship between the Comptroller and the Commission, but strengthen it through the various approval processes and requirements.

Referendums

Your report notes that the Electoral Commission has identified five improvements that it believes should be made to the Political Parties, Elections and Referendums Act 2000 (PPERA). The Report notes that the CRAG Bill fully addresses two of these; addresses a further two for the purposes of the proposed referendum on the Alternative Vote system only; and does not address one.

PPERA sets out the general framework under which statutory referendums in the UK must be conducted. However, further enabling legislation must be agreed by Parliament before any referendum on a particular issue can be held. As well as dealing with important matters of substance (such as specifying the referendum question or the means by which it should bet set), it may be appropriate for this further legislation to specify, on a case-by-case basis, what further provisions will apply to any particular referendum, having regard to the particular circumstances or issues involved. The sorts of provisions that such legislation may seek to make could relate to the way that the referendum campaign is to be regulated or the way the referendum itself is to be conducted.

In addition, any amendment to the generic PPERA framework would apply to all future referendums held under PPERA. Before making such an amendment, the Government must therefore be satisfied that it is appropriate for all future referendums to be conducted in such a manner, and that there is no reason why flexibility to make provision on a case-by-case basis should be retained.

The Government is satisfied that the Commission's proposal for aggregation of spending incurred by permitted participants with a common purpose should apply both to the proposed referendum on voting systems and to any future referendums, since that is consistent with the approach taken to regulation of spending by third parties in the Political Parties, Elections and Referendums Act 2000. Clause 89 of the CRaG Bill therefore amends the generic PPERA legislation.

Your report suggests that clause 37 of the Bill ("Conduct etc of referendum") satisfies the Commission's recommendation that a generic conduct order for future referendums should be prepared. This is not the case. Clause 37 provides a specific enabling power that may be used to make such provision as is necessary or expedient in relation to the conduct of the referendum and other related matters. The power applies only to the proposed referendum on voting systems and not to any other future referendums. The Government has no current plans to introduce a generic conduct order for future referendums. The Government believes that orders dealing with the conduct of referendums should be made on a case-by-case basis, in order to retain a degree of flexibility which will enable the specific circumstances of any given referendum to be taken into account. That also reflects the position for statutory elections, where a conduct order is made in advance of that particular poll in order to take account as necessary of any change in the electoral law framework in the intervening period.

Your report notes that the clauses in the CRaG Bill providing for Regional Counting Officers and a conferral of powers on the Electoral Commission to promote public awareness apply in relation to the proposed referendum on voting systems only, and not to all future referendums. The Government will examine the position further with the Electoral Commission before a change to the overarching PPERA framework is made.

Your report notes that no amendment is proposed in relation to the 28 day restricted period on publication of Government promotional material, as set out in section 125. The Government does not accept the Commission's recommendation that the restriction should apply throughout the whole of the referendum period. In relation to the proposed referendum on voting systems, this referendum period could last for up to six months. For other future referendums, this could potentially be longer. The Government does not believe it would be appropriate to restrict the publication of Government material for such a potentially lengthy period of time in each and every case. Depending upon the subject of the referendum, such a restriction could cause significant difficulties to the operation of normal Government business. The Government believes that whether or not the proposed 28 day closed period should be extended should be considered on a case-by-case basis, taking into account the particular circumstances and subject matter of each referendum. The Government notes that, for the 2004 North East referendum, the then Office of the Deputy Prime Minister agreed to a self-imposed restriction on the publication of material from the point 28 days before the issue of postal ballot packs. The Government would consider closer to the time whether any extension of the restriction set out in section 125 of PPERA would be appropriate in relation to the proposed referendum on voting systems.

Your Report notes that the clauses in the CRaG Bill provide that the question for the proposed referendum on voting systems will be specified by the Secretary of State in secondary legislation, following consultation with the Commission on the intelligibility of that question. The role of the Commission in this respect is entirely consistent with that provided for it by the provisions of PPERA. Your report prefigures a recommendation to be made in the forthcoming Report from your Committee, *Referendums in the United Kingdom*, that statutory responsibility for formulating the question should be passed to the Electoral Commission, which would then present the question to Parliament for approval.

The Government awaits your Committee's final report on referendums before commenting fully. However, in its evidence to the your Committee's recent enquiry, the Government stated its firm view that the final decision on the wording of the question should be a matter for the Government to propose and for Parliament to agree. Giving evidence to the Committee, I stated that:

> "It is right that the ultimate authority should lie with Parliament, with the Government of the day framing the question [in] secondary legislation, but, of course, it is crucial that the Electoral Commission has the role that it does in deciding on the intelligibility of the question, which is fundamental to it being perceived as a fair process."

(http://www.publications.parliament.uk/pa/ld/lduncorr/uccnst100210ev6.pdf)

The Government notes that that the Electoral Commission, in its briefing on amendments for Commons report stage of the CRaG Bill commented:

> "We have made clear previously that we are content with the approach currently set out in PPERA which would apply to other referendums held under that framework, whereby the Government proposes the referendum question and Parliament approves it, with the Electoral Commission's views on the intelligibility of the question being made available to Parliament for its consideration. We believe that the existing approach strikes the right balance between Government responsibility for proposing the question, Commission responsibility for providing an independent assessment of it, and overall Parliamentary accountability in approving the question."

(http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/87139/Report-Commons-Briefing-01.03.2010.FINAL.pdf)

Parliamentary standards

The Committee also comments on the provisions which give effect to the report of the Committee on Standards in Public Life on MPs' expenses and allowances, and wonders whether the changes being made to the Parliamentary Standards Act 2009 are an indicator that the legislative process for that Bill was flawed.

The Government rejects the Committee's suggestion that the legislative process of the Bill that became the Parliamentary Standards Act 2009 was flawed. There was a clear need to respond to the public's legitimate concerns about the abuses of the MPs' expenses scheme. Passing the Act last July has meant that the Independent Parliamentary Standards Authority (IPSA) is now established and will be in a position to have the new expenses regime in place for the start of the new Parliament. The Parliamentary Standards Act provided the firm foundations on which IPSA and the Government could quickly implement the recommendations of the Committee on Standards in Public Life.

The Kelly report noted that:

> "We applaud the creation of an independent regulator. We think it is very important that it should be in operation from the beginning of the next Parliament. Nothing in this report need or should be allowed to get in the way of that happening."

The response to the Kelly report shows us that there is now a clear consensus that the report's recommendation should be implemented and Part 4 of the Bill gives effect to those recommendations requiring urgent primary legislation.

Process issues

Chapter four of the Committee's report is entitled "Process Issues", although concerns are raised at a number of points through the report in a similar vein. I have grouped my responses together.

In paragraph 4, the report draws attention to the fact that the Bill grew during its passage through the Commons, with the addition of provisions on a referendum on the voting system, on parliamentary standards, on the tax status of MPs and Members of your Lordships' House, and public records and freedom of information. Your Lordships' concern seems to be that these amendments were made late in the legislative process.

In response, I would like to stress that most of these provisions are largely matters of cross-party agreement, a fact which is highlighted by the speed with which those on parliamentary standards, tax status and freedom of information passed through the Commons and the very small number of amendments which were tabled to them. Moreover, a number of these new parts responded either to independent reviews which the Government had already said it would implement or to matters of widespread public concern. In the circumstances I feel it is only right that the Government should take a timely opportunity to legislate on these matters.

The Committee also comments on the Government's handling of the Bill, notably at paragraphs 5, 39, and 40, suggesting that this has led to a lack of scrutiny of the Bill, and insufficient opportunity to consider amendments of constitutional significance.

In response, I must say that the Bill was before the Commons for 7 months. There was ample opportunity for Select Committees in that House to consider it if they wished to do so, in addition to the consideration that a number of Select Committees gave to the Draft Constitutional Renewal Bill and to individual policies before that point. It also had 6 days in Committee on the Floor of the Commons. Most of the Bill was fully discussed; indeed, on one day the business in Committee finished early. I accept that amendments to add completely new material to the Bill were not always reached, but the Bill itself was given more than adequate scrutiny.

I also note your comments in paragraphs 26 and 37 that you were unable to raise a number of issues with the Government in correspondence due to the lack of time made available for scrutiny. I am somewhat surprised by this, since the Bill completed its Commons passage on 2 March. There will therefore have been 3 weeks, rather than the standard 2, between the end of Commons consideration and the Lords Second Reading.

Moreover, the provisions outlined in paragraphs 17 to 25 of your report – on the membership of the House of Lords, demonstrations in the vicinity of Parliament, convention rights, courts and tribunals, audit, and transparency of Government's financial reporting – have been part of the Bill since its initial introduction in the fourth session, on 20 July 2009, and have not been subject to significant amendments.

I regret that you feel you have not had time to sufficiently scrutinise these provisions – or those outlined in paragraphs 33 to 36 of your report, which were all the subject of cross-party support – but where you have raised particular points on these parts in this report, I have endeavoured to respond fully.

Finally, the Committee goes on to suggest, in paragraphs 45 to 47, that the Government's handling of the time available may lead the House to the conclusion that parliamentary consideration has been substantially curtailed on matters that remain contested, and that agreement on such matters in the wash-up before the general election would be "extraordinary".

I disagree with the assessment of the Committee that many of the provisions on which the Commons spent its time seem to be contested. This is a common misconception of a Bill which, while dealing with areas of interest to many members of both Houses, and therefore inviting much comment, is largely founded in broad consensus.

As the Committee has pointed out, this Bill has had six days in Committee on the floor of the House, has been the subject of 18 consultations and publications, draft Bills, and several Select Committee reports. In addition, many Members have contributed diligently and tirelessly to improving the Bill during its passage.

Since the beginning of its gestation more than two years ago, Parliament and politics have faced new challenges, and the Bill has grown to meet them. As I have said, we have tried to proceed on the basis of consensus as far as possible, and I believe that the third reading debate in the Commons was very encouraging. It is highly significant that third reading was agreed to, as was second reading before it, without a division. This Bill has come a long way; I believe the differences between the major parties are relatively small, and I hope they can be overcome. I therefore reject the Committee's assertion that proceeding with the Bill during the wash-up would be inappropriate.

In order to assist Members in their continuing consideration of this Bill, I will make arrangements for copies of this letter to be placed in the library of your Lordships' House.

Yours ever

Michael

MICHAEL WILLS