

Note on draft Constitutional Renewal Bill for OECD

Summary

Clauses 12-14 of the draft Constitutional Renewal Bill propose to significantly increase the powers of the Attorney General, a politician, to stop an individual criminal investigation or prosecution on the grounds of 'national security'. The draft bill (by the use of conclusive national security certificates and express limits on reporting to Parliament) would place formidable barriers in the way of a Court, Parliament or the OECD carrying out meaningful scrutiny of decisions to halt future investigations into bribery of foreign public officials on 'national security' grounds.

If passed, the effect of the draft Bill will be that sensitive prosecutions could be halted (or appear to be halted) for political reasons, without explanation or accountability, either to Parliament, the Courts or international bodies. 'National security' could be invoked to stop any investigation or prosecution with non transparent decisions being taken by a politician, not an independent prosecutor.

Draft Constitutional Renewal Bill

1. On 25 March 2008, the Government published a White Paper ("The Governance of Britain – Constitutional Renewal"). The White Paper was accompanied by a draft Bill to implement the proposals in the White Paper. The draft Bill will now be placed before Parliament. One of the key issues addressed in the White Paper is the proper role of the Attorney General (a politician) in sensitive criminal prosecutions, especially those raising issues concerning national security or international relations.
2. The White Paper acknowledges the concerns expressed by respondents to the Government's consultation about the "extent of the Attorney General's role in relation to individual criminal prosecutions". The White Paper also notes "the unease expressed about the lack of clarity as to the relationship between the Attorney General and the prosecuting authorities" (para. 78 of the White Paper).
3. Accordingly, at para. 79 of the White Paper, the Government has set out its proposal to legislate "to provide that the Attorney General's function of superintending the prosecuting authorities does not entail an ability to give a direction in relation to a particular case. Thus it will not be open to the Attorney General as superintending minister to direct a prosecuting authority to prosecute a particular case, or not to prosecute a particular case".
4. These proposals are reflected in Clauses 7-11 of the draft Bill. However, the White Paper and the draft Bill adopts a strikingly different approach in relation to individual criminal investigations or prosecutions that are considered by the Attorney General to give rise to 'national security' issues.

5. Clause 12 of the draft Bill empowers the Attorney General, if satisfied that it is necessary to do so for the purpose of safeguarding national security, to give a direction to the Director of the Serious Fraud Office, or to any prosecutor, to discontinue an investigation or prosecution. By Clause 13 of the draft Bill, such directions are binding on the prosecuting authorities.
6. There is no definition of national security. However, previous authorities have indicated that it is a wide concept. See *Rehman v SSHD* [2003] 1 AC 153. There is always the risk when national security is relied upon by politicians that it will be elided with the interests of the government, especially where there is no democratic or legal scrutiny of the relevant decision.
7. By Clause 13(5), if in any proceedings any question arises whether a direction under Clause 12(1) is or was necessary for the purposes of safeguarding national security, a certificate signed by a Minister certifying that the direction was necessary for that purpose is to be conclusive evidence of that fact. The purpose of such a certificate is to prevent any investigation by the Courts as to whether there is any proper basis for decisions claimed to have been taken (a) on national security grounds; and (b) complying with Article 5 of the Anti-Bribery Convention.
8. By Clause 14 the Attorney General is obliged to report to Parliament on the giving or withdrawal of a direction under Clause 12. However, by Clause 14(3) the Attorney General is not obliged to include in that report any information which she considers to be privileged or the publication of which she is satisfied would prejudice national security or seriously prejudice international relations.
9. Prejudice to international relations is defined in Clause 17 as including prejudice to relations between the UK and any other state, or international organisation or court, as well as prejudice to the interests of the UK abroad, or the promotion or protection by the UK of its interests abroad.
10. The effect of Clause 14 is that Parliament will also not be able to examine the facts or exercise any meaningful supervision or oversight where damage to international relations might occur. However, it is in such cases that oversight is all the more important, because damage to relations between states is a prohibited factor under Article 5 of the Anti-Bribery Convention.
11. Clauses 12-14 would, if enacted, significantly increase the Attorney General's powers to stop an individual investigation or prosecution and place formidable barriers in the way of scrutiny of such a decision either by a Court, by Parliament or by the OECD.
12. The maintenance of a veto on prosecutions by a politician (the Attorney General) in cases of national security has serious effects both as a matter of domestic constitutional principle and as a matter of the UK's international law obligations under the OECD Anti-Bribery Convention.

Example of Serious Fraud Office investigation into BAE Systems plc / Al-Yamamah arms deal

13. The effects of Clauses 12-14 can be illustrated by reference to the current proceedings concerning the decision to stop the investigation into allegations of corruption arising out of the Saudi Arabian Al-Yamamah arms deal.
14. Under the current legal regime, the decision to stop the investigation was taken by the Director of the Serious Fraud Office, an independent prosecutor with no political functions. The decision was taken following a 'Shawcross exercise' under which Ministers were asked to give information relevant to the national security assessment. However, the ultimate decision was taken by the Director, an independent prosecutor, not a politician.
15. The decision of the Director of the SFO has been subject to careful scrutiny by a Court through judicial review proceedings in which the Government was required to disclose all relevant documentation to the Court. The Director and the Attorney General are also accountable to Parliament and both have been called before a Select Committee to explain and justify the Director's decision.
16. The public interest in this process is clear. As Lord Justice Moses commented when giving permission for judicial review, the case "cried out" for a full hearing not least because speculation as to the real reasons for stopping the investigation warranted proper forensic examination.
17. However, under the draft Bill the decision to stop the Al-Yamamah investigation would be taken by the Attorney General, a political appointee and a member of the Government who would be entitled to withhold her reasons for doing so both from a Court (by use of a conclusive national security certificate) and from Parliament (by invoking the provisions of Clause 14(3)).
18. Such a process risks undermining the principle of the rule of law since it is likely to give rise (at the very least) to the appearance of a situation in which sensitive prosecutions can be halted for political reasons, without explanation or accountability, either to Parliament, to the Courts or to the OECD.
19. This process also risks breaches of the United Kingdom's obligations under the OECD Anti-Bribery Convention. Article 5 of the Convention provides that the investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each party, but they shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved.
20. The OECD, in its Phase 2 report on the UK's implementation of the Convention, dated 17 March 2005, identified its concern that the requirement for the Attorney General's consent to a prosecution for a statutory bribery offence may be an obstacle to effective implementation of the Convention. The OECD examiners were concerned "that the consent process involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases" (para. 170). At that time, the Attorney General gave an express assurance to the OECD that none of

the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute.

21. Despite this assurance, the Director of the SFO informed the Court in the current judicial review challenge to the BAE decision that he would have decided to stop the investigation even if he had understood that decision to be a breach of the Convention. Under the proposals in the draft Bill, that fact would not have been made public. There is a serious risk that the opaque and unaccountable decision making process envisaged under the draft Bill could lead to breaches by the UK of its international law obligations, which would be extremely difficult to detect or challenge because the relevant information would never be made public, or available to the Courts, Parliament or the OECD.

Wider implications of draft Constitutional Renewal Bill

22. Further, the test to be applied under Clause 12 does not require the Attorney General to consider the harm to national security in the light of the importance in a democratic society of upholding the rule of law and the public interest in the investigation and prosecution of serious crime, especially cross-border bribery of foreign public officials.
23. Thus, a powerful criminal, who was able to make a credible threat to the UK's national security (eg. a member of the IRA) could thereby escape prosecution. It is incompatible with basic constitutional principles for extraneous threats of such a nature to be taken into account when deciding whether to prosecute crime, save in circumstances of extreme necessity (*R v Coventry City Council, ex parte Phoenix Aviation* [1995] 3 All ER 37).

**Dinah Rose QC
Ben Jaffey**

Blackstone Chambers

**Richard Stein
Jamie Beagent**

Leigh Day & Co.

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Attachment: Extracts from draft Constitutional Renewal Bill

Constitutional Renewal Bill

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B I L L

TO

Repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005; to make provision relating to the Attorney General and prosecutions; to make provision relating to judges and similar office-holders; to make provision relating to the ratification of treaties; to make provision relating to the civil service.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

DEMONSTRATIONS IN THE VICINITY OF PARLIAMENT

1 Repeal of sections 132 to 138 of Serious Organised Crime and Police Act 2005

- (1) Omit sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (c. 15) (which regulate demonstrations in the vicinity of Parliament). 5
- (2) In the Table in section 175(3) of that Act (transitional provision relating to offences) omit the entries relating to section 136.
- (3) In paragraph 1(1) of Schedule 2 to the Noise and Statutory Nuisance Act 1993 (c. 40) (which is about consents for the operation of loudspeakers) omit “or of section 137(1) of the Serious Organised Crime and Police Act 2005”. 10
- (4) Omit paragraph 64 of Schedule 6 to the Serious Crime Act 2007 (c. 27).

PART 2

THE ATTORNEY GENERAL AND PROSECUTIONS

Ground rules for Attorney’s superintendence of Directors

2 Ban on directions in individual cases 15

- (1) The Attorney General’s function of superintendence of the Directors does not include power to give a direction in relation to an individual case.

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- (2) Subsection (1) is subject to section 12 (power to intervene to safeguard national security).
- (3) In this section and section 3 “the Directors” means –
- (a) the Director of Public Prosecutions (see section 4),
 - (b) the Director of the Serious Fraud Office (see section 5), and 5
 - (c) the Director of Revenue and Customs Prosecutions (see section 6).
- (4) Nothing in subsection (1) affects the operation of any enactment or provision of subordinate legislation under which the Attorney General has a prosecution consent function.
- 3 Protocol for running of prosecution services 10**
- (1) The Attorney General must, in consultation with the Directors, prepare a statement (a “protocol”) of how the Attorney General and the Directors are to exercise their functions in relation to each other.
- (2) The protocol may in particular include provision as to –
- (a) the general responsibilities of the Attorney General and each of the Directors; 15
 - (b) the arrangements for ensuring that the Attorney General is properly advised on matters relating to the strategic direction of the prosecution services and on matters affecting more than one prosecution service;
 - (c) the circumstances in which the Attorney General is to be consulted or provided with information; 20
 - (d) the objectives of the prosecution services;
 - (e) the way in which the objectives are set and the means by which their achievement or otherwise is reviewed;
 - (f) the roles of the Attorney General and the Directors in relation to criminal justice policy; 25
 - (g) the way in which matters relating to the accountability of the Attorney General to Parliament for the prosecution services are to be handled;
 - (h) the roles of the Attorney General and the Directors in relation to dealings with representatives of the press and other media; 30
 - (i) procedures for dealing with complaints relating to the prosecution services.
- (3) The Attorney General must lay the protocol before Parliament.
- (4) The Attorney General must from time to time review the protocol and may, in consultation with the Directors, revise it. 35
- (5) If the protocol is revised, the Attorney General must lay it before Parliament.
- (6) The Attorney General and the Directors must have regard to any relevant provision of the protocol when carrying out their functions.
- (7) “The prosecution services” means the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office. 40

New provisions about tenure of office of Directors

4 Director of Public Prosecutions

- (1) The Director of Public Prosecutions –
 - (a) is appointed by the Attorney General, and
 - (b) subject to what follows, holds office in accordance with the terms of the appointment. 5
- (2) The Director must have a 10 year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41).
- (3) Service as the Director is service in the civil service of the State.
- (4) There is to be paid to the Director such remuneration as the Attorney General may, with the approval of the Minister for the Civil Service, determine. 10
- (5) Any appointment under subsection (1) must be for a term of 5 years.
- (6) The Director may at any time resign by notice in writing to the Attorney General.
- (7) The Attorney General may remove the Director from office only if satisfied that the Director is unable, unfit or unwilling to carry out the functions of the office. 15
- (8) The factors which the Attorney General may take into account in determining whether the Director is unfit to carry out the functions of the office include, in particular –
 - (a) failure by the Director to comply with section 3(6) (duty to have regard to relevant provisions of protocol), and 20
 - (b) failure by the Director to perform the functions of the office efficiently and effectively.

5 Director of the Serious Fraud Office

- (1) The Director of the Serious Fraud Office –
 - (a) is appointed by the Attorney General, and
 - (b) subject to what follows, holds office in accordance with the terms of the appointment. 25
- (2) Service as the Director is service in the civil service of the State.
- (3) There is to be paid to the Director such remuneration as the Attorney General may, with the approval of the Minister for the Civil Service, determine. 30
- (4) Any appointment under subsection (1) must be for a term of 5 years.
- (5) The Director may at any time resign by notice in writing to the Attorney General.
- (6) The Attorney General may remove the Director from office only if satisfied that the Director is unable, unfit or unwilling to carry out the functions of the office. 35
- (7) The factors which the Attorney General may take into account in determining whether the Director is unfit to carry out the functions of the office include, in particular –
 - (a) failure by the Director to comply with section 3(6) (duty to have regard to relevant provisions of protocol), and 40

- (b) failure by the Director to perform the functions of the office efficiently and effectively.

6 Director of Revenue and Customs Prosecutions

- (1) The Director of Revenue and Customs Prosecutions –
 - (a) is appointed by the Attorney General, and 5
 - (b) subject to what follows, holds office in accordance with the terms of the appointment.
- (2) The Director must have a 10 year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41).
- (3) Service as the Director is service in the civil service of the State. 10
- (4) There is to be paid to the Director such remuneration as the Attorney General may, with the approval of the Minister for the Civil Service, determine.
- (5) Any appointment under subsection (1) must be for a term of 5 years.
- (6) The Director may at any time resign by notice in writing to the Attorney General. 15
- (7) The Attorney General may remove the Director from office only if satisfied that the Director is unable, unfit or unwilling to carry out the functions of the office.
- (8) The factors which the Attorney General may take into account in determining whether the Director is unfit to carry out the functions of the office include, in particular – 20
 - (a) failure by the Director to comply with section 3(6) (duty to have regard to relevant provisions of protocol), and
 - (b) failure by the Director to perform the functions of the office efficiently and effectively.

Attenuation of Attorney's prosecution consent functions 25

7 Ending of certain prosecution consent functions of Attorney

Schedule 1 (which amends certain enactments under which the Attorney General has prosecution consent functions) has effect.

8 Power to end other prosecution consent functions of Attorney

- (1) The Attorney General may by order amend any existing enactment or existing provision of subordinate legislation under which the Attorney General has a prosecution consent function. 30
- (2) An order under this section may, in particular, make provision under which the Attorney General's prosecution consent function – 35
 - (a) becomes the function of one of the Directors or, in the absence of that Director, a person authorised by that Director;
 - (b) becomes the function of one of the Directors but is a function to which the relevant delegation provision applies;
 - (c) is removed.

- (3) In this section and section 9 “the Directors” has the same meaning as in sections 2 and 3, except that it also includes the Director of Service Prosecutions.

9 Effect of provisions conferring functions on Director or authorised person

- (1) This section applies in relation to any enactment or provision of subordinate legislation under which a function is that of one of the Directors or, in the absence of that Director, a person authorised by that Director. 5
- (2) The relevant delegation provision does not apply to the function.
- (3) The Director’s authorisation –
- (a) may relate to a specified person or to persons of a specified description, and 10
 - (b) may be general or relate to a specified function or specified circumstances.

10 Sections 8 and 9: supplementary

- (1) In sections 8(2)(b) and 9(2) “the relevant delegation provision” means –
- (a) in relation to the Director of Public Prosecutions, section 1(7) of the Prosecution of Offences Act 1985 (c. 23); 15
 - (b) in relation to the Director of the Serious Fraud Office, section 1(8A) of the Criminal Justice Act 1987 (c. 38);
 - (c) in relation to the Director of Revenue and Customs Prosecutions, section 37(4) of the Commissioners for Revenue and Customs Act 2005 (c. 11); 20
 - (d) in relation to the Director of Service Prosecutions, section 365(4A) of the Armed Forces Act 2006 (c. 52).
- (2) In section 8(1) –
- (a) “existing enactment” means an enactment contained in an Act passed on or before the last day of the Session in which this Act is passed; 25
 - (b) “existing provision of subordinate legislation” means a provision of subordinate legislation made on or before that day;
 - (c) “amend” includes repeal or revoke.
- (3) An order under section 8 may make consequential, incidental, supplementary, transitional or saving provision. 30
- (4) The power to make an order under section 8 is exercisable by statutory instrument.
- (5) No order may be made under section 8 unless a draft of the order has been laid before and approved by a resolution of each House of Parliament. 35

Abolition of nolle prosequi

11 Abolition of nolle prosequi

The power of the Attorney General to enter a nolle prosequi is abolished in relation to proceedings in England and Wales.

*Safeguarding of national security***12 Power to intervene to safeguard national security**

- (1) The Attorney General may, if satisfied that it is necessary to do so for the purpose of safeguarding national security –
- (a) give a direction to the Director of the Serious Fraud Office that no investigation of specified matters is to take place in England and Wales; 5
 - (b) give a direction to any prosecutor, in relation to an investigation of specified matters, that no proceedings for an offence are to be instituted in England and Wales in respect of those matters;
 - (c) give a direction to any prosecutor that proceedings for a specified offence which are being conducted in England and Wales against a specified person are not to be continued. 10
- (2) The Attorney General may withdraw a direction given under subsection (1).
- (3) “Prosecutor”, in relation to an offence, means any person who –
- (a) has the conduct of proceedings for the offence, or 15
 - (b) has the function of or is determining whether proceedings for the offence should be instituted.

13 Effect of certain directions under section 12 etc.

- (1) Where the Attorney General has given a direction under section 12(1)(b), no proceedings for an offence are to be instituted in respect of the matters which are the subject of the investigation. 20
- (2) Subsection (1) does not prevent the institution of proceedings for an offence in respect of those matters if the direction is withdrawn.
- (3) Where the Attorney General has given a direction under section 12(1)(c), the prosecutor must take such steps as are appropriate to ensure that the proceedings which are the subject of the direction are brought to an end as soon as is practicable. 25
- (4) If the prosecutor fails to comply with subsection (3), any court before which the proceedings are being conducted may make an order –
- (a) bringing the proceedings to an end, and 30
 - (b) making such other provision as appears to the court appropriate (including provision as to the effect of the order on the bringing of fresh proceedings in respect of the same offence).
- (5) If in any proceedings any question arises whether a direction under section 12(1) is or was necessary for the purpose of safeguarding national security –
- (a) a certificate signed by a Minister of the Crown certifying that the direction is or was necessary for that purpose is conclusive evidence of that fact, and 35
 - (b) a document purporting to be a certificate under paragraph (a) is to be received in evidence and, unless the contrary is proved, is to be treated as being such a certificate. 40
- (6) “Prosecutor” has the same meaning as in section 12.

14 Reports on directions under section 12

- (1) This section applies where the Attorney General has –
 - (a) given a direction under section 12(1), or
 - (b) withdrawn a direction under section 12(2).
- (2) The Attorney General must prepare and lay before Parliament a report on the giving or withdrawal of the direction –
 - (a) as soon as is practicable after the giving or withdrawal of the direction, or
 - (b) if the Attorney General is satisfied that delay is necessary for the purpose of safeguarding national security, as soon as the Attorney General is satisfied that further delay is not necessary for that purpose.
- (3) Nothing in subsection (2) requires information to be included in a report if the Attorney General is satisfied that –
 - (a) a claim to legal professional privilege (or, in Scotland, confidentiality of communications) could be maintained in respect of the information in legal proceedings,
 - (b) the inclusion of the information would prejudice national security or would seriously prejudice international relations, or
 - (c) the inclusion of the information would prejudice the investigation of a suspected offence or proceedings before any court.

15 Power to require information for purposes of section 12

- (1) Subsection (3) applies if –
 - (a) the Attorney is considering whether to give a direction under section 12(1), and
 - (b) it appears to the Attorney General that the person to whom the direction would be given may possess information which could assist the Attorney General in determining whether to give such a direction.
- (2) Subsection (3) also applies if –
 - (a) the Attorney General has given a direction under section 12(1), and
 - (b) it appears to the Attorney General that the person to whom the direction was given may possess information which could assist the Attorney General –
 - (i) in determining whether to withdraw the direction (under section 12(2)), or
 - (ii) in preparing a report (under section 14(2)).
- (3) The Attorney General may require the person to provide, within a specified period –
 - (a) specified information, or
 - (b) information of a specified description.
- (4) A person who without reasonable excuse fails to comply with a requirement under subsection (3) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

*Miscellaneous and supplementary***16 Annual report on exercise of Attorney’s functions**

- (1) As soon as is practicable after 4 April in any year the Attorney General must prepare and lay before Parliament a report on the exercise of the functions of the Attorney General during the year ending with that date. 5
- (2) Nothing in subsection (1) requires information to be included in a report if the Attorney General is satisfied that –
- (a) a claim to legal professional privilege (or, in Scotland, confidentiality of communications) could be maintained in respect of the information in legal proceedings, 10
 - (b) the inclusion of the information would prejudice national security or would seriously prejudice international relations, or
 - (c) the inclusion of the information would prejudice the investigation of a suspected offence or proceedings before any court.

17 Interpretation 15

- (1) For the purposes of this Part the Attorney General has a prosecution consent function under an enactment if under that enactment –
- (a) proceedings for an offence may not be instituted except by, or with the consent of, the Attorney General (or by, or with the consent of, the Attorney General or one or more other persons), or 20
 - (b) the Attorney General (or the Attorney General or one or more other persons) has a function of giving a consent to the taking of any other step in connection with proceedings for an offence.
- (2) In subsection (1) and sections 12 and 13, “offence” includes a service offence as defined by section 50 of the Armed Forces Act 2006 (c. 52) (and the reference in section 13(4) to a court includes a reference to a service court within the meaning of section 324(4) of the 2006 Act). 25
- (3) For the purposes of sections 14(3) and 16(2), international relations are prejudiced if any of the following are prejudiced –
- (a) relations between the United Kingdom and any other State; 30
 - (b) relations between the United Kingdom and any international organisation or international court;
 - (c) the interests of the United Kingdom abroad;
 - (d) the promotion or protection by the United Kingdom of its interests abroad. 35
- (4) In this Part, “subordinate legislation” has the same meaning as it has in the Interpretation Act 1978 (c. 30).

18 Amendments consequential on this Part

Schedule 2 (which contains amendments consequential on this Part) has effect.