

Submission to the Joint Committee on the Draft Constitutional Renewal Bill

By The Corner House

The Corner House is a non-governmental organisation focusing on environment, development and human rights. It has a track record of detailed policy research and analysis on overseas corruption, including UK laws on corruption and enforcement.

The Corner House will restrict its comments on the Draft Constitutional Renewal Bill to Part 2 (The Attorney General and Prosecutions) of the bill (<http://www.justice.gov.uk/docs/draft-constitutional-renewal-bill.pdf>).

General comments

The Corner House believes that actual and perceived independence of the prosecuting bodies is essential to a functioning constitutional democracy. As the Director of Public Prosecutions' 2004 Statement of Independence puts it: "*our independence is of fundamental constitutional importance. It is a force for human rights and justice in society.*" As former Attorney General, Lord Goldsmith, also put it, "*you simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this.*"¹ The Corner House believes that the Draft Constitutional Renewal bill must protect and enshrine that independence.

Need for statutory oath for the Attorney General

The Corner House welcomes the fact that the oath of the Attorney General is to be modernised. However, if, as the government proposes, the Attorney General is to both remain a government minister and keep superintendence function over the prosecuting authorities, it is essential that the Attorney General's oath of office is a statutory one, like that of the Lord Chancellor. This statutory oath should require the Attorney General both to uphold the rule of law and to act independently of government in exercising her or his prosecution functions. Anything less would simply not address the credibility gap that will remain if a member of the executive has responsibility for and superintendence of independent prosecuting bodies.

Clause 2: Ban on individual directions

The Corner House welcomes section 2 of the bill banning directions from the Attorney General on individual cases and believes that this is an important principle enshrining the independence of prosecutors. The Corner House believes that there should be no exemptions from this principle and therefore opposes the powers permitted in section 12 as explained in detail below.

Clause 3: Protocol for running of prosecution services

The Corner House believes that the protocol between the Attorney General and the three Directors of the prosecuting authorities, its implementation and effectiveness should be subject to Parliamentary debate and that it should be regularly monitored by

¹ 13th Tom Sargent Memorial Lecture, "Politics, Public Interest and Prosecutions - a view by the Attorney General", An Address by the Right Hon the Lord Goldsmith QC, Her Majesty's Attorney General, London, 20/11/01.

a Parliamentary Select Committee, who should take evidence from both the Attorney and the Directors of the prosecuting services.

The Corner House believes that with respect to circumstances in which the Attorney General is to be consulted or provided information (section 3, clause 2 c) of the draft bill), both in relation to prosecutions by any of the bodies supervised and in relation to investigations by the Serious Fraud Office, these should be exceptionally limited. In relation to overseas corruption cases, the fact that the Attorney General has been constantly informed of the progress of investigations has severely undermined the perception of the independence of prosecutors, and created the impression that this is a route for political interference in such investigations.

The Corner House also believes that the protocol should address the circumstances under which the Attorney General should consult independent counsel in undertaking her or his supervisory role. In one recent overseas corruption case the Attorney General's office employed separate counsel to that employed already by the Serious Fraud Office. The Attorney is entitled to take independent legal advice on whether to provide consent for prosecution of certain offences and it is appropriate that she or he should do so. In practice, however, it appears that the Attorney has been taking parallel legal advice on the nature of the evidence and the merits of cases under investigation by the Serious Fraud Office before consent stage. This practice undermines the prosecutors at the Serious Fraud Office and the independence of the Bar and is unnecessarily costly on the public purse. The protocol should establish clearly when it is appropriate for the Attorney's office to seek such separate advice and ensure that when it does so with full visibility to the prosecuting office. Given that the draft bill proposes to remove many of the Attorney's consent functions or transfer them to the various Directors, such independent advice should be needed only in wholly exceptional cases, and there should be transparency about how and when the Attorney decides to take such advice.

Clauses 4-6: Provisions for tenure of office of Directors

It is inappropriate for the Directors of the various prosecuting authorities to be appointed by the Attorney General as long as the Attorney General remains a member of the executive. The appointment process should be independent to remove any perception of appointees being chosen by the executive. This would significantly assist the independence of the prosecuting bodies.

The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, (section 5), stipulates that:

“States should take measures to ensure that:

a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures

...

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review”

The Corner House is not convinced that the current provisions for tenure of office of

the Directors contained in the draft bill fully meet these criteria and believes that such measures should be specifically provided for by statute to enhance the independence of prosecutors. The selection criteria and process should be fully transparent. There should be a mechanism for parliamentary scrutiny of the appointment process. Any decision to remove a Director from office should be subject to an independent and impartial review, and not undertaken by the Attorney General alone.

Clauses 7-10: Attenuation of Attorney's prosecution consent functions

The Corner House welcomes the removal of Attorney's consent for prosecution and transfer of consent to the various Directors of the prosecuting authorities. The Corner House notes, however, that the government has not clarified precisely the offences for which Attorney General's consent will be kept (Official Secrets Act offences and war crimes are the only ones mentioned in the White Paper). The Corner House believes that there should be a proper public and parliamentary debate about which offences would continue to require the Attorney's consent for and that guidelines should be drawn up for the circumstances in which the Attorney should give consent.

Clause 11: Abolition of nolle prosequi

The Corner House welcomes the abolition of nolle prosequi.

Clause 12-15: Safeguarding national security

The Corner House has very grave concerns about Clauses 12-15 of the draft bill, and believes that these clauses may be unconstitutional and breach international standards on public prosecution as well as rights to access to justice under the European Convention on Human Rights.

The Corner House believes that the way in which legitimate national security concerns are involved in halting a prosecution or investigation may need clarification, and that the Draft Constitutional Renewal Bill may be the place for this clarification. Any such clarification by statute however needs to be based on domestic and international law principles and needs to contain strong checks and balances to avoid the arbitrary abuse of national security arguments by the executive or by any decision-maker.

Creation of a new statutory power of direction

By means of Clauses 12-15 of the draft bill, the government proposes to create a new statutory power for the Attorney General to halt an investigation by the Serious Fraud Office (SFO) or a prosecution by any prosecutor. The government has stated that it has created this new power on the basis that a small majority of people responding to its consultation on the Attorney General favoured some role for the Attorney in relation to cases which involve a national security or public interest element.² The government also noted that the new power was in keeping with the Law Commission's 1998 report on Consents to Prosecution which recommended (again on the basis of a very small majority of respondents to its consultation) keeping consent for a very limited number of offences which involved a national security or

² The government's analysis of its consultation on this aspect of the Attorney General's role is however contradictory. The analysis refers to at least 6 respondents who wished for no Attorney General consent whatsoever (regardless of national security concerns). It goes on to say that 14 out of 16 who replied on this specific issue (out of a total of 52 respondents) favoured keeping some role for the Attorney.

international element (such as War Crimes, Taking of Hostages, Biological Weapons, Prevention of Terrorism and the Official Secrets Act).

The Corner House considers that there are some significant differences between the new power to halt an investigation by the SFO and any prosecution on national security grounds and the existing arrangements. The new power is a statutory power. Under existing arrangements, the Attorney General would theoretically be able to halt an investigation by the SFO in his superintendence role but she or he does not have the statutory power to do so. He or she would also be able to refuse permission for a prosecution to continue for offences where consent was required, using the public interest or national security as a reason to do so. This is limited however to those offences where consent is required.

Furthermore, the consent regime and the Attorney's supervisory role, by convention and in practice, involves discussion and consensus reaching between Attorney and prosecutor. As Lord Goldsmith told the Constitutional Affairs Committee in 2006, "*I take the view, which I believe was the conclusion which Sir Ian Glidewell reached when he looked at the CPS, that if ultimately, after discussion, there is a difference of view between an Attorney General and a Director then the Attorney General's view should prevail. I have never had to test it. I think it would be quite a big thing if it had to be tested. I do not direct*" (emphasis added).³ The power to override a Director of the prosecuting agency has never apparently been used. Various commentators have pointed out the ambiguity over the Attorney General's right to override a Director of the prosecuting agencies.⁴

By contrast, the draft bill proposes a new statutory right for the Attorney to direct. It allows the Attorney to take the decision to halt an investigation and prosecution without any input from or discussion with the prosecutor. Indeed (Clause 13 (4) of the draft bill) propose that if a prosecutor fails to comply with the Attorney's direction, a court can make an order to bring the proceedings to an end. The new power would also allow the Attorney to require information from a Director that is relevant to determining whether to give such a direction (Clause 15); failure to provide such information would become a criminal offence (Clause 15 (4)). This would set up a new and potentially confrontational dynamic between the Attorney and the Directors where such decisions are concerned.

The new power also, by giving power to the Attorney General to make a decision to halt a prosecution or SFO investigation on national security grounds, makes the executive the sole arbiter of national security considerations. This raises significant domestic constitutional issues. It is not a right, the Corner House believes, that can be granted without a proper assessment of its constitutional impact. No such power should be given, the Corner House believes, without clear mechanisms for accountability, including judicial oversight. Nor should it be given without a requirement on the Attorney or whoever takes the decision (which we will argue should be an independent prosecutor) to conduct a thorough and documented balancing exercise between national security issues and the rule of law. Without

³ House of Commons, Constitutional Affairs Committee, 5th Report of Session 2006-07,

"*Constitutional Role of the Attorney General*", 24th July 2007, oral evidence by Lord Goldsmith.

⁴ See Clare Dyer, *Guardian Online*, "Conflicting roles, Explainer: Attorney General", 26 March 2008, available at: <http://www.guardian.co.uk/politics/2008/mar/26/constitution.law>

strong checks and balances, the new power will seriously erode public confidence in important national security decisions rather than enhance it and undermining the constitution.

Lack of checks and balances

The draft bill proposes to create a new power for the Attorney General to halt SFO investigations and any prosecution with no meaningful oversight by either Parliament or the Courts.

Clause 13 of the draft bill contains a provision for establishing a conclusive certificate where any question arises in relation to whether the new power of direction is or was necessary. As section 5 (a) puts it: “*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*”. The effect of this provision is to prevent any judicial enquiry into whether the decision was rational, based on real evidence, was applied according to domestic and international law principles, and whether irrelevant or improper considerations were taken into consideration. As this submission will argue below on domestic law issues, it is doubtful whether a power that precludes judicial scrutiny and denies access to due process of law for individuals can be constitutional or compatible with the Human Rights Act.

Clause 14 of the bill requires the Attorney to prepare and lay before Parliament a report on the giving or withdrawal of a direction. While at first sight, this provision allows for Parliamentary scrutiny, section 3 of the Clause makes clear that the Attorney need not include any information in that report which is legally privileged, would prejudice national security or “seriously prejudice international relations”, or would prejudice an investigation or proceedings before any court. In practice this is likely to mean that the Attorney will provide extremely limited information about his or her decision.

As constitutional expert Professor Bradley told the House of Lords Select Committee on the Constitution, however: “*it should not be possible for the Attorney to avoid accounting for decisions taken in the public interest without indicating the facts that had been taken into account*”.⁵ Parliamentary accountability can be meaningful only when the Attorney General is required to put forward a full account of a decision and the facts and reasoning behind the decision. The draft law does not require the Attorney to provide any factual evidence for his or her decision, or to lay out the basis on which his or her decision was made. Nor does the draft law provide for any scrutiny mechanisms within Parliament for the intelligence assessments on which a national security decision is made. Given several recent controversies over executive manipulation of intelligence for political purposes, this is a grave oversight that will do nothing to enhance the accountability of the executive’s decision-making with regard to national security or increase public confidence in such decision-making.

These clauses taken together essentially mean that there will be no meaningful checks and balances on the executive, and the executive will be the sole judge of when and how to apply national security grounds in relation to halting an SFO investigation or prosecution. The lack of meaningful parliamentary accountability and exclusion of

⁵ House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, “*Reform of the Office of Attorney General*”, 18th April 2008

judicial scrutiny has the real potential to allow for abuse of national security arguments. Without having to account for the reasons for its decision the executive could use national security arguments as a shield for other reasons to which it actually gives as much if not more weight, such as damage to international relations and to commercial contracts which it may be prohibited from taking into account by international law obligations, or for reasons which are synonymous with its interests as the ruling party rather than with the national interest.

Breach of international guidelines on public prosecution

The Corner House believes that the new statutory power as currently formulated would breach international guidelines on public prosecution.

The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, section 5 f is clear that:

“instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and subjected not only to requirements indicated in paragraphs d and e above but also to an appropriate specific control with a view in particular to guaranteeing transparency” (emphasis added)

The requirements in paragraphs d and e are that any such instruction, which must be in writing and published in an adequate way, must carry

“d. adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

- to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;*
- duly to explain its written instructions, especially when they deviate from the public prosecutor's advice and to transmit them through the hierarchical channels...;*

e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received”

The Council of Europe's Recommendation makes no exception for national security cases.

The International Association of Prosecutors statement of standards of professional conduct for all prosecutors and of their essential duties and rights states (section 2) that where non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, *“such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.”* Again, no exception for national security cases is envisaged.

If there is to be a statutory power to halt a prosecution or an SFO investigation on

grounds of national security, these international guidelines outline strong checks and balances that need to be in place. These should include that:

- A decision to halt a prosecution must be in writing and made public;
- If it is made by a non-prosecutorial authority, the authority must first seek written advice from the public prosecutor;
- The decision must be explained and it must be shown how it is consistent with the law;
- The decision must not preclude a public prosecutor submitting any legal arguments of their choice to a court;
- There should be established guidelines for how such a decision is taken;
- There must be an appropriate control to guarantee transparency in relation to the decision.

The new statutory power proposed for the Attorney General does not contain these safeguards.

Domestic law issues

As Professor Bradley told the House of Lords Select Committee on the Constitution: “*decisions not to prosecute ... appear to bar access to due process of law*” and need to take into account European Convention rights incorporated into UK law under the Human Rights Act.⁶ The same must hold true for decisions to halt prosecutions and criminal investigations. Certainly, the ‘conclusive certificate’ provision of the bill (Clause 13 (5)) which effectively prevents any judicial review of the decision would appear to be in breach of Article 6 of the European Convention on Human Rights. Article 6 states that “*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*” The rights of both the person whose trial has been halted who may want a fair hearing to clear his/her name, and the person who believes that the decision to halt the prosecution is irrational and contrary to the public interest and wishes to bring a judicial review are infringed by the conclusive certificate.

Furthermore, the decision to halt a prosecution or investigation involves the criminal justice system and the administration of public justice and necessarily involves questions about the rule of law. There is a real question as to whether it is constitutional for the executive to take such a decision without any reference to or oversight from the courts, who have responsibility for protecting the integrity of the criminal justice system and for upholding the rule of law. As Lord Hope put it in a recent judgment: “*the rule of law enforced by the courts is the ultimate controlling factor on which our Constitution is based.*”⁷ If the rule of law is to be suspended on grounds of national security, the courts must have scrutiny over whether that suspension was lawful.

The UK’s domestic law already and clearly allows for a defence of duress and a justification of necessity in cases where due process of law is to be suspended. It is worth noting Halsbury’s Laws of England, in the volume that deals with

⁶ House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, “*Reform of the Office of Attorney General*”, 18th April 2008

⁷ *(R(Jackson) v Attorney General* [2006] 1 AC 262 para 107.

Constitutional Law and Human Rights on this issue, which states (paragraph 6) that:

“common law does recognise that in cases of extreme urgency, when the ordinary machinery of state cannot function, there is a justification for the doing of acts needed to restore the regular functioning of the machinery of government.”

But Halsbury also states that:

“the argument of state necessity is not sufficient to establish the existence of a power or duty which would entitle a public body to act in a way that interferes with the rights or liberties of individuals.”

In other words, national security or state necessity is not a sufficient reason to create a new statutory power that interferes with the rights of individuals; national security or state necessity may however be cited in extreme circumstances as a legitimate reason to take appropriate action.

The courts themselves are in the process of establishing what legal principles should be deployed for assessing when a criminal investigation or prosecution may be halted in response to a threat, and what role the courts should have in assessing whether such a decision meets those principles. The Corner House believes that it would be wise for Parliament to delay consideration of the creation of such a new power, and indeed of how national security decisions should be taken, until the full and final view of the courts can be taken into account.

It is highly desirable that any statute clarifying how national security decisions in relation to halting prosecutions and SFO investigations can be taken contains reference to the specific domestic law criteria by which such decisions can be taken. In particular, the statute should specify the conditions under which national security may be invoked under domestic law, that is to say where there is duress, necessity (defined in detail below through customary international law), or extreme urgency, and define these terms in an appropriately restrictive way.

The Corner House believes that any statutory clarification of how national security decisions are taken in relation to halting prosecutions and SFO investigations should also include an appropriately restrictive definition of national security, which confines it to a definite and immediate threat.

International law issues

Decisions to halt a prosecution on national security grounds are likely to raise international law issues especially where that decision involves the breach of an international obligation. The Corner House notes that under general international law, where a state wishes to invoke national security as a reason for breaching an international obligation, the state must show that the act that breaches that obligation was as a result of self-defence, force majeure, distress (that there was no other reasonable way to save lives) or necessity.⁸ According to the International Law Commission, *“the plea of necessity ... will only rarely be available to excuse non-*

⁸ Articles 21, 23, 24 and 25 of the International Law Commission’s Draft Articles on State Responsibility.

performance of an obligation and ... it is subject to strict limitations to safeguard against possible abuse".⁹ The plea of necessity is subject to certain conditions that include¹⁰:

- A State may invoke necessity only to safeguard an essential interest from grave and imminent peril and the course of action taken must be the 'only way' to safeguard the essential interest of the State (article 25. 1(a))
- The course of action taken to safeguard the essential interest of the State must not impair the essential interest of other States or the international community as a whole (article 25 1 (b)).
- Necessity may not be pleaded where the State has contributed to the situation of necessity or the international obligation excluded the possibility of invoking necessity (article 25.2).

The International Court of Justice confirmed that these conditions "*reflect customary international law.*"¹¹ The UK is therefore bound by them.

Furthermore, international judgments have added other limitations to the circumstances in which States can invoke necessity, such as:

- a requirement that as soon as the situation of necessity has ended, and stability resumed the State must resume its international law obligations immediately;¹²
- the State invoking the situation of necessity "*is not the sole judge*" of whether the conditions which would enable it to do so have been met, rather objective criteria must be satisfied.¹³

Where international treaties do expressly allow for national security to be invoked, there are usually careful restrictions on and principles for how it may be invoked. For instance, in relation to the UN Convention relating to the Status of Refugees, 1951, the UNHCR consider that, where the national security exception in article 33 (2) of that Convention is used to remove refugees from a host country:

- The threat must be interpreted restrictively and according to the principle of proportionality
- The danger posed must be very serious;
- The finding of dangerousness must be based on reasonable grounds and supported by credible and reliable evidence;
- There must be a rational connection between the removal and the elimination of the danger;
- The removal must be the last possible resort;

⁹ International Law Commission, Draft Articles on State Responsibility, Commentary 2 to Article 25, http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_6_2001.pdf

¹⁰ See International Law Commission Commentaries on Draft Articles on State Responsibility and commentaries.

¹¹ International Court of Justice, *Gabcikovo-Magymaros Case*

¹² *LG&E Energy Corp, L&E Capital Corp., LG&E International Inc v. Argentine Republic*, ICSID case NO. ARB/02/1, Decision on Liability, 3 October 2006.

¹³ International Court of Justice, *Gabcikovo-Nagymaros Case*, 25/9/07; see also the ICJ's *Oil Platforms Case*, where the court held that whether a measure is 'necessary' is "*not purely a question for the subjective judgment of the party*" (2003 ICJ Reports, p. 183, para 43).

- The danger to national security must outweigh the risk to the refugee.¹⁴

In a different context, the OECD has developed similar principles in relation to the circumstances in which member states can invoke national security in order to intervene with Sovereign Wealth Funds.¹⁵ Key principles on which governments should be able to design and implement measures intended to address national security concerns in the context of foreign investment and Sovereign Wealth funds include:

- Transparency and predictability (including prior notification of interested parties; consultation with interested parties; and full disclosure)
- Proportionality (ensuring that the measure taken should be avoided where other measures are adequate and would address the concern; that any such measure is based on rigorous risk assessment techniques and designed with appropriate expertise; that any such measure should be restricted to the specific risk identified; and that any such measure should only be taken as a last resort)
- Accountability (ensuring there are procedures for parliamentary oversight, judicial review and monitoring).

Given that according to the International Court of Justice, States cannot be the sole arbiters of whether the objective conditions are present to invoke necessity, it is undesirable that a member of the executive should make a decision about halting a prosecution or SFO investigation on grounds of necessity. It is undoubtedly against international law if they do so without any scrutiny from the courts or parliament. If there is to be a statute expressly allowing either the attorney or any decision-maker to use national security grounds as a basis for halting a prosecution or SFO investigation, it must make specific reference to the principles outlined in international law. In particular, such principles that should be specifically included are that:

- halting the prosecution is a proportionate response to the national security threat;
- halting the prosecution must be the only way to respond to that threat;
- the threat must be ‘grave and imminent’ and there must be credible, reliable and objective evidence that the threat is such;
- the decision-maker must make public for scrutiny the objective grounds on which he or she has taken the decision;
- as soon as the threat has eased, full consideration must be given to resuming the prosecution.

The case for an independent prosecutor to make the decision to halt a prosecution on grounds of national security

As long as the decision to halt a prosecution on national security grounds remains exclusively with a member of the executive with no meaningful checks and balances on that decision, there will always be a perception that the decision may have been

¹⁴ See UNHCR Advisory Opinion on the scope of the national security exception under Article 33(2) of the 1951 Convention, 2/1/06, http://www.unhcr.se/Pdf/Position_countryinfo_papers_06/Advisory_opinion_national_security_USA.pdf

¹⁵ OECD Investment Committee Report, 4/4/08, “Sovereign Wealth Funds and Recipient Country Policies”, <http://www.oecd.org/dataoecd/34/9/40408735.pdf>

based on political rather than objective grounds and that any intelligence assessments on which such a decision is based may have been politically manipulated. For the sake of the integrity of both the judicial system and the security and intelligence system in the UK, a decision to halt a prosecution or investigation on grounds of national security should be taken by an independent prosecutor who has responsibility for upholding the rule of law, and is able to assess whether or not the threat to national security is so exceptional as to justify setting aside the duty to prosecute or investigate.

It is worth noting that the former Attorney General, Lord Goldsmith stated: “*robust independence in the prosecuting function is the only way to ensure that potentially controversial prosecution decisions command respect.*”¹⁶ A decision to halt a prosecution on national security grounds is always likely to be controversial and contentious. A decision taken by an independent prosecutor with appropriate input from the government, made according to the principles of transparency, legality and appropriate control, is likely to command more respect than one taken by a member of the executive with no checks and balances.

As law professor Jeffrey Jowell put it in evidence to the House of Lords Select Committee on the Constitution:

*“it is not necessary to have a ‘political’ Attorney in order to identify or assess [matters of national security or public interest]. In countries such as Ireland, an independent DPP has proved perfectly capable of making these decisions. He consults in sensitive cases with the Government (in a similar way to our Attorney’s consultation with ministers under the ‘Shawcross Convention’) but the decision is his alone, untainted by the perception of unacceptably partisan bias.”*¹⁷

It is worth noting that at present in the UK decisions to halt prosecutions on grounds of national security primarily in relation to terrorism cases where the identity of an intelligence agent might be made known by a prosecution are routinely taken by the Director of Public Prosecutions after consulting with the Government.

The Corner House believes that there are mechanisms for ensuring that an independent Director can be accountable to Parliament for any such decision. The Director can and indeed must be called before a Parliamentary Select Committee to account for his or her decision and be required to provide full information to Parliament about his or her decision and the grounds on which it was made.

If any role for the Attorney is to be kept, the Corner House believes that it must be dependent upon there being a statutory oath of independence and of upholding the rule of law for the Attorney and that the role must be limited to an advisory role rather than a power of direction. The Attorney must be required to reach a consensus with the independent Director in taking the decision to halt the prosecution, and will seek

¹⁶ 13th Tom Sargent Memorial Lecture, “Politics, Public Interest and Prosecutions - a view by the Attorney General”, An Address by the Right Hon the Lord Goldsmith QC, Her Majesty’s Attorney General, London, 20/11/01

¹⁷ House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, “*Reform of the Office of Attorney General*”, 18th April 2008, Appendix 3.

written representations from the Director and/or the prosecutor involved as to his or her views.

The Corner House also believes that whoever takes the decision, whether the Attorney or a Director must make a full public and written account of the grounds on which the decision was taken, documenting clearly the exercise that was undertaken to assess whether the national security considerations were so exceptional as to justify setting aside domestic legal principles and the government's international law obligations.

Government input and advice on national security issues

Whoever takes the decision, there must be clear guidelines for how the government can make legitimate representations about information and considerations which may affect the decision to be made, and transparency about how these representations are made. A Shawcross exercise, or a similar consultation exercise that seeks the views of government Ministers on the public interest aspects of an investigation or prosecution if it is an independent prosecutor, should meet the following criteria:

- The representations of each government department should be put before Parliament and made public. Clearly some information may need to be omitted to protect the lives of intelligence agents, but damage to international relations is not a legitimate reason to withhold information. This is particularly the case where the decision to halt a prosecution is in breach of an international obligation, such as the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, which expressly prohibits damage to international relations being used as a reason to halt a prosecution.
- Government ministers may not in their representations raise considerations that are forbidden by domestic law or international conventions. This creates confusion as to the real basis for their advice, and whether unlawful reasons may have affected their advice.
- Government ministers will not express an opinion on whether the Attorney or independent Director should halt or proceed with the prosecution, but only lay out the information and considerations which they believe should be taken into account.
- The Government must show, in its advice, that it has requested full, rigorous, objectively verifiable intelligence assessments from the security services about the national security threats, and that it has sought to verify these with security experts. The Government should provide the assessments in full to the Attorney General or the Director taking the decision, and should provide, at the very least, the conclusions reached by these assessments, to Parliament.

Mechanisms for judicial scrutiny

The Corner House believes that any decision to halt a prosecution on grounds of national security must be open to proper scrutiny through the courts as to its lawfulness, both under domestic and international law, and that there must therefore be proper judicial scrutiny of any such decision.

The Corner House believes that the removal of the conclusive certificate in Clause 13 is absolutely essential to ensure that decisions to halt a prosecution on national security grounds can be subject to judicial review.

An additional procedural mechanism would be to specify in the legislation that where one of the Directors wishes to invoke national security as a grounds for halting a prosecution (or if the Attorney General's role is kept, if the Attorney wishes to do so), he or she should apply to the courts to get the prosecution halted. Professor Bradley, for instance, suggested a similar mechanism in his evidence to the House of Lords Select Committee on the Constitution, when he proposed that any decision to prevent a prosecution by the Attorney General could be subject to a requirement that the decision "*be approved by (for instance) the Queen's Bench Divisional Court*" on the grounds that it may be considered that it is not sufficient "*to rely on conventional safeguards against abuse of this power*".¹⁸ Careful consideration would need to be given as to whether such a mechanism would preclude judicial review thus preventing access to justice required by Article 6 of the ECHR.

Conclusion

The Corner House believes that the new statutory power for the Attorney General at Clauses 12-15 of the draft bill is a break from the previous consent role envisaged for the Attorney and has considerable constitutional implications. The new power has not been drafted with any meaningful checks and balances that are essential for a functioning democracy.

The Corner House believes that clarification of how decisions on halting prosecutions on national security grounds is needed and that the draft bill may be the place to do this. However, the Corner House believes that any mechanism for invoking national security exemptions in relation to halting prosecutions must be based on clear, objective criteria and a transparent and accountable process which meets international guidelines on public prosecution as well as domestic and international law principles.

The Corner House believes that for the sake of credibility, it is desirable that any decision to halt a prosecution or SFO investigation on national security grounds be taken by an independent Director, following a process of consultation with government that is based on clear guidelines and that is transparent. The decision must be put in writing and made public. It must document the evidential basis and the grounds on which it was taken, and the exercise that was undertaken assessing that national security considerations were exceptional enough to justify setting aside domestic legal principles and the government's international law obligations. The decision must be subject to judicial scrutiny. There must also be a full accounting to Parliament of how the decision was reached.

Finally, the Corner House believes that any statute clarifying how decisions to halt prosecutions on national security are taken must specify the domestic (and international) law principles upon which such a decision may be taken.

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May 2008

¹⁸ House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, "*Reform of the Office of Attorney General*", 18th April 2008

Additional submission to the Joint Committee on the Draft Constitutional Renewal Bill

1. The Corner House would like to bring to the attention of the Joint Committee additional evidence relating to the contradictions between the proposed new powers for the Attorney General at Clauses 12-18 of the Draft Constitutional Renewal Bill and the Government's own national security strategy, published in March 2008.
2. As The Corner House has already stated to the Joint Committee, any clarification of how legitimate national security concerns are used to halt a Serious Fraud Office investigation or any prosecution need to be accompanied by strong checks and balances.
3. The Cabinet Office's March 2008 national security strategy document stresses the importance of checks and balances. Several provisions in the Bill, however, create the possibility for the executive or any decision-maker to abuse national security arguments.
4. To prevent such abuse, The Corner House believes that:
 - i) national security must be defined narrowly as "national security creating a situation of necessity".
 - ii) the provision invoking "prejudice to international relations" should be removed.

i) National security must be defined narrowly as "national security creating a situation of necessity".

5. The Corner House would like to draw the Committee's attention to the Cabinet Office's March 2008 document, *The national security strategy of the United Kingdom*.¹⁹ This stresses repeatedly the importance of the rule of law and accountable government in maintaining national security. For example:

"Our approach to national security is clearly grounded in a set of core values. They include human rights, *the rule of law, legitimate and accountable government*, justice, freedom, tolerance, and opportunity for all." (page 6, emphasis added)

"At home, our belief in liberty means that new laws to deal with the changing terrorist threat will be balanced with the protection of civil liberties and *strong parliamentary and judicial oversight*." (page 6, emphasis added)

"The single biggest positive driver of security within and between states is the presence of legitimate, *accountable* and capable *government operating by the rule of law*." (page 19, emphasis added)

¹⁹ http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf

"[Tackling global instability, conflict, and failed and fragile states] means advocating and helping deliver the ingredients of long-term healthy societies, from *the rule of law*, civil society and *legitimate, accountable* and effective *government*. " (page 34, emphasis added)

6. As pointed out in our first submission, The Corner House believes that Clause 13, in particular the issuing of a certificate by a Minister as being held to be conclusive evidence that a direction to stop any prosecution or a Serious Fraud Office investigation was necessary, removes judicial oversight of such directions, while the exclusions in Clause 14 (3) in reports to Parliament weaken parliamentary oversight.
7. The Cabinet Office's national security strategy document also identifies "challenges to the rules-based international system" as one of the main drivers of insecurity:

"Overseas, *our belief in the rule of law* means we will support *a rules-based approach to international affairs*, under which issues are resolved wherever possible through discussion and due process, with the use of force as a last resort." (page 6, emphasis added)

"We believe that a multilateral approach in particular *a rules-based approach led by international institutions* brings not only greater effectiveness but also, crucially, greater legitimacy." (page 7, emphasis added)

". . . how well it [the international system] succeeds in . . . dealing with states that violate international laws and norms, will be one of the most significant factors in both global security and the United Kingdom's national security over the coming decades." (page 17)

8. Yet Clauses 12-18 will have the effect of enabling the UK Government to override the UK's obligations under at least one multilateral, rules-based approach to international affairs, that of the OECD Anti-Bribery Convention.
9. This would seem to conflict with the government's own stated analysis of the importance of tackling corruption to maintain national security. Indeed, the Cabinet Office's national security strategy highlights the problems corruption can cause and stresses the government's commitment to tackling it:

"Over the long term, we can expect that . . . democracy will continue to spread, and governance to improve, with resulting benefits for global security as well as for well-being and prosperity. But it will be a long and uneven path, and dictatorship, *corruption*, weak or absent government, and civil war will remain a feature of the landscape over the coming decades." (page 20, emphasis added)

"We will continue to play a leading role in wider international efforts to fight corruption . . . (page 53)

10. Part 2 of the draft Constitutional Renewal Bill, therefore, despite being titled 'Safeguarding of national security', significantly contradicts and undermines the government's own national security strategy.
11. As stressed in its earlier submission, The Corner House believes that any statutory clarification of how national security decisions are taken in relation to directions to halt prosecutions and SFO investigations should include an appropriately restrictive definition of national security, which confines it to a definite and immediate threat. We therefore suggest replacing 'national security' with "national security creating a situation of necessity".
12. This is especially important given ongoing policy proposals by the Government and others to broaden the understanding of national security to encompass a wide range of threats and risks beyond those made by another state to the UK's territory. Such threats and risks would include transnational organised crime; infectious diseases (particularly influenza), extreme weather and coastal flooding; man-made emergencies; climate change; competition for energy; poverty, inequality, and poor governance; and migration and demographic changes.
13. While these threats and risks undermine many people's individual and collective security and their rights to life and livelihood, and have the potential to undermine those of many more, the extent to which they should be considered as *national security* threats is still a matter of debate.
14. Given that understandings of national security are currently in flux, it is especially important that powers pertaining to national security are restricted and subject to checks and balances.

ii) The exception invoking "prejudice to international relations" should be removed.

15. Given the importance of parliamentary oversight, highlighted by the Cabinet Office's own national security strategy, it is important that full explanations be given to Parliament on any direction to stop a prosecution or SFO investigation on the grounds of national security .
16. The draft Bill's inclusion of "prejudice to international relations" as a reason not to provide full information to Parliament needs, The Corner House believes, to be removed, both at Clause 14 (3) (b)²⁰ and Clause 17 (3).²¹

²⁰ 14 (3) "Nothing in subsection (2) requires information to be included in a report [to Parliament] if the Attorney General is satisfied that – . . . (b) the inclusion of the information would prejudice national security or would seriously prejudice international relations

²¹ 17 (3) . . . international relations are prejudiced if any of the following are prejudiced – relations between the United Kingdom and another other State; relations between the United Kingdom and any international organisation or international court; the interests of the United Kingdom abroad; the promotion or protection by the United Kingdom of its interests abroad.

17. The definition of international relations at Clause 17 (3) is so broad as to allow the Government (or any decision-maker) effectively to exclude information that may be highly relevant to Parliament's ability to hold the Executive (or any decision-maker) to account. If this exception for "prejudice to international relations is maintained, it will become extremely difficult, if not impossible, for Parliament to disentangle whether a decision to halt a Serious Fraud Office investigation or any prosecution is based on national security grounds alone or has, in fact, been mingled not only with concerns about international relations but also with commercial and partisan interests.
18. As the Joint Committee will be aware, consideration of damage to international relations is expressly forbidden as a ground for discontinuing a prosecution or investigation under Article 5 of the OECD Anti-Bribery Convention. The inclusion of this exception will therefore create the suspicion that the Government is not committed to upholding Article 5 of the OECD Convention despite its assurances to the contrary to the OECD. Such suspicion will undermine still further public trust and belief in the Government's decisions and actions invoking national security.

The Corner House
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