MEMORANDUM FOR THE JOINT COMMITTEE ON HUMAN RIGHTS PREPARED BY H M TREASURY

BUDGET RESPONSIBILITY AND NATIONAL AUDIT BILL

LORDS INTRODUCTION

INTRODUCTION

1. This memorandum addresses issues arising under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") in relation to the Budget Responsibility and National Audit Bill [HL] ("the Bill"). The Bill is to be introduced in Parliament this week (21st October 2010). Lord Sassoon has made a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998 on introduction.

2. The Bill consists of three parts and six schedules. Part 1 and Schedule 1 concerns Her Majesty's Treasury's functions relating to the formulation and implementation of fiscal and debt management policy, including the establishment of the Office for Budget Responsibility ("OBR"). Part 2 changes the term of office of the Comptroller and Auditor General ("C&AG") and creates a new corporate National Audit Office ("NAO") to support the delivery of that office's functions; there are five associated schedules. Part 3 contains final provisions including consequential amendments and commencement powers.

3. The Joint Committee on Human Rights ("the JCHR") considered the Part 2 provisions during the progress of the Constitutional Reform and Governance Act 2010. The relevant excerpt of its fourth report of 2009-19 [HL 33/HC 249] is attached.

4. As an overarching consideration, the OBR, C&AG, and NAO are public authorities for the purposes of the Human Rights Act 1998. As such they cannot act in ways that are incompatible with a Convention right. Where they have a discretion on how to act the discretion must be exercised in a manner compatible with the Convention rights.

PART 1: BUDGET RESPONSIBILITY

5. Part 1 of the Bill establishes a new framework for the management and scrutiny of fiscal and debt management policy, including the establishment of the OBR.

6. Clause 1 provides for the preparation of a document to be known as the Charter for Budget Responsibility (the "Charter") which will set out the Treasury's fiscal policy and debt management objectives. The Charter is to be laid before Parliament and subject to approval of the House of Commons. This clause does not give rise to any Convention rights.

7. Clause 2 sets out the Treasury's duties in respect of the preparation and laying of an annual Budget (Financial Statement and Budget Report) in accordance with the Charter. This clause does not give rise to any Convention rights.

8. Clauses 3 to 8 make provision for the establishment of the OBR as a body corporate. The provisions confer a duty on the OBR to examine and report on the sustainability of the public finances. Clause 6 provides a power for the Treasury to provide guidance to the OBR as to the discharge of this duty. Clause 7 requires the OBR to act efficiently and cost-effectively. Clause 8 imposes obligations on the publication of reports by the OBR. These clauses do not give rise to any Convention rights.

9. Clause 3 also gives effect to Schedule 1 which makes provision about the governance and administration of the Office. This includes provision relating to the appointments of members, status, appointments, remuneration and employees. The schedule is largely comprised of conventional provisions which do not give rise to any Convention rights other than to the extent outlined below.

10. Paragraph 6 of Schedule 1 concerns the termination of members' appointments. Sub-paragraph (2) sets out the grounds for termination. The grounds are considered to be fully compatible with Convention rights, representing the standards normally expected of a member of a public office and a dismissal is subject to judicial review should the office-holder challenge the reasons for the dismissal. It is not considered necessary to address the requirement for TSC consent to the dismissal of the OBR's expert members in this context since the dismissing authority would be the Chancellor and not the TSC.

11. Clause 9 gives the Office a right of access to information held by Ministers of the Crown or Government departments which it may reasonably require for the purpose of the performance of any of its functions.

12. It is anticipated that the information that the Office will receive from other Government departments will be the information that the Treasury already receives in order to discharge its forecasting functions. Such information is at present exchanged subject to existing limitations on disclosure. This means that the majority of data received by the Treasury for forecasting is aggregated (for example, HMRC supply to the Treasury a forecast for total income tax receipts; it is not broken down by individual taxpayer). This practice will continue for the OBR. Any sharing of personal information in connection with the preparation of fiscal and economic forecasts and the other functions of the OBR will be in accordance with the law and can be justified as necessary in a democratic society, in accordance with the legitimate aims in Article 8(2) ECHR (right of privacy).

13. Sub-clause 9(4) contains express provision to safeguard information that is subject to any common law or statutory rule which would prohibit or restrict the disclosure of information. This means that the OBR will not have unqualified rights to information held by Ministers of the Crown or Government departments – it would be subject to existing and on-going safeguards as to disclosure and further dissemination. As such the clause is not considered to give rise to any Convention rights.

14. Clause 10 concerns the repeal of statutory provisions superseded by the Bill. The repeal of these provisions does not give rise to any Convention rights

PART 2: NATIONAL AUDIT

15. Part 2 of the Bill changes the term of office of the C&AG and creates a new corporate NAO to support the delivery of that office's functions.

16. Clause 11 sets out the future arrangements for the office of the C&AG. Save for clause 10(6), which is discussed below, it is not considered that this clause raises any Convention rights issues.

17. Clause 11(6) states that the person appointed as the C&AG holds the office for a fixed term of ten years. Under the current arrangements, the C&AG is appointed for an unlimited term. At the time of commencement of this Bill, the incumbent C&AG will have been appointed under the current provisions. The practical impact of this clause will be to change the C&AG's term of office from an unlimited term to a fixed ten-year term. Paragraph 5(2) of Schedule 4 provides as a transitional arrangement that the office-holder

in post will serve a total of ten years from the date of appointment under the current provisions.

18. The change in the term of appointment of a serving C&AG may engage Article 1 of Protocol 1. If so, it is considered that any interference can be justified as being in the public interest of ensuring that the role of the office-holder charged with the independent scrutiny of public accounts does not become too closely associated with the personality of a single person. Moreover, the balance between the interests of the state and the individual will have been fairly struck because the affected C&AG knew before appointment that the term of office was being changed to a fixed ten-year term. The new C&AG has already given his agreement to the ten-year term of his appointment.

19. Clauses 12 and 13 deal with the status and remuneration of the C&AG. It is not considered that these clauses raise any Convention rights issues.

20. Clause 14 relates to the resignation or removal of the C&AG. Clause 14(2) provides that Her Majesty may remove the C&AG from office on an address of both Houses of Parliament. In the event of this provision being used, it would be up to Parliament to devise a procedure that ensures that the removal of the C&AG from office is carried out fairly, and complies with Article 6 standards. This type of dismissal procedure can be found in other primary legislation, both old and new, including, for example, paragraph 2 of Schedule 8 to the Government of Wales Act 2006, in respect of the removal from office of the Auditor General for Wales. The power would need to be exercised in a manner which is human-rights compliant, for which Parliament would need to design a procedure which offers appropriate safeguards. This has parallels with other areas in which Parliament could be said to determine civil rights, such as private bill and hybrid bill procedures. Establishing the details of a fair procedure is properly a matter for Parliament and is not something that one would expect to find on the face of the Bill.

21. The JCHR (in its report on these provisions when they appeared in the Constitutional Reform and Governance Bill) considered that they “raise a difficult issue about the relationship between Article 6(1) ECHR and parliamentary privilege”. The JCHR agreed that nothing in the Human Rights Act would require Parliament to address these issues, Parliament not being a public authority for the purposes of that Act. However, privilege would not provide a defence to an action in the Strasbourg court and so the JCHR

recommended that "the Leader of the House of Commons bring forward proposals which are Article 6(1) compliant and make provision for a right of access to a court or tribunal". We accept that the power would need to be exercised in a compatible way, but consider that the power is capable of compatible exercise and that it would be for Parliament to devise the appropriate procedure to ensure that that happens.

22. Clause 15 sets out provisions that control or restrict the future employment etc. of a former C&AG. Clause 15(2) requires a former C&AG to consult a specified person before taking up other offices or positions or entering into other agreements and arrangements of a specified description. Clause 15(3), read with clause 15(4), provides that, for a period of two years from ceasing to be C&AG, a former C&AG must not hold an office or position for which they are appointed or recommended on behalf of the Crown, or be a member, director, officer or employee of a body/person whose accounts are audited or open to the inspection of the C&AG. Clause 15(3), read in conjunction with clause 15(5), provides that, for a period of two years from ceasing to be C&AG, a former C&AG must not provide services in any capacity to the Crown, any person acting on behalf of the Crown, or a body/person whose accounts are audited or open to the inspection of the C&AG. During the two years, an exception is made for the other three auditors general positions (see clause 15(6)).

23. Consideration has been given to whether this provision engages Article 1 of Protocol 1. It is not considered that an employment restriction would engage Article 1 of Protocol 1. Article 1 of Protocol 1 has been applied restrictively, and the future employment prospects of a former C&AG are not considered likely to fall within the category of protected property rights (*R (Countryside Alliance) v Her Majesty's Attorney General*[1]). In respect of whether Article 8 is engaged, the European Court of Human Rights has held that there is no right to work in a particular profession (see the *Countryside Alliance* case cited above) and therefore the prospects of a claim under this head are not considered to be strong. It is arguable that the restrictions might have a sufficient impact on a former C&AG's ability to establish, develop and maintain relationships, particularly with public sector workers, such that is would fall within the ambit of Article 8 (see *R (Wright) v Secretary of State for Health*[2]). The limited extent and duration of the ban, however, and

[1] [2007] UKHL 52.
[2] [2009] UKHL 3.

its automatic application (which is therefore without stigma) would significantly moderate any impact.

24. With regard to Article 14, even if a claimant were able to persuade a court that the ban did fall within the ambit of either of Article 1 of Protocol 1 or Article 8 then it would still be necessary to establish that there was a difference of treatment contrary to a prohibited ground. Although it may be argued that the ban is likely to impact on younger applicants because their employment opportunities would be restricted for a longer period than would those of older applicants, it would still be necessary to establish that age is a prohibited ground within Article 14.

25. In any event, it is considered that a restriction lasting two years could be objectively justified, due to the importance of preserving the visible independence of the C&AG by limiting the scope for conflicts of interest between a former C&AG's work as C&AG and any future employment.

26. It seems less likely that a longer restriction could be justified because the real risk of damage to the perceived independence of the C&AG will reduce as time elapses. A complete ban on future public sector employment for more than two years, for example the five years recommended by the Public Accounts Commission, would be significantly more likely to be regarded as a disproportionate way of achieving that legitimate objective.

27. While the requirement of clause 15(2) has no fixed duration, it is similarly considered to be objectively justifiable and proportionate. The obligation is merely to consult the specified person. That person will be able to provide advice on the propriety of taking up the contemplated office etc. but will not be able to insist that it is acted on.

28. The JCHR made no comment on the equivalent restrictions when they appeared in the Constitutional Renewal and Governance Bill 2009-10.

29. Clauses 16 to 23 relate to the way the C&AG is to exercise functions and the future governance arrangements for the NAO, including its incorporation, expenditure and interaction with the office of C&AG. It is not considered that these clauses give rise to any Convention rights issues.

30. Schedule 2 sets out further details regarding the structure and governance arrangements for the NAO. Part 1 (paragraphs 1 and 2) provides for its membership and status, and the way in which it holds property. It is not considered that these paragraphs give rise to any Convention rights issues.

31. Part 2 (paragraphs 3 to 10) of Schedule 2 sets out provisions relating to the non-executive members of the NAO. Paragraphs 3 and 4 relate to the Chair of the NAO and the appointment of other non-executive members. Paragraph 5 sets out the period of appointment for the Chair and non-executive members.

32. It is not considered that these provisions give rise to any Convention rights issues.

33. Paragraphs 6 to 10 contain provisions relating to terms of appointment of the NAO Chair and non-executive members, including resignation and termination rights. It is not considered that these clauses, with the exception of paragraph 10(1) (see below) give rise to any Convention rights issues.

34. Paragraph 10(1) of Part 2 to Schedule 2 states that Her Majesty may terminate the appointment of the Chair of the NAO on an address of both Houses of Parliament. As with the power to terminate the C&AG's appointment (see clause 14(2)) in the event of this provision being used, it would be for Parliament to devise a procedure that ensures that the removal of the Chair from office is carried out fairly, and complies with Article 6 standards. The procedure would need to offer appropriate safeguards. Establishing the details of that fair procedure is properly a matter for Parliament and not something one would expect to find on the face of the Bill.

35. Parts 3 to 7 of Schedule 2 set out provisions as to the chief executive, employee members, employees, procedural rules and other relevant matters in connection with the NAO. It is not considered that any of these paragraphs give rise to any Convention rights issues.

36. Schedule 3 contains provisions relating to the interaction between the NAO and the C&AG. It is not considered that the schedule gives rise to any Convention rights issues.

37. Clauses 24 and 25 provide for indemnities for the CA&G, the NAO and NAO employees and the interpretation of Part 2. It is not considered that they engage any Convention rights.

38. Clause 26 introduces Schedule 4 which sets out the transitional provisions relating to the commencement of this Bill and Schedule 5 which sets out consequential amendments to primary legislation. It is not considered that these provisions give rise to any Convention rights issues.

39. Clause 27 and Schedule 6 confer legislative competence on the National Assembly for Wales by adding a new matter 14.1 to Part 1 of Schedule 5 to the Government of Wales Act 2006 in the field of public administration. The competence conferred would allow the National Assembly to pass legislation, known as Assembly Measures, to put in place new governance arrangements for the Auditor General for Wales and the Wales Audit Office. The Assembly's legislation could be similar to provisions set out elsewhere in Part 2 in relation to the C&AG and the NAO. Similar provision is also provided for in relation to the Assembly's parallel competence to make Acts of the Assembly under Part 4 of the 2006 Act. That competence (the detail of which is in Schedule 7 to that Act) may only be brought into force if a majority of those voting in a referendum throughout Wales vote in favour.

40. Since clause 27 confers legislative competence on the National Assembly for Wales it does not engage any Convention rights. This is because the clause only confers competence on the National Assembly and that body cannot legislate incompatibly with Convention rights by virtue of sections 94(6)(c) and 108(6)(c) of the Government of Wales Act 2006. Were a specific proposal brought forward in the National Assembly, compatibility with Convention rights would have to be considered at that stage.

PART 3: FINAL PROVISIONS

41. Part 3, in clauses 28 to 31, contains a power to make consequential provision and provisions on commencement, extent and the short title. It is not considered that these clauses give rise to any Convention rights issues.

Extract from the Fourth Report of the Human Rights Joint Committee, *Legislative scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill*, HL 33/HC 249, 18 January 2010)

(e) Removal of Comptroller and Auditor General and of Chair of National Audit Office

1.73 The Bill provides for the removal from office of both the Comptroller and Auditor General and the chair of the National Audit Office by HM the Queen on an Address of each House of Parliament.

1.74 In both cases the Government appears to accept that the right to a fair hearing in Article 6(1) ECHR, as well as the common law right to procedural fairness, would apply. However, the Bill is silent on the procedure which should be used prior to such removal, and the Government says that in the event of either provision being used, Parliament would need to devise a procedure which offers appropriate safeguards to ensure that the removal from office is carried out fairly and in accordance with Article 6(1). Establishing the details of such a fair procedure, the Government argues, is properly a matter for Parliament.

1.75 We asked the Government why the Bill does not prescribe at least a minimum of procedural safeguards to ensure that the office holders receive a fair hearing and why there is no provision for a right of access to a court following removal. The Government replied that specifying what procedure the Houses should follow in making an address to Her Majesty risks breaching the privilege of Parliament to devise its own procedures. It accepts that "events preliminary to the giving of an address, whether in Parliament or outside it, might be covered by the protections of Article 6 and the common law right of procedural fairness", but it does not believe that it would be appropriate to prescribe a more detailed mechanism in the Bill. To the extent that these rights are engaged, the Government believes that they are sufficiently protected by the obligation for Parliament to adopt a procedure that is fair in the circumstances.

1.76 **We accept that these provisions raise a difficult issue about the relationship between Article 6(1) ECHR and parliamentary privilege. The Government accepts that the power to remove these office holders engages Article 6(1) ECHR and that**

Parliament is under an obligation to adopt a procedure that is fair in the circumstances, but parliamentary privilege demands that it is for Parliament itself to devise those procedures. Where Article 6 applies there must also be a right of access to a court or tribunal to challenge removal, but this is also in tension with the traditionally recognised privileges of Parliament. There is nothing in the Human Rights Act to require Parliament to address these issues, but parliamentary privilege will not provide a sufficient defence to a challenge brought before the European Court of Human Rights in Strasbourg and we therefore recommend that the Leader of the House of Commons bring forward proposals which are Article 6(1) compliant and make provision for a right of access to a court or tribunal.