| THE CONSTITUTION UNIT NEWSLETTER | ISSUE 42 | MAY 2009 |

MONITOR

CSPL INQUIRY INTO MPS' EXPENSES

In late March, Sir Christopher Kelly's Committee on Standards in Public Life (CSPL), the independent advisory body charged with monitoring ethical standards across the whole of British public life, announced that it was bringing forward its 'wide-ranging review of MPs' allowances'. The announcement followed a number of allegations that some MPs, including senior ministers, were abusing the House of Commons' second-home allowance scheme (formerly the Additional Cost Allowance, now the Personal Additional Accommodation Expenditure).

An 'Issues and Questions paper', published in April, set out the CSPL's overall objective: 'to devise a set of arrangements which command a much greater degree of public confidence, which properly supports MPs in their important and difficult jobs, which allows them to claim for expenses properly incurred without creating suspicion that they are somehow obtaining personal advantage, which hold MPs properly to account, and which is enforceable and sustainable over the longer term.'

Realising that objective will not be easy. It is inherently difficult to devise a fair system for supporting MPs, whose job often requires the maintenance of two homes. Intelligent, well-meaning individuals can easily disagree over what should be done. The CSPL will also have to build media and public support for its proposals. As the CPSL recognises, it must be prepared to argue the case for increasing MPs' pay as part of a comprehensive settlement. The CSPL has a unique moral authority in the political system; given the public's current anti-politics mood, it may have to draw on this resource to the full.

Perhaps the biggest challenge facing the CSPL is winning over MPs. They can ultimately choose to reject any or all of its proposals. Their choices will be shaped by their own ideas about appropriate financial support – many MPs think their pay is neither commensurate with their responsibilities nor adequate to support a lifestyle split between London and the constituency – and by the media and public response to the CSPL's report. A looming general election and party-political calculations will also be a consideration.

This review will be the CSPL's fourth visit to the Commons. It first visited in 1994 when the newly created committee, chaired by Lord Nolan, examined arrangements for regulating MPs' outside interests. The ensuing report led to the introduction of a Code of Conduct and the appointment of a Parliamentary Commissioner for Standards. The second visit was in 1999, when the CSPL reviewed the new arrangements, and the third was in 2002, when the CSPL made a number of recommendations following the House's spat with the second Commissioner, Elizabeth Filkin.

This fourth visit should probably have been made a year ago. The CSPL must now strike a balance between haste and thoroughness. On the one hand, the CSPL must work speedily. It has promised a report by the end of the year, but sooner would be better. On the other hand, the issues raised deserve full public deliberation. Gordon Brown's own proposals for reform, involving a flat-rate attendance allowance, lacked widespread support and illustrated the dangers of quick fixes.

Brown's proposals also raised more general questions about the role of the CSPL. Up to now the committee has cleared its proposed inquiries with the Prime Minister of the day. When the Prime Minister subsequently sought to pre-empt the committee's inquiry, the committee announced it was going ahead anyway. The inquiry is going to be a crucial test of the independence of CSPL, from Parliament and from government. It appeared to lose its way during the interregnum before Kelly's appointment as chairman. It will not be at all easy, but if CSPL manages to craft recommendations on MPs' expenses which command general assent, it will have earned its place again as a central watchdog in the system of government.

THE FUTURE OF CHURCH AND STATE

Does it really matter that Roman Catholics cannot become British sovereigns or that heirs cannot succeed if they marry them? Should we be bothered that all sovereigns have to be 'faithful Protestants' and in communion with the Church of England? After all, the chances of a prospective heir becoming a Roman Catholic or marrying one seem remote. Having 26 Anglican bishops in the House of Lords adds colour to that institution, and we can overlook the fact that bishops are nowadays appointed by unaccountable Anglican committees according to criteria which do not include participation in the legislature.

The Constitution Unit's new book *Church and State in 21st Century Britain: The Future of Church Establishment* (see page 7) argues that these things do matter – and not because of some polemical whim or secularising programme. Discrimination is not a peculiarly Roman Catholic problem. Rather it reflects a situation where Britain has religious *freedom* but not religious *equality*. The discrimination against Roman Catholics is also discrimination against all who cannot enter into communion with the Church of England -

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CHURCH AND STATE (CONT'D)

and a discrimination which also prevents the sovereign from being able to choose their own religion or none.

Clearly, Britain is no longer a confessional Protestant state holding out against its Catholic neighbours, as it was in 1700. Nor is it the Britain of 1952, when the present Queen acceded, ethnically homogeneous and observant Christian. Britain now is pluralised beyond any post WWII imagining: the Black and Minority Ethnic community constitutes over 8 per cent of the population; non-Christian religious observance is a well consolidated presence; Christian observance itself has radically declined and non-observance/unbelief extends to two thirds of the population.

Continuing pragmatic drift remains tempting to both church and state. Old forms cling on and politicians are reluctant to involve themselves in unnecessary controversy. Anyway, cannot likely difficulties (heir falls in love with a Catholic girl) be circumnavigated by fudge? It is important to recognise that some issues cannot be resolved by fudge. Removing Roman Catholic disabilities is not something that can be done by subterfuge or half-measures, and will inevitably result in further separation of Church and State.

The book – the product of a long-running Unit study – examines not only how we have got to where we are, but also what seem to be the pathways to a settlement which reflects current realities. It eschews ancient establishment/disestablishment tropes which are but shorthand for a series of discrete church/state links by no means mutually dependent. For example, ending automatic episcopal membership of the House of Lords would not provoke 'disestablishment' or spell the end of a national church.

Whilst it makes some suggestions, the book is not prescriptive: the outcome can only be the product of an informed interaction between the parties, an interaction in which the Church of England itself could best take the lead. On that basis, elements for inclusion in the equation might include a new concept for the Church of England as a national church and agreement on further changes in its governance. The sovereign could even retain a role as a voluntary patron rather than Supreme Governor. In this situation reinterpreting *Fidei Defensor* as 'Defender of Faith' could signal a monarchy and a society more evidently open to all the varieties of religious faith without denying the Christian heritage.

BRITISH BILL OF RIGHTS AND RESPONSIBILITIES

In March the Ministry of Justice published its long awaited consultation paper *Rights and Responsibilities: developing our constitutional framework* (Cm 7577). The Green Paper appeared a year later than originally planned because other government departments were strongly opposed to the creation of any new legally enforceable rights. So it is no surprise that the paper states 'the Government does not consider a general model of directly legally enforceable rights or responsibilities to be the most appropriate for a future Bill of Rights and Responsibilities'.

The paper offers a range of options on enforceability. At the lowest level, the bill of rights could be symbolic and cultural, empowering people by making them more aware of their rights and responsibilities. Or it could have political effect, placing new duties on government through a statement of principles to inform legislation and policy, with compliance monitored by Parliament. Or it could contain guidance from Parliament to the courts and public authorities as to how discretion should be exercised or the law developed, without giving rise to new causes of action.

There is a separate chapter on responsibilities. The government is clear that the rights of the ECHR cannot be legally contingent on responsibilities. But to break away from the 'me' culture associated with human rights, the government wishes to bring together in one place the key responsibilities owed to other members of society. Such responsibilities could include treating NHS and public sector staff with respect; safeguarding and promoting the wellbeing of children; living within our environmental limits; participating in civic society through voting and jury service; assisting the police in reporting crimes; as well as general duties such as paying taxes and obeying the law.

Similarly with rights, there is no enthusiasm for creating legally enforceable social and economic rights. But the Green Paper suggests bringing together in one place a range of welfare entitlements, similar to those in the recent NHS constitution; and adding victims' rights; equality; good administration; children's wellbeing; as well as sustainable development in relation to the environment.

The Green Paper has three interesting omissions. There is no mention of a British statement of values, which Gordon Brown and Michael Wills had promoted as a means of binding the UK together. That is now to appear in a separate consultation document in the summer. Unlike the JCHR's 2008 report *A Bill of Rights for the UK?* (HL 165-I, HC 150-I), there is no draft bill of rights attached, so that the government's proposals seem particularly vague and fluid. And there are no strong plans for consultation. The government merely invites responses to the consultation paper in the usual way, with no deadline. As the JCHR has pointed out, this is in marked contrast to Australia, where an independent committee has been established to promote a national debate on an Australian bill of rights, with a six month time limit.

These weaknesses in the Green Paper reflect the opposition to the proposals in the rest of Whitehall, and the fact that the government has run out of time. Nothing further is going to happen in this Parliament. What happens next will depend on the agenda of the next government in the next Parliament.

Rights and Responsibilities: developing our constitutional framework, Cm 7577, is available at: http://www.justice.gov.uk/publications/rights-responsibilities.htm
The NHS constitution is available at: http://www.dh.gov.uk/en/Healthcare/NHSConstitution/DH_093184

The JCHR report A Bill of Rights for the UK?, HL 165-I, HC 150-I, is at: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf

The Government response at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/15/15.pdf

CONSTITUTIONAL RENEWAL

Lord Tyler's Private Member's Bill

The government's plans for constitutional reform as contained in the Constitutional Renewal Bill may have stalled for now (see *Monitor* 41), but others are trying to restart the engine. In December, First Civil Service Commissioner Janet Paraskeva urged the government to find the legislative time either for the Bill as a whole or the part of it that relates to the Civil Service. Now Lord Tyler has introduced a Constitutional Renewal Private Member's Bill into the House of Lords. The Bill aims to put pressure on the government. It would give effect to some aspects of the government's draft Constitutional Renewal Bill but go further than it in others.

Unchanged from the previous draft are the provisions to repeal sections 132-138 of the Serious Organised Crime Act, which prohibit protests around Parliament. There are also provisions to increase the independence of the Attorney General and reduce his or her influence over cases investigated by the Director of Public Prosecutions, Director of the Serious Fraud Office and Director of Revenue and Customs Protection. Parliament's scrutiny of international treaties would be greater under Lord Tyler's Bill, which would create a joint Treaties Committee to flag treaties for attention as the House of Lords Committee on the Merits of Statutory Instruments does for secondary legislation. The Civil Service provisions are tighter, putting the Civil Service on a statutory basis and limiting the number of special advisers, for instance.

Lord Tyler's Bill goes significantly further than the government's constitutional renewal bill in other respects. Picking up on a commitment from Labour's 1992 manifesto, the Bill would create fixed parliamentary terms of four years. It would also, following a 1997 manifesto commitment, provide a referendum on the voting system for the House of Commons. In a section on Conduct of Members of the Houses of Parliament, the Bill also allows for Peers who have committed certain offences to be disbarred from the Lords (see next item).

PARLIAMENT

Allegations over peers' propriety

The Lords has been much in the media spotlight recently, but largely for undesirable reasons. In January an undercover investigation, by *Sunday Times* reporters posing as businessmen, claimed four Labour peers had agreed to take payment for promoting legislative amendments. A whole flurry of stories followed, making other allegations about peers' links with outside organisations.

The main allegations were treated with gravity. Leader of the House of Lords Baroness Royall said that she was 'deeply shocked' (*Sunday Times*, 1 February). The matter was immediately referred to the House of Lords Subcommittee on Lords' Interests: a five-member subcommittee of the Privileges Committee. Its role is to investigate whether any of the four peers breached the Lords code of conduct.

One difficulty is that if misconduct is proven, the sanctions available are very limited. A member cannot be barred from the House without legislation, though temporary suspension is possible. Baroness Royall also reported to the House that she had asked the Chairman of the Privileges Committee, Lord Brabazon, to look at whether the rules of the House needed to be changed. She herself has suggested that 'tougher sanctions are necessary'. A tightening of the code of conduct is also possible.

Reform proposals from Lords and Commons

The allegations gave a further boost to calls for Lords reform, though the government shows no sign of speeding up progress on the proposals in its July 2008 White Paper. Attention has focused instead on smaller reforms, which could be progressed before the next election.

Two proposals come in private peers' bills, both of which have been seen before. Lord Oakeshott's bill, which received a second reading on 23 January and began its committee stage on 22 April, would require members of the Lords to be resident in the UK for tax purposes. Lord Steel's bill would make the Appointments Commission statutory, remove the remaining hereditaries, allow members to retire, and bar serious criminals from membership. It received a second reading on 27 February, and began its committee stage on 19 March. Both bills have had a lukewarm reception from ministers, though many peers want the government to take up the proposals within them. Responding to a PQ about the Steel bill on 3 February, Justice Secretary Jack Straw stated that it lacked support not because its proposals were wrong, but thanks to 'the suspicion that [Steel's] real purpose was to kick any greater reform of the House of Lords into touch'.

The Commons Public Administration Committee also issued a short report in January responding to the White Paper. This re-emphasised its previous recommendation that the system of Lords appointments should be immediately reformed to allow the Appointments Commission to choose party peers from longlists provided by the parties (currently the parties have the last word). This could be an interim measure until further reform was enacted, and since it would require no legislation the committee suggested there was 'no reason for further delay'.

New HOLAC Guidelines

Following Lord Jay's appointment as chair of the House of Lords Appointments Commission (see *Monitor* 41), the Commission issued revised guidelines in March. These state that newly-appointed members should be 'willing to commit the time necessary to make an effective contribution to the House of Lords' rather than simply 'having the time available'. Nominees should also confirm their intention to remain (rather than simply being) independent of political party. A leaked report from the Commission earlier in March had suggested that it was disappointed at the performance of some members appointed previously, though others have been very regular attenders.

Committee inquiry on peers and public

The House of Lords Information Committee has launched an inquiry on People and Parliament, asking how the Lords 'could relate better to the public'. It has invited comments, in particular, on outreach, online communication and media relationships. The deadline for written evidence was 27 April, and a report is planned for July. Meg Russell of the Constitution Unit submitted written evidence, suggesting that the Lords needs a 'Clause IV moment' to communicate the extent to which it has changed since 1999. She suggests peers should cease wearing ermine robes for the Queen's speech since this image, invariably used by the media when reporting the Lords, encourages the view that the chamber is out of touch.

EXECUTIVE

The role of the Cabinet Office and the centre of government

The House of Lords Select Committee on the Constitution is taking evidence on its recently launched inquiry into the role of the Cabinet Office and the centre of Government.

The aim of the inquiry is to investigate the workings of the centre of government in an increasingly complicated policy making arena, and the impact of institutional changes that aim to respond to this context by emphasising strategy and delivery. While public policy has become more diverse, pluralistic and decentralised, resources have been built up at the centre to increase its ability to control and coordinate.

The committee may have one eye on the Cabinet Office's own Capability Review, the most recent of which was published in December 2008. While the Cabinet Office was reasonably well placed in its strategic capability, specifically its role in encouraging collaboration and acting as a neutral arbitrator, its delivery capability was found wanting. The Cabinet Office is weak at precisely that skill which is needed to work through a dispersed policy process. Instead of achieving objectives by implementing its own policies directly, the Cabinet Office must proceed by 'strategic alignment', in the words of Sir Gus O'Donnell, among stakeholders such as other central government departments and local authorities; 'steering, not rowing', as it has been known.

EXECUTIVE (CONT'D)

The Public Administration Select Committee also conducts a regular annual scrutiny of the work of the Cabinet Office. This is mainly based on evidence sessions, the last of which was with Sir Gus O'Donnell in December 2008.

Evidence is being accepted until May 15. More details at: http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm

More details about PASC's inquiries at: http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc_work_of_cabinet.cfm

DEVOLUTION

Scotland

The SNP is remarkably popular for a mid-term government and still able to present an image of governing competence during difficult times. However, the political landscape appears to be more testing in 2009 than anything we have seen since 2007. For example, although Alex Salmond is still the most popular leader in the Scottish Parliament, the latest opinion poll suggests that Labour have taken the lead. This comes on the back of a torrid time for the SNP when it failed to pass its annual budget first time round, dropped its plans to introduce legislation establishing a local income tax and appeared to be forced by the opposition parties to introduce new legislation (rather than use existing regulations) to further its aims on alcohol policy.

While these examples perhaps demonstrate the harsh realities of minority government, they do not represent a nail in its coffin. The failure of the budget reflected badly on all parties (rather than a successful attempt on their part to embarrass the government), producing a scramble among Labour and the Liberal Democrats to find a way to accept a new bill that differed marginally from the old one. Subsequently, it showed that a political system containing a minority government could deal well with a crisis (assuming that the opposition parties would not welcome an early election), passing a new budget within a week of rejecting the old bill. There is further potential for cross-party cooperation on alcohol policy: there is a lot of common ground between the SNP and Labour on interventionist public health measures. And on the issue of fiscal autonomy, given Scottish Labour's new enthusiasm and the SNP pledge, following a budget concession to the Liberal Democrats, to engage with the Calman Commission on this point. Perhaps the more important problem for the SNP is its public image during the policy process. The economic crisis has already damaged its hopes to appear to do a lot with limited powers, since Gordon Brown emerged as the leader most able to intervene and use the types of policy levers unavailable in Scotland.

Similarly, a succession of legislative failures presents the image of a government struggling to exert its power. The role of Jim Murphy as Labour's Secretary of State for Scotland may be to further this image. On the one hand the UK Government has accepted Scotland's veto on nuclear power. On the other, Murphy appears determined to block any formal meetings between First and Prime Minister that present the former with a sense of equal status. The strategy may be to equate Salmond on a par with Murphy and therefore less important than Brown.

Paul Cairney, University of Aberdeen

Wales

It is nearly two years since Wales's latest devolutionary settlement came into force. Part Three of the 2006 Government of Wales Act gives the National Assembly Measure-making powers on the basis of Legislative Competence Orders (LCOs) passed through Westminster. For its supporters, Part Three opened up the possibility of the steady accumulation of legislative powers in Cardiff, allowing the National Assembly to build up the requisite experience of law making before any move to law-making powers proper, as envisaged by Part Four of the same Act. For its critics, however, Part Three was pregnant with the possibility of delay, obfuscation and complication. A particular concern was that the National Assembly's legislative programme would be hostage to different bureaucratic and political priorities in London – a danger symbolised above all by the role of the Welsh Affairs Select Committee (WASC) in undertaking pre-legislative scrutiny of LCOs.

It is the sceptics that have been proven correct. A number of LCOs have become bogged down in seemingly endless 'consultations' with Whitehall. For example, it is now nearly two years since the Environmental Protection and Waste Management LCO entered the Whitehall labyrinth. There seems to be no prospect that it will emerge in the near future, let alone that the Measure itself will be laid before the National Assembly. Meanwhile, WASC has become increasingly insistent that LCOs be very tightly drafted, constraining the National Assembly's room for legislative manoeuvre. WASC also insists that the Welsh Government provide detailed accounts and justification of what precisely it intends to legislate for. Indeed, when reading the agenda of forthcoming WASC meetings, is hard not to conclude that it is seeking to usurp for itself the role of an *ex ante* revising chamber.

With the system so obviously failing, it is not surprising that the Welsh Government has been seeking ways to break the log-jam. But those solutions are proving equally problematic. In one recent case, in order to seek to progress the Affordable Housing LCO, an attempt was made to write into the LCO the power to allow the Secretary of State to veto the Assembly's use of its proposed power to suspend right to buy legislation. This proposal had then to be withdrawn when Parliament's Joint Committee on Statutory Instruments suggested (in March) that the role proposed for the Secretary of State might not be legal under the terms of the 2006 Act.

Even more worrying for the longer term is the trend pointed to in an important new paper by Cardiff University's Marie Navarro and David Lambert, who cite an increasing tendency to empower the Assembly Government directly, rather than transfer legislative powers to the Assembly itself. If this tendency is not checked then executive dominance may well become the main story of the second decade of devolution in Wales.

Richard Wyn Jones, Wales Governance Centre, Cardiff University

Northern Ireland

It has been a time of jangled nerves in Northern Ireland, following the murder of two soldiers and a policeman in March, and the re-emergence of 'punishment' shootings, at the hands of 'dissident' republicans not reconciled to the renewal of power-sharing devolution in May 2007.

The murders were condemned not just by unionists but also, notably, by the Sinn Féin deputy first minister, Martin McGuinness, who denounced the 'traitors' responsible. The UK government was keen to build on the changed relationship between SF and the state by advancing the devolution of policing and justice – enabling legislation was rushed through Westminster. And the trade unions rediscovered the role they had played in Northern Ireland's darkest days, mobilising thousands across the sectarian divide at peace rallies.

That was the good news. But the persistent exercise by the Democratic Unionist Party of the *de facto* veto it has acquired over political developments, following the St Andrews agreement of October 2006, has engendered renewed alienation among a significant section of young Catholic males. And the fringe republican groups could easily paint Mr McGuinness as the real 'traitor' to the cause – indeed, the police were to warn him of a threat to his life.

In January, moreover, the visceral emotions that lie just below the surface in Northern Ireland were tragically evident in the anger and controversy which surrounded the launch of a report into how to deal with the region's 'troubled' past. And, looking to the future, the DUP has yet to agree when policing should be devolved.

With the dominant executive parties having so little in common, only a trickle of devolved legislation was presented to the assembly in recent months. But while the Ulster Unionist Party and the SDLP argued that the flimsy Programme for Government should be rewritten in the context of the galloping economic crisis, the first minister was unmoved.

Perhaps most damagingly, chaos loomed in the forthcoming school year, with both Catholic and 'controlled' (predominantly Protestant) grammar schools voting with their feet to resist the plans by the SF education minister, Caitriona Ruane, to abolish academic selection by introducing tests of their own.

While the trade unions also brought their members on to the streets to protest against a catalogue of manufacturing job losses, the Northern Ireland middle class was thus organising too to protect its interest across communal lines. In both cases, the devolved government looked disturbingly like a spectator as events unfolded.

Robin Wilson, Queen's University Belfast

Regions

The most recent monitoring period witnessed the onset of recession, with unemployment reaching 2 million and a sharp contraction in GDP. Manufacturing sectors were particularly badly hit, as were the larger cities in the north and the midlands and those areas of the country that continue to be more reliant on manufacturing activity. A Government-commissioned report by Professor Michael Parkinson argued that the credit crunch had made the predominant property and housing-led regeneration model defunct.

Against this background, Business Secretary Lord Mandelson sought to present Regional Development Agencies as a key part of the Government's response to recession, claiming for them a strong role in a new era of 'industrial activism'. This aspiration, it quickly became apparent, would see an end to the commitment to require RDAs to delegate funding and decision-making to localities and sub-regions. In some senses therefore RDAs are again the political battleground in sub-national governance. On one hand there has been continued indecision in Government policy. A report commissioned by the Government from PricewaterhouseCoopers on the performance of RDAs was published in April and was largely positive, indicating that the net impact of RDAs was greater than the taxpayer contribution. But the report had apparently been delayed from the autumn because ministers wanted to again outline a clear 'mission' for RDAs.

The centralist tendencies shown by Lord Mandelson contrast with emerging Conservative party policy approaches to sub-national economic development and governance. The Conservatives' intention to abolish some or all of the RDAs appears to be hardening, and in January the shadow Housing spokesman threatened also to scrap the Homes and Communities Agency if it cannot prove its worth within the next 18 months. In February the Conservatives published a policy paper suggesting that local authority partnerships representing functional economic areas could take over funding and powers from RDAs. It is expected that RDAs would also lose their recently granted planning role under a Conservative administration determined to return planning powers to the local level. Referendums on some cities gaining elected mayors could also be expected. Emerging Conservative policy in this area therefore focuses on localism, decentralisation and returning powers to local councils – a process it argues would not be directed from the centre.

Three further city-regional multi-area agreements were signed off in January: Merseyside, Leicester and Leicestershire, and Pennine Lancashire. Seven city-regional partnership groups – centred upon Manchester, Leeds, Birmingham, Middlesbrough, Bristol, Luton and Sheffield – were also shortlisted for the two or more statutory city-region pilots that were announced by the Government towards the end of 2008. Leeds and Manchester were confirmed as the successful candidates in the Budget on 22 April. The test in the coming months will be what level and form of devolution and delegation will be afforded these pilots.

James Rees and Alan Harding, University of Manchester

INFORMATION POLICY

First use of executive veto on Iraq Cabinet minutes

The Cabinet minutes on the Iraq war will not be released, as ordered by the Information Commissioner and Information Tribunal, after the government announced its first use of the executive veto in February. This power, which the government has undertaken to exercise collectively, is provided for under section 53 of the Freedom of Information Act.

The request was for the minutes of two meetings of Cabinet in March 2003, at which it was decided to send military forces to Iraq. Under the Act, the decision to disclose or withhold Cabinet minutes is subject to a public interest test. The Commissioner and Tribunal were both of the view that the public interest in knowing how such an important and controversial decision was reached outweighed any public interest in withholding the information. Any longer term 'chilling effect' on Cabinet discussion and papers would be limited since disclosure would only take place in highly exceptional cases like this one.

Two reasons were put forward by Jack Straw when issuing the veto. Disclosure of the minutes would impair the deliberation that takes place in Cabinet, and harm the convention of collective Cabinet responsibility. Therefore, although there is public interest in understanding how the decision was reached, there is greater public interest in preventing damage to the Cabinet system.

What happens next? If the Commissioner and Tribunal continue the current line of reasoning in other controversial cases, the government may attempt to exempt Cabinet minutes from the Act. Such a move would be hard to get through Parliament, which may be the reason why it has not already been proposed. Otherwise the government may continue to exercise the veto whenever it feels its 'crown jewels' are encroached upon.

Reduction in 30 Year Rule on the table

The independent review of the 30 Year Rule, which was set up after the Prime Minister's October 2007 'Liberty' speech, reported in January. The review team described the current set up as 'anachronistic and unsustainable'. Currently records are sifted and sent to the National Archives for release after 30 years unless requested under FOI earlier. The review favours halving the time to 15 years.

Despite the estimated cost of £75m over a 15 year period, the government's intitial response was favourable. A release from the Ministry

INFORMATION POLICY (CONT'D)

of Justice stated that the government 'agrees that there should be a substantial reduction in the period after which official papers should generally be released to the public, and that this should be introduced on a phased basis'. A more detailed response is currently being worked on.

The review makes some other recommendations on government information policy. These include the suggestion that government 'may wish to consider whether there is a case for enhanced protection of [some sensitive] categories of information', and that the Civil Service Code be adjusted to contain an explicit injunction to keep complete and accurate records of government business.

Sir Joe Pilling gave a seminar on the 30 Year Rule at the Unit in February – see page 7

New Information Commissioner

Current Information Commissioner Richard Thomas steps down in June after 7 years and two terms at the helm. He is to be succeeded by Christopher Graham, Director-General of the Advertising Standards Authority.

Christopher Graham was the Ministry of Justice's preferred candidate, and was endorsed by the Justice Select Committee after their pre-appointment scrutiny. As part of this scrutiny the committee published a report on *The Work of the Information Commissioner: appointment of a new Commissioner* (HC 146). In the report the Committee notes that on two previous occasions it has recommended that the Commissioner be responsible to and funded by Parliament, but it does not make an additional recommendation here. It does draw attention to the Commissioner's backlog, recommending that the MOJ provide sufficient resources to resolve the backlog in a reasonable time. In its response the MOJ stated that additional funding has been provided for 2009-10 specifically to reduce the backlog, and that seven civil servants from government departments have been seconded to the ICO to work on the backlog. In his hearing, Christopher Graham recognised the problem of a backlog, stating 'justice delayed is justice denied'.

Richard Thomas will be giving a valedictory seminar at the Constitution Unit on 7 July – see back page.

INTERNATIONAL FOCUS

Refreshing FOI in Australia and the USA

The new administrations in both Australia and the USA have committed themselves to a reinvigoration of FOI and openness after years of comparative neglect. FOI in Australia had long been in the doldrums. In 2008, the new Rudd government introduced a bill to abolish the power to issue 'conclusive certificates' (in effect a Ministerial veto). In March of this year, two more draft bills followed. One would set up an Information Commissioner's Office, with an Information Commissioner supported by a Privacy Commissioner and an FOI Commissioner. This is important since the absence of a Commissioner enforcing the Act has been a significant factor in the Act's stagnation. The second bill would, among other things,

- create new obligations to publish proactively
- extend the scope of the Act to cover 'contracted service providers and subcontractors'
- amend the Archives Act to make most government records accessible after 20 years rather than the current 30, phased in over a 10 year period
- reformulate the public interest test so that there is one single form, and it favours disclosure
- narrow and clarify the Cabinet papers exemption.

The consultation closes in May.

In the USA, President Obama's first two memoranda, which carried the force of an executive order, contained a similar commitment to increased openness intended to overturn the effects of the 'Ashcroft memorandum', which sought to curb the impact of FOI during the Bush administration. The memoranda committed the new administration to 'creating an unprecedented level of openness in Government' and promoting proactive disclosure and a presumption of openness across Federal government. The first test came with the publication in April of memos from the Justice Department relating to controversial torture techniques.

PEOPLE ON THE MOVE

Lord Justice Lawrence Collins (a former solicitor) and **Sir Brian Kerr** (Lord Chief Justice of Northern Ireland) have been appointed as law lords, in succession to Lord Hoffmann and Lord Carswell. **Sir Anthony Clarke** (Master of the Rolls) becomes the first new Justice to be appointed direct to the new Supreme Court, succeeding Lord Scott who retires in September. All three were recommended for appointment by a Selection Commission chaired by the senior law lord, Lord Phillips, and comprising the second senior law lord, Lord Hoffmann, and the chairs of the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission.

Sir Michael Willcocks steps down as the Gentleman Usher of the Black Rod and Serjeant-at-Arms to the House of Lords. **Sir Freddie Viggers** takes over the ceremonial and security duties as Black Rod, while **Carl Woodall** takes over the accomodation and works duties as director of facilities.

The Constitution Unit

CONSTITUTION UNIT NEWS

New Research Project on Perceptions of Political Ethics

Nicholas Allen (Constitution Unit) and Sarah Birch (University of Essex) have been awarded grants by the British Academy and the ESRC to explore citizens' attitudes towards political ethics. The eighteen-month project will explore how people judge the integrity of politicians and political processes. It will analyse the extent of citizens' concern about political misconduct, the importance of direct experience and media coverage in shaping their perceptions, and it will examine differences between mass and elite attitudes towards political corruption. The project will draw principally on a representative survey of the British public, which will be fielded in three waves as part of the new British Cooperative Campaign Analysis Project. The first findings should be available in the summer, and the project will culminate in the writing of a book.

Unit Publication on Church and State

Much of the formal structure of the UK state remains locked in the geopolitics of the late 17th century. The sovereign has to be a Christian monarch in communion with the Church of England, swearing oaths to support that Church and the Church of Scotland. No-one may succeed to the throne who is either a Roman Catholic or married to one. Whereas in Scotland the established Church is held distinct from the state, the Church of England remains controlled by parliament where twenty-six Anglican bishops sit as of right in the House of Lords – a privilege unknown in any other sovereign legislature.

A new Constitution Unit book, *Church and State in 21st Century Britain: the Future of Church Establishment* by R.M Morris (ed.) and published in March argues that, in an increasingly pluralized society, the gap between form and reality has become unacceptably stretched. Disregarding facile arguments about disestablishment, the book analyses the present position afresh and examines what are the options for change, including to the religious character of the monarchy.

See story on front page. The book will be launched at a seminar on 15 June (see back page) and is available to order at a discount from the Unit website: http://www.ucl.ac.uk/constitution-unit/publications

Two New Research Grants on FOI

The Constitution Unit has been awarded a grant from the Leverhulme Trust to study the impact of FOI on Parliament and a grant from the ESRC to study the impact of FOI on local government.

Of the more than 100,000 public bodies subject to FOI, one of the most important is Parliament. Since implementation in 2005, the interaction between FOI and Parliament has been a source of tension and controversy. On the one hand, Parliamentarians have begun using the FOI Act to hold government to account. On the other hand, the Maclean Bill, which sought in 2007 to exempt both Houses of Parliament from the scope of the FOI Act, and the succession of revelations relating to MPs' expenses revealed deep divisions within Parliament over how transparent the institution should be. In this research project we ask to what extent Parliament has used FOI to hold the government to account, and to what extent Parliament itself is now more open and accountable as a result of FOI. Despite the inclusion of Parliament in some FOI Acts abroad, no systematic study has been done of the consequences of making a Westminster-style Parliament subject to FOI.

As more than half of FOI requests go to local authorities, the full picture of FOI in the UK cannot be understood without reference to its impact on local government. But very little is known about the requesters, the requests or their effects. The local government project will seek to answer two questions: to what extent FOI has met its objectives at a local level, and how it has affected the new model of local government? The study will use interviews with officials and politicians across 15 case study local authorities, analysis of media stories featuring FOI and surveys of FOI officers across England and FOI requesters.

Contact b.worthy@ucl.ac.uk if you would like to be involved in either project.
More details at: http://www.ucl.ac.uk/constitution-unit/foidp/research

Freedom of Information and the Policy Process

A Constitution Unit report for the Information Commissioner on Freedom of Information and the policy process is to be published in June. The Unit won a tender let by the Commissioner to analyse the policy process in central government, which relates to FOI through the section 35 exemption on 'the formulation and development of government policy'. The report also learnt lessons about the operation of similar exemptions abroad, including the status of Cabinet papers. The work was carried out by Peter Waller, Bob Morris and Duncan Simpson. More information will be available in due course on the FOI/DP research pages: http://www.ucl.ac.uk/constitution-unit/foidp

Freedom of Information Seminars

In February, Rudi Leoni from Wandsworth Borough Council and Steve Wood of the ICO discussed possible ways of dealing with vexatious FOI requests, and the ICO's guidance on the subject. At a seminar in March Sir Joe Pilling gave an exegesis of the report of the 30 Year Rule Review, which recommended a reduction in the rule from 30 to 15 years (see page 7). The Constitution Unit performed at a seminar in April, comparing the first four years of the UK FOI Act with the same period in Australia, Canada, Ireland and New Zealand and, based on their comparative experience, describing future scenarios of how the UK Act might develop.

More details about FOI seminars at: http://www.ucl.ac.uk/constitution-unit/foidp/events

Interns

As ever the Unit is grateful for the diligence of its interns: James Asfa, Dave Busfield-Burch, Gareth Davies, Ross Jones, Alexandre Rosu and Laragh Widdess.

BULLETIN BOARD

RECENT UNIT PUBLICATIONS

- Allen, N. 'Voices from the shop floor: MPs and the domestic effects of ethics reforms', *Parliamentary Affairs* 62(1): 88-107.

- Allen, N. and Ward, H. '"Moves on a Chess Board": A Spatial Model of British Prime Ministers' Powers over Cabinet Formation', *British Journal of Politics & International Relations*, 11(2): 238-258.

- Morris, R.M. (ed.) *Church and State in 21st Century Britain. The Future of Church Establishment* (Basingstoke: Palgrave Macmillan, 2009).

- Russell, M. 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999, and the Lessons for Bicameralism', *Political Studies*, forthcoming.

- Russell, M. 'House of Lords Reform: Are We Nearly There Yet?' *Political Quarterly*, 80(1): 119-125 (available online without subscription).

- Various authors, *Devolution Monitoring Reports January 2009* (Scotland, Wales, Northern Ireland, English Regions, and Devolution & The Centre). Available at www.ucl.ac.uk/constitution-unit/research/devolution/devo-monitoring-programme.html.

Further details on Constitution Unit publications can be found at: http://www.ucl.ac.uk/constitution-unit/publications

FORTHCOMING EVENTS

Constitution Unit Seminars

- Launch of *Church and State in 21st Britain: the Future of Church Establishment*, Monday 15 June, 1pm. Speaker: Bob Morris (Constitution Unit, editor and main author of *Church and State in 21st Century Britain*). Respondent: William Fittall (Secretary General, General Synod of the Church of England).

- Jenny Watson (Chair, Electoral Commission), Tuesday 30 June, 6pm, *Future plans for the Electoral Commission* (provisional title).

- Richard Thomas (Information Commissioner), Tuesday 7 July, 6pm, *Valedictory Dispatch* (provisional title).

- Lord Jay of Ewelme (Chair, House of Lords Appointments Commission), Thursday 22 October, 1pm, *The Work of the House of Lords Appointments Commission*.

Government Information Policy Seminar Series 2009 (subscription only)

- Richard Allan (European Government Affairs Director, Cisco, and chair of Power of Information Taskforce), Wednesday 20 May, 6.15pm, *Public Information and Public Participation*.

- Belinda Lewis (Head of Information Policy Division, Ministry of Justice), Tuesday 8 September, 6.15pm, *Information policy: where we've come from, where we're going* (provisional title).

- Jeremy Hayes ('The World Tonight', BBC), Tuesday 13 October, 6.15pm, *A Shock to the System: Journalism, Government and the FOI Act*.

- Professor John Angel (Chair, Information Tribunal), Tuesday 17 November, 6.15pm, *Cases at the Information Tribunal*.

Full information on events at: http://www.ucl.ac.uk/constitution-unit/events/index.html

PUBLICATIONS RECEIVED

- Blick, A. *A Federal Scotland Within a Federal UK* (London: Federal Trust, 2009).

- Kermode, D. *Ministerial Government in the Isle of Man – The First Twenty Years* (Douglas: Manx Heritage Foundation, 2009).

- Macdonald, J., Crail, R. and Jones, C. *The Law of Freedom of Information*, 2nd edn (Oxford: Oxford University Press, 2009).

- Ministry of Justice, *Freedom of Information Act 2000 – Statistics on implementation in central government: Q4 October– December 2008* (London: Ministry of Justice, 2009).

- O'Connor, P. *The Constitutional Role of the Privy Council and the Prerogative* (London: JUSTICE, 2009).

- Smith, J. (ed.) *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal & Kingston: McGill-Queen's University Press, 2009).

- Uberoi, V., Coutts, A., McLean, A. and Halpern, D. *Options for a New Britain* (Basingstoke: Palgrave Macmillan, 2009).

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