Monitor 47

Constitution Unit Newsletter

January 2011

Constitutional reforms hit trouble in Parliament

The flagship constitutional reforms of the new coalition government are running into serious parliamentary trouble. They have all been the subject of scathing reports from parliamentary committees: in particular for their haste, and lack of pre-legislative scrutiny or public consultation. Two have been subject to defeat in the Lords, but none has yet completed all its stages. If the Lords share the criticisms voiced by the select committees they will want to make significant changes.

The vanguard bill is the Parliamentary Voting System and Constituencies Bill, which completed all its Commons stages on 2 November, and by Christmas had been in Committee for six days in the Lords. The bill provides for a referendum in May to change the voting system for the House of Commons to AV, and for boundary changes to reduce the size of the House to 600 in time for the next general election planned for 2015. For the AV referendum to be held on 5 May the bill needs to be passed by early February, allowing just three months for the referendum campaign.

The bill was the subject of critical reports by the new Political and Constitutional Reform Committee in the Commons, chaired by Graham Allen MP (HC 437, October 2010), and by the Lords Constitution Committee chaired by Baroness Jay (HL 58, November 2010). Both committees strongly criticised the government for its haste, and for combining in one bill two issues which should have been considered separately. The timetable for the referendum is particularly tight. There was no time for consultation with the devolved administrations, who are dismayed that the referendum is being held at the same time as the next devolved assembly elections. And there was no time for considering alternative approaches, or the option of PR. If the Lords make major amendments, the referendum may have to be postponed. The Lords have already amended the bill to provide for that.

Parliamentary debate on the plans to reduce the size of the House of Commons exposed the absence of any rationale for the new figure of 600 MPs; and the absence of any plan to reduce the number of Ministers, or the payroll vote (the new government had a record 46 PPSs). The government have said there will be a reduction, but not through this bill. Concerns were also expressed at the abolition of local inquiries into the results of boundary reviews (to be replaced by a 12 week written consultation period); at the spurious precision of equal sized constituencies based upon outdated (2010) electoral registers, from which 3.5m voters are said to be missing; and at 18 months being insufficient time for political parties to form new local associations and to choose candidates for the new constituencies.

The Fixed Term Parliaments Bill is next in line. Introduced in July, it had its Commons Second Reading in September, and by Christmas had undergone just two days in Committee (of the whole House). This bill has also been the subject of a quick report from the Commons Political and Constitutional Reform Committee (HC 436, September 2010), and a detailed inquiry by the Lords Constitution Committee (HL 69, December 2010). Both committees suggested a four rather than a five year term. On the wider issue, the Lords Committee were not convinced that a strong enough case had been made for fixed term Parliaments. The Committee also criticised the date clash with the devolved elections in May 2015, and every 20 years thereafter. It also pointed out that the Parliament Acts cannot be applied to the Fixed Term Parliaments Bill, so the Commons cannot override the Lords.

The third bill in trouble is the European Union Bill, which aims to strengthen the UK procedures for agreeing EU decisions and Treaty changes. It provides a sovereignty clause confirming that ultimate legal authority remains with Westminster; and for a referendum lock on any Treaty transferring further powers to the EU. The sovereignty clause was strongly criticised by the Commons European Scrutiny Committee, chaired by Bill Cash MP (HC 633-I, December 2010). After taking evidence from EU and constitutional legal experts, the committee concluded that the legislative supremacy of Parliament was not under threat from EU law; so the sovereignty clause was unnecessary. It was also unlikely to have any effect, not least since it could be repealed by any future parliament. This second argument will also apply to the provisions for a referendum lock, to which the committee will return at a later date.

Finally there is the Public Bodies Bill, which started in the House of Lords in October. Following the Cabinet Office review of public bodies, led by Francis Maude MP, the bill allows Ministers to make orders abolishing, merging or modifying a wide range of public bodies. The Lords Constitution Committee issued a powerful warning in November about the extraordinary scope of the Henry VIII powers in the bill (HL 51, November 2010), repeated by the Lord Chief Justice when he gave evidence before them in December (see page 6). Labour opposition peers are ensuring that the bill makes painfully slow progress: so slow that the government may start all night sittings. The bill's opponents will be further encouraged by the damning report of the Commons Public Administration Committee, whose chair Bernard Jenkin MP described the government's bonfire of the quangos as 'botched' (HC 537, January 2011).

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These bills will provide an early test of the extent to which the Lords are willing to vote down legislation of the coalition government. With Lib Dem peers committed to support the coalition, it should be in a stronger position than its Labour predecessor. The Crossbenchers now hold the swing votes. But in the first 31 divisions in the Lords the government has been defeated eight times: much the same rate as under the previous government. And with the government's decision to extend the first session for two years the Parliament Act is a weaker instrument, increasing the Lord's powers of delay.

The fate of this legislation also provides an early test of Nick Clegg as leader of the coalition's constitutional reform programme. There was no need to introduce these bills at quite such reckless speed. More deliberation would have allowed for consultation, long term planning, and better crafted legislation. The AV referendum is likely to be lost because of the mad rush. The plans for 200 state funded primaries are being shelved, as the government realises the consequences for 650 MPs competing for re-selection in new constituencies. It is not a good omen for the forthcoming plans for Lords reform. But having learnt some painful lessons, the government may now be willing to move more slowly.

Further information:
- Watch Prof Ron Johnston's seminar on boundary changes: **http://vimeo.com/13757407**
- Read Robert Hazell's report on Fixed Term Parliaments: **http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/150.pdf**

Parliament: Lords

Lords appointments

The most notable event for the Lords since the publication of October's Monitor has been another large raft of appointees. As reported then, David Cameron created 56 new peers in the immediate aftermath of the election. Of these, 29 were Labour and so many were effectively Gordon Brown's resignation honours. In November another 54 appointments were announced: 27 Conservative, 15 Liberal Democrat, 10 Labour and one Crossbench and one (long-awaited) Plaid Cymru. This took the total number of new peers appointed to 117 in just six months. The likely effect was to take the size of the chamber to around 800 members (plus approximately 40 on 'leave of absence' or otherwise temporarily disqualified). For comparison, immediately after the reform to remove most hereditaries in 1999 the chamber had 666 members.

The new appointments created immediate practical problems: sitting times were slightly extended to allow more to be sworn in, 15 new seats have been created in the chamber, and the parliamentary authorities must deal with the consequences in terms of office space and resources. The new peers also add to the challenges of managing business in what has already become a slightly more rowdy chamber. But the appointments also raise bigger, longer term problems, about how numbers in the chamber should be regulated. The coalition agreement pledged to create 'a second chamber that is reflective of the share of the vote secured by the political parties at the last general election'. But to honour this commitment in full, given the existing number of Labour peers, would require a chamber of nearly 1000 members, which is plainly unworkable. Furthermore, many have pointed out that this would require appointment of large numbers of BNP peers, amongst others. The space for future appointments depends crucially on any future arrangements for retirement from the chamber, and the whole issue is of course linked to longer-term Lords reform. Until at least one of these matters is sorted out, the Unit's Meg Russell has suggested that there should be a moratorium on Lords appointments. Her article can be found here: **http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/221110**

Lords reforms: large and small

Options for retirement have been much on the political agenda. The Lords Leader's Group on this topic, chaired by Lord Hunt of Wirral, issued an interim report on 3 November, and this was debated in the chamber on 16 November. Options floated in the paper included simple voluntary retirement, or compulsory retirement based on age limits, length of service, level of attendance, or elections to remove a certain proportion of each party. The Group noted that any binding arrangement (even voluntary retirement) would require legislation.

One such legislative vehicle is the private member's bill again moved by Lord Steel of Aikwood, which received a second reading on 3 December. The bill would put the House of Lords Appointments Commission on statutory footing, end replacement of hereditary peers when they die, exclude those sentenced to more than a year in prison, permit peers to take permanent leave of absence (i.e. effectively retirement), and deem that any peer who had not attended at all during a session had taken such leave. Despite considerable support in the chamber, it a private peer's bill on such a controversial matter is unlikely to ever become law.

The final report of the Leader's Group was published on 13 January. It recommended greater encouragement to take leave of absence, particularly for rare attenders, and in advance of legislation a ceremony allowing members to "retire" (which would be legally non-binding). Responding, Lords Leader Lord Strathclyde said he would ask the Procedure Committee to put these recommendations into effect. The report quoted extensively from Meg Russell's evidence, and while it stopped short of endorsing a moratorium on new appointments, suggested that "restraint should be exercised" in such appointments, and that they should be only for a fixed term. The government has yet to respond.

All of this discussion takes place in the shadow of the coalition's promised large-scale reform of the House of Lords, to replace it with a largely or wholly elected chamber. A draft bill had been promised by the end of 2010, but this has slipped and is now promised 'early in the New Year'. The question is being considered by a cross-party committee of frontbenchers. Initially this was (according to evidence from Nick Clegg to the Lords constitution committee in July) to look at 'the issue of how members arrive in the second chamber, rather than what they do when they get there, on which the Government believes there is no need for change'. But in answer to a question in the chamber on 29 November, Minister Lord Taylor of Holbeach said that the cross-party committee was also 'considering the relationship between the two Chambers and the conventions on which this relationship is based'. Such complexities may help account for the delay. Once the draft Bill is published it is due for consideration by a joint committee of both Houses. A final bill is unlikely to be introduced before the 2012-13 session.

Lords defeats of the coalition

Although the two coalition parties have comfortably more peers than Labour, and their numbers are rising, there were nonetheless eight government defeats in the Lords by the end of 2010. The balance of power is now effectively held by the independent Crossbenchers, who number over 200. In the last parliament these members rarely made the difference to the outcome of votes, as the Liberal Democrats voted both more cohesively and in greater numbers. Peers have continued to take a keen interest in constitutional matters, with a defeat on the Parliamentary Voting System and Constituencies Bill (to allow the referendum to be held on a day other than 5 May 2011), two defeats on the Public Bodies Bill and two on the Identity Documents Bill. In the vote on the Public Bodies Bill to guard the Chief Coroner against abolition, 84 Crossbenchers voted against the government, as did four Liberal Democrats. There have been small numbers of Liberal Democrat and Conservative rebels on several other votes.

Full details of all Lords defeats are included on the Unit website, at: **http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats**

Executive

Publication of the Draft UK Cabinet Manual

On 14 December 2010, the Cabinet Office finally published the long-awaited draft Cabinet Manual in its entirety for public scrutiny and comment. The Constitution Unit had recommended the drafting of a Cabinet Manual as early as 2009, in its report *Making Minority Government Work*, not just to clarify the principles and processes surrounding government formation, but also as an instrument of good government. The draft chapter on elections and government formation was published in February 2010 in preparation for the May general election, and was a useful guide for all key actors.

The full draft Manual, which is modelled on the New Zealand Cabinet Manual, has 11 chapters, covering:

- The Sovereign
- Elections and Government Formation
- The Executive—the Prime Minister, Ministers and the Structure of Government
- Collective Cabinet Decision-Making
- Ministers and Parliament
- Ministers and the Law
- Ministers and the Civil Service
- Relations with the Devolved Administrations and Local Government
- Relations with the European Union and Other International Institutions
- Government Finance and Expenditure
- Official Information

The Manual aims to provide an executive lens on the workings of the UK's constitutional arrangements. Some have talked of the Manual as the first step towards a written constitution, but it is not. It is 'lore, not law', to paraphrase Lord Butler. It is meant to provide Ministers and civil servants with a 'rough guide' to the inner workings of government, a compilation of best practices on rather technical matters. Much of the Manual draws together material already publicly available into a single document.

Having published a draft version, can we expect many changes? There is now a three month period in which all those interested may examine this document and make submissions on its form and content. This is unusual: the New Zealand executive has never made the Cabinet Manual the subject of public scrutiny, or suggested it might be modified in light of public comment. Sir Gus O'Donnell has already stated in the Manual's preface that it may need to be revised in light of the coalition government's constitutional reform programme (fixed term parliaments, the AV referendum, etc), but aside from that, in structure and approach the Manual is unlikely to be changed fundamentally.

The Commons Political and Constitutional Reform Committee has already shown a strong interest in the Manual in its inquiry on the 2010 process of government formation, and has now launched a new inquiry on the constitutional implications of the Manual, with Robert Hazell being invited to give evidence in January. For the most part, the media has focused on the revised election chapter.

Further information:
- Unit Blog: 'The Cabinet Manual – at last, a rough guide for Ministers' Unit event: Seminar with Sir Gus O'Donnell Tuesday 24 February. The UK draft Cabinet Manual can be read or downloaded from the Cabinet Office website: **http://www.cabinetoffice.gov.uk/news/draft-cabinet-manual-published**
- Details of the Political and Constitutional Reform Committee inquiry on the constitutional implications of the Cabinet Manual can be found here:**http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/news/constitutional-implications-of-the-cabinet-manual/**

Join the debate: Constitution Unit Blog **www.constitution-unit.com**

Putting the Goats amongst the Wolves: Appointing Ministers from outside Parliament

In 2007 Gordon Brown appointed several ministers with no previous political or parliamentary experience, prompting a debate about the desirability of appointing ministers from outside Parliament. The Constitution Unit has published a report on this issue thanks to the generous funding of a private donor, Peter Scott QC.

Putting the Goats amongst the Wolves explores the arguments for appointing ministers from outside Parliament ('outsiders'), and studies the experience of such appointees. It also looked at the overseas experience, in countries where such appointments are more common. France, Sweden, the Netherlands, and as an 'outlier', the United States.

Advocates of such ministers point to the limited talent pool in the House of Commons, and argue that outsiders can significantly widen the skills and experience available to the government. The size and complexity of modern government requires ministers with more technocratic skills. Opponents point to the high failure rate of such ministers, measured by their short time in office. Their lack of political and parliamentary skills was said to be a serious handicap.

We found a wide range of views and experience. A few of these new UK 'outsider' ministers were regarded as successful, and several as failures. Most were given little or no induction. Some felt that too much emphasis was placed on the parliamentary role. Many were critical of the lack of clear delegation or objectives.

The overseas experience also proved less distinctive than generally supposed. Many of those appointed from technocratic backgrounds turned out to have significant political experience as well, at local and

regional level, or as party officials. One key finding was that 'hybrid' appointments who have both technocratic and political skills may be more likely to be successful than purely technocratic appointments.

There were no special problems of accountability at Westminster, since all such outsiders were appointed as junior peer ministers and so became accountable to the House of Lords. The main complaint arose in relation to Lords Mandelson and Adonis, who were not directly accountable to the House of Commons. The Commons could have devised accountability mechanisms, but chose not to do so, because they did not want to facilitate the appointment of more Secretaries of State in the Lords.

The report made two sets of recommendations. The first set concerned the appointment and training of ministers, suggesting, amongst other matters, more formalised and comprehensive induction for all ministers; greater clarity in regards to lines of authority and delegation; and a more formalised evaluation process. The second set of recommendations concerned accountability, suggesting the need for an institutional space in which members of both Houses could meet freely, allowing for greater responsiveness.

Further information:
- Full report and more at: **http://www.ucl.ac.uk/constitution-unit/research/parliament/ministers-outside-parliament2**

Devolution

Northern Ireland

The image of people queuing at standpipes for water, flashed across the UK-wide media over the holiday period, symbolised the nadir to which devolution in Northern Ireland had come. Tens of thousands of homes were cut off for several days, after a rapid thaw had seen massive leaks from the system. Hundreds of thousands of litres of water were offered by Scotland to the benighted region and by Co Louth in the Republic to Newry city across the border.

The Northern Ireland Executive eventually met—principally to throw mud at Northern Ireland Water, the government company established in 2007 under direct rule from Westminster with a view to introducing water charges and, many suspected, privatisation of the still public service. Yet the region's political class had shown remarkably little intellectual curiosity in the governance model adopted—a former Department of Environment permanent secretary had unsuccessfully pressed for a replication of GlasCymru, because of its accountability to its publicly appointed 'members'.

Moreover, under both periods of devolution since 1999, ministers have dodged the issue of paying for water, fearful they might pay a price in a political culture still consumed by elite ethnic protagonism and so unable to address socio-economic challenges distinctively under devolution in anything other than a populist manner. A decade on, they were still blaming direct rule for the under-investment in the Victorian system which meant so much water routinely leaked and made it so vulnerable to the extreme weather in December. A common canard was that water was already paid for via the regional rate—only partially true and blown out of the water when an expert review in 2007, when devolution was re-established, swiftly recommended that charges take the form of an additional rate burden to make up the difference (which would also ensure the wealthiest, rather than the neediest, were hit hardest).

A weary end-of-year leader in the *Belfast Telegraph* commented: 'Yet again Northern Ireland is seen as a region whose political leaders accept no responsibility for any crisis. In their eyes, the fault always lies with someone else. It is a mantra which, quite frankly, everyone is tired of hearing.'

The budget agreed by ministers after the October spending review by the chancellor had once more postponed the introduction of charges, despite the huge spending cuts entailed by the 'Barnett consequentials'. Emerging only in mid-December—and behind Scotland and Wales—the document was short on detail. Northern Ireland's most respected economist said it 'does not provide any reader with enough information to make an informed judgment about any area of public policy and where it is going'. No attempt has been made by the executive to replicate the Calman and Holtham commissions in reviewing the region's fiscal position in response to the crisis, with ministers sticking to the traditional quixotic aspirations that the Treasury provide more while granting Northern Ireland lower corporation tax to pay less.

Meanwhile, the real economy continued to haemorrhage. The Ulster Bank reported that November had been the worst month for contracting orders since April 2009, sustaining three years of decline (almost to when devolution had been restored)—in contrast to 17 months of modest apparent recovery across the UK as a whole. Yet an economic policy, promised as the priority of the Programme for Government agreed in early 2008, remained in the ministerial pending tray.

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Scotland

There has been a number of stories vying for attention in the latter part of 2010, including the US report on Lockerbie (suggesting economic pressure on the UK to free the Lockerbie bomber), the date of the referendum on AV (the Lords process may push it past the Scottish Parliament election date), the resignation of Stewart Stevensson (blamed for motorists being trapped on the M8 overnight during the cold spell), the non-story regarding the lapse of the Scottish Parliament's powers to modify Scottish income tax (the power would not have been used) and, of course, Tommy Sheridan. However, the biggest issue relates to the economy and the budget. Legislation, based on the Calman report (see previous monitors) is currently going through Westminster to devolve a range of taxes to the Scottish Parliament (despite opposition by the SNP). We are also gearing up for the annual budget bill which has generally proved controversial.

There are two added elements this time. First, it is the first budget bill in the new era of austerity, with the Scottish Government faced with finding ways to reduce budgets across the board. This is the context for most coverage of issues with, for example, Scottish Labour linking C difficile related deaths to NHS cost cutting, the Auditor General warning that further cuts in the NHS have to be made, Education Secretary Mike Russell accused of interfering in the schools closure agenda in his constituency and challenging the opposition parties to state their position on charging tuition fees, and Justice Secretary Kenny MacAskill considering the move to single fire and police services.

Second, Alex Salmond's threats to resign and force an early election may have a bit more bite this time (although SNP support is not that high) because we are within six months of May (meaning that another election would be unnecessary; the new government would operate for over 4 years). Much centres on Finance Secretary John Swinney's proposal of a 'supermarket tax' (or rise in business rates for large businesses) which has been opposed by the three main opposition parties. Swinney has also begun to play hardball with local authorities, linking funding to a commitment to maintain police and teacher numbers and to freeze council tax (or face a reduction in budget settlements).

Dr Paul Cairney, University of Aberdeen

Wales

The autumn and early winter did not see any dramatic developments, but more preparation for what will be a busy spring and early summer, with the referendum on the National Assembly's legislative powers followed by Assembly elections in May. Opinion polling suggests Labour will do well come May – the real question being whether it secures a working majority on its own or not (and what a working majority is).

The Order formally calling the referendum on the Assembly's legislative powers was made shortly before Christmas, confirming the date as Thursday 3 March. The referendum order was accompanied by orders setting the spending limits for the campaign, and revising the list of legislative powers to be devolved if there is a 'Yes' vote in the referendum. All were approved in the National Assembly and both Houses at Westminster with little difficulty (or, at Westminster, fuss).

Setting up referendum campaigns has proved a more complex business. While True Wales, the aspirant No campaign, has been up and running for some time, the Yes side has taken much longer to get itself together. The appointment of Roger Lewis, chief executive of the Welsh Rugby Union, as chairman of what is now called the 'Yes for Wales' campaign was announced in mid-December, and the campaign was formally launched on 4 January – less than 2 months before the referendum date. There has been support for a Yes vote from a range of figures, including Ed Miliband, but the attempt to link support for a Yes vote to support for Welsh Labour risks antagonising non-Labour supporters of primary legislative powers.

Whether True Wales and Yes for Wales will be formally designed as the Yes and No campaign organisations (and receive the public funding to which that status entitles them) will be announced between 19 January and 2 February.

Opinion polling continues to show strong support for a Yes vote, though that declines somewhat when only those likely to vote are taken into account. On what may be a low-turnout poll, that could be significant. YouGov polls continue to show a lead for the Yes side of about 20 percentage points. An ICM poll for the BBC published on 1 December showed 57 per cent supporting a Yes vote, 24 per cent for 'No', and 18 per cent Don't Knows.

On the financial front, and in the wake of the UK Government's Spending Review, the Assembly Government published its budget for 2011-12 on 11 November 2010. Despite rhetoric about taking a 'distinctive Welsh approach' to cuts, the budget largely delivered the sort of cuts that had been imposed for similar services in England, with a particular savaging of capital spending programmes. Whether this succeeds in protecting front-line services is unclear. The Assembly debated the Holtham Commission's report in November, and unanimously endorsed its recommendations for a 'fair grant' and limited fiscal autonomy for Wales, but the looming referendum means that this is largely on the shelf for now.

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Courts and the Judiciary

Parliamentary Privilege Appeal Rejected

On 1 December 2010, the Supreme Court rejected appeals brought by former MPs David Morley, Elliot Chaytor and Jim Devine concerning whether they can be charged for false accounting in relation to parliamentary expenses claims. The former MPs argued that criminal proceedings cannot be brought against them because their actions are protected by parliamentary privilege under Article 9 of the Bill of Rights 1689. They also maintained that filing expenses claims falls within the exclusive jurisdiction of Parliament and is therefore not a matter for the courts.

The Supreme Court unanimously dismissed the appeals with Lord Phillips and Lord Rodger giving the lead judgments. The Court held that the conduct of MPs is not privileged within the meaning of Article 9 simply because it occurs in the House of Commons. The primary purpose of Article 9 is the protection of freedom of speech and debate within Parliament and parliamentary committees. As to the issue of exclusive jurisdiction, the Court ruled that Parliament has not asserted exclusive jurisdiction in relation to criminal conduct which occurs within Parliament. Accordingly, the Court determined that the prosecutions did not violate Article 9 or interfere with the exclusive jurisdiction of Parliament. On 7 January, David Chaytor pleaded guilty to falsely claiming parliamentary expenses and was sentenced to 18 months in prison. He has also been expelled from the Labour Party.

Further information:
- The full judgment is available at: **http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0195_Judgment.pdf**

Oldham East and Saddleworth Election Declared Void

For the first time in almost 100 years, a specially convened election court has declared an election result invalid. Specifically, the 6 May 2010 election in Oldham East and Saddleworth, in which former Labour Immigration Minister Phil Woolas retained his seat after defeating his nearest rival, Robert Elwyn Watkins, by 103 votes, has been declared void and a by-election scheduled for 13 January 2011. Watkins contested the result of the election under section 120 of the Representation of the People Act 1983 (RPA 1983). He alleged that Woolas was guilty of an 'illegal act' under section 106 of the RPA 1983. Section 106 states that a person is guilty of an 'illegal act' if they, before or during an election and for the purpose of affecting the return, make or publish any false statement of fact in relation to a candidate's personal character or conduct which they had no reasonable grounds for believing to be true and did not believe to be true.

The false statements of fact were published in three election addresses sent to voters shortly before the election. They claimed that Watkins courted violent Muslim extremists and refused to condemn their views in pursuit of electoral advantage. The Court held that, on the basis of the publications, Woolas had committed an illegal act and the election in the constituency was void. Although section 106 of the RPA places limits on freedom of speech, the Court held that the section seeks to 'ensure that the electorate expresses its opinion…on the basis of facts and competing policy arguments rather than on false assertions', and is therefore proportionate.

Further information:
- The full judgment is available at: **http://www.bailii.org/ew/cases/EWHC/QB/2010/2702.html**

Chief Justice Criticises Public Bodies Bill

The coalition government published proposals to abolish nearly 200 quangos in October. The Public Bodies Bill is intended to give Ministers power to abolish and/or consolidate quangos with the aim of reducing their number and overall cost. The Bill confers significant Henry VIII-type powers upon ministers. The Lord Chief Justice, Lord Igor Judge, expressed concern about these aspects of the Bill in his appearance before the House of Lords Constitution Committee (HLCC) in December 2010. He said the inclusion of several quasi-judicial bodies in the Bill was a threat to the independence of the judiciary.

Lord Judge expressed unease with the fact that about 120 Bills with Henry VIII clauses had been enacted in the 2008-2009 legislative session. He expressed particular concern with Schedule 7 of the Public Bodies Bill in which are included around 150 organisations which may in future be abolished or modified by a ministerial order.

Included in Schedule 7 are a number of quasi-judicial bodies that are important to the judiciary, such as the Judicial Appointments Commission and the Criminal Cases Review Commission. These organisations exist specifically so that they will be independent from the Government of the day. Their inclusion under Schedule 7of the Bill makes them amenable to abolition by a Government with relative ease, a situation Lord Judge described as extraordinary. The bodies in question have been created by Parliament and their independence is, Lord Judge maintained, part and parcel of the independence of the judiciary. Their abolition should thus be a matter for Parliament and not for a minister exercising power through a Henry VIII clause.

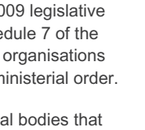
Lord Judge also suggested that responsible engagement between judges and the media could be a positive guarantee of the independence of both journalism and the judiciary. The use of blogs such as Twitter as a journalistic tool in court (as occurred recently in the Tommy Sheridan perjury case) might be appropriate if done responsibly and in appropriate circumstances.

Further information:

- Unit blog: Lord Chief Justice on the Public Bodies Bill and Judicial Independence. A transcript of Lord Judge's evidence before the HLCC is available at: **http://www.parliament.uk/documents/lordscommittees/constitution/lordchiefjustice/ucCNST151210LCJev1.pdf** and there is also a video record available at: **http://www.parliamentlive.tv/Main/Player.aspx?meetingId=7287**.

Unit Research Project Launch: the independence and accountability of the judiciary. Lord Phillips, President of the UK Supreme Court Tuesday 8 February, 5.45pm for 6.00pm start Venue: Gustave Tuck Lecture Theatre, Wilkins Building, UCL. Book online at: **http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch**

Information Policy



Do MPs and peers use FOI?

The Unit's FOI team is half-way through a project looking at FOI and Parliament, both how the Act has changed Parliament and its people, and how the Act has been utilised by Parliamentarians. This article looks at the latter point: Do members use FOI?

Members constantly need information in order to seek publicity or news coverage, to support a campaign or as a means to bring accountability, scrutiny and assist the work of opposition. The Freedom of Information Act offers the potential to assist in all these activities.

FOI requests can be used to ask a specific question in a particular area, or be tailored more broadly to obtain a large amount of information that can be examined. Requests can be used simultaneously to ask the same question of many public bodies through 'round robins', gathering data to cross-compare or aggregate to give a nationwide picture. Finally, FOI requests can generate publicity, controversy or create a nuisance.

There are some notable uses of FOI by backbench MPs, with requests providing information to challenge the government, reveal mistakes and injustice, or contribute to a policy discussion. Justine Greening used FOI to investigate the controversial decision to build a third runway at Heathrow. The All-Party Parliamentary Group used the US FOI Act to investigate claims of torture. Norman Baker investigated the death of Dr David Kelly.

One of the key questions is thus why more MPs and peers are not using FOI. Five years since the Act was enacted, with FOI requests proving an effective check on government, the study so far has found only a small number of MPs, and virtually no peers, make FOI requests. Parliamentarians in the UK seem to make use of the tool less than their overseas counterparts. Half-way through the study, we can offer a number of provisional explanations.

First and most simply, FOI can take more time than other methods of accountability. David Laws MP told the Procedure Committee in 2007 that use of FOI can be a long and frustrating process and that, despite its 20 day statutory deadline, can take up to six months: 'You put in an FOI request, and that is almost always blocked the first time, and then you have to go through an appeal. All of this takes a long time. It is designed to wear you down'. MPs, working to tight deadlines may find FOI is not good use of their finite resources. Few peers have a dedicated research assistant, and most have their information needs ably met by the Lords' Library.

Second, MPs and peers are 'creatures of habit' and will habitually use the traditional methods such as PQs. As one interviewee argued, there are 'many established ways of accessing information. Why do they need FOI?'

PQs remain an important tool for MPs – and to a lesser extent, peers - and their usefulness has not been undermined by the introduction of FOI; indeed, the number of PQs made increase every year. MPs that have used FOI seem to see both tools as useful for different things. They feel PQs are quicker than FOI and a more 'basic' means of obtaining information; they can serve as 'a ready made press release', according to one MP. PQs seek an answer, and generally receive a brief one in a short space of time.

FOI requests do have some key advantages over PQs. While the refusal of a PQ is discretionary, FOI has an appeal system to the Information Commissioner (ICO) and beyond. FOI has a wider coverage, covering organisations like the BBC and local councils. Unlike PQs, answers to FOI requests are not publicly available and so cannot be picked up or used by another member. Researchers have spoken of trawling answers to PQs each day, with simultaneous press releases issued by different parties using PQ material.

Third, use of FOI may depend upon the individual parliamentarian. It may be, as one interviewee suggested, most are not 'curious, cynical or suspicious' so do not use FOI above what tools are available.

Fourth, is the issue of context: 'Some subjects lend themselves to FOI' as one interviewee put it. Those subjects, the politically sensitive, long term 'crusades', may be the sort of private investigations undertaken by a small group of MPs.

Of the very few peers who use FOI, the trend is that requests are made with the help of, or in conjunction with, outside parties like NGOs. Some peers peruse their own policy or research agendas with FOI, wholly separate from the work of the Lords.

The Lords does not carry the same role of representation, or holding the government to account as the Commons. As a consequence, peers use all accountability mechanisms more rarely. To illustrate, between 2007 and 2008 73,356 written questions were tabled in Commons compared with 6,537 in the Lords. Importantly, peers are not elected and do not need the publicity that MPs are motivated to find. Several peers have noted FOI is tarnished with the perception it is an 'underhand tactic', something professionals use to dig dirt. This clashes with the cordial nature of the House. As one peer put it: 'There is the idea that the Lords operates with courtesy… FOI breaks this clubby bond. The feeling is, why wouldn't you just talk to your colleagues, find out through the usual channels?'

The Unit is continuing to interview parliamentarians and their staff to gather more evidence. We are still asking:

- Why do MPs and peers not use FOI more?
- Can requests be used to formulate policy?
- What use are political researchers or advisers making of FOI?

If you want to help to contribute to the project, please contact Dr Ben Worthy on **b.worthy@ucl.ac.uk**. If you would like to read more about our project, please visit **http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-parliament**

People On The Move

Sir David Normington has been appointed First Civil Service Commissioner and Commissioner for Public Appointments. The former Commissioner for Public Appointments Janet Gaymer stepped down at the end of December following the expiry of a five year non-renewable term. **Una O'Brien** is the new permanent secretary at the Department of Health in succession to Sir Hugh Taylor. **Sir Bob Kerslake** becomes permanent secretary at the Department of Communities and Local Government in succession to Sir Peter Housden. **Dame Helen Ghosh** is the new permanent secretary at the Home Office. **Martin Donnelly** is the permanent secretary at the Department of Business Innovation and Skills in succession to **Simon Fraser** who is now permanent secretary at the Foreign and Commonwealth Office. **Robert Devereux** takes over from Leigh Lewis as the permanent secretary at the Department for Work and Pensions.**Ursula Brennan** is the new permanent secretary at the Ministry of Defence in succession to Sir Bill Jeffrey. **Lin Homer** is now permanent secretary at the Department of Transport. **Sir Peter Housden** is permanent secretary to the Scottish Government following the departure of Sir John Elvidge.

Constitution Unit News

Making Coalition Government Work

The Unit has been awarded a 12 month grant from the Nuffield Foundation, starting in January 2011, to examine coalition governance in the UK. The project is led by Robert Hazell and Ben Yong, and supported by Honorary Senior Research Associate Peter Waller. The study has received the approval of Prime Minister David Cameron and Deputy Prime Minister Nick Clegg. Following on from previous reports by the Unit (*Coalition Government: Lessons from Overseas; Making Minority Government Work*), it will look at how the first coalition government at Westminster in decades is coping. We hope that it will result in better preparedness for the next coalition government, whenever that comes; better guidance in Westminster and Whitehall; and better understanding of how coalition government works by the media and the general public.

Coalition governments face two sets of difficulties. One is instability: coalition governments in Europe are more short lived than single party majority governments. So procedures to manage conflict and resolve disputes between the coalition partners are vital. The second difficulty is the unity/distinctiveness dilemma. A coalition must devise means of ensuring its constituent parts remain coordinated and coherent if it is to govern effectively; but must also ensure that different parties' policies and values are implemented, to satisfy party supporters. These competing considerations are fundamental to understanding how a coalition government operates. Thus our central research questions are how coalition government can remain stable, and how it can reconcile unity in government with the need for the parties to project distinct identities.

The project will engage with politicians and senior officials, through private seminars and meetings. On our website we will be publishing regular coalition updates, collecting media reports on the inevitable tensions which arise. In addition we aim to provide basic information on how coalition governments have worked in the UK and overseas. For all this and more information, see: **http://www.ucl.ac.uk/constitution-unit/research/coalition-government**

Parliament's Impact on Legislation

A second Nuffield Foundation grant has been awarded to Meg Russell for further work on the policy impact of parliament: this time focusing on legislation. The two-year project will start in February 2011, and examine passage of a number of case study bills (both pre- and post-2010) in detail. Meghan Benton will work with Meg Russell on the project, and two further researchers will be recruited in the spring. Watch the Unit website and the next Monitor for further details. The parliament team is currently completing its work on policy impact of House of Commons select committees, for spring publication.

Constitution Unit Staff Update

In January, Patrick O'Brien joined the Unit as a Research Associate working on the Politics of Judicial Independence project and editing the Monitor. Patrick recently completed his DPhil thesis at St. John's College, Oxford. His doctoral research was on the relationship between democracy and judicial review. He also holds a BCL degree from Oxford and an LLB from Trinity College Dublin. He qualified as a barrister in Ireland in 2006.

Mark Chalmers will be leaving the Unit at the end of January to join a City law firm. Mark joined the Unit in June 2009 as a Research Assistant to Professor Robert Hazell, and was also responsible for editing the Monitor and organising the Unit's Public Seminar Series.

Interns

As always, the Unit is grateful for the hard work and diligence of our interns: Anna Colquhoun, Benjamin Mueller, Estelle Levoyer, Nadina Fejes, Frank Fogarty and Rachel Heydecker.

Bulletin Board Constitution Unit Newsletter

Forthcoming Events

The Constitution Unit Public Seminar Series is funded by her family in memory of Barbara Farbey, late of UCL, who greatly enjoyed them and who died in 2009

Sign up for all our events on our website, and find videos and presentations from previous seminars **http://www.ucl.ac.uk constitution-unit/events**

- **Wednesday 26 January, 6.00pm.** Mark Pack (Co-editor, Liberal Democrat Voice), will discuss the Liberal Democrats and the Coalition
  Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Tuesday 8 February, 5.45 for 6.00pm start.** Lord Phillips of Worth Matravers (President of the UK Supreme Court) launches our new Judicial Independence project with a lecture on the accountability of the judiciary from the perspective of the Supreme Court
  Venue: Gustave Tuck lecture theatre, Wilkins Building, UCL (free and open to all)
- **Thursday 24 February, 6.00pm.** Sir Gus O'Donnell (Cabinet Secretary, head of the Civil Service and Permanent Secretary of the Cabinet Office), discusses the new UK Cabinet Manual
  Please note that this event is being held at the Institute for Government, 2 Carlton Gardens, London, SW1Y 5AA (Public Seminar Series, free and open to all)
- **Friday 11 March, 1pm**. Prof Tim Bale, The black widow effect: A pessimist's take on the consequences of the coalition for Clegg and co.
  Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Monday 28 March, 6.00pm**. Prof Dame Hazel Genn, Dean of UCL Laws, will talk about judicial diversity in England and Wales
  Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Wednesday 13 April, 6.00pm.** Prof Tony Travers (LSE) will discuss the emergence of the New Localism in England and Wales
  Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Wednesday 15 June, 1.00pm.** Jenny Watson, Chair of the Electoral Commission, will talk about issues relating to the AV referendum. Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Wednesday 6 July, 6.00pm.** Prof Justin Fisher (Brunel University) discusses reforming the current system of party funding
  Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)

Watch our events again

Subscribe to our audio & video podcasts on iTunesU

Centre for Political and Constitutional Studies Lectures on the Coalition and the Constitution by Professor Vernon Bogdanor

- The Hung Parliament and the Formation of the Coalition, **24 January**
- The Coalition and Constitutional Reform, **21 February**
- Government by Parliament and Government by the People, **21 March**

Each lecture will be held at 12.00 in the Edmond J. Safra Room, King's College London, Strand, London WC2R 2LS

Entry free to all – notification of attendance to the Centre's Senior Research Fellow, Dr Andrew Blick, at **blickandrew@aol.com**.

The Centre for Political and Constitutional Studies was established by Professor Robert Blackburn at King's College London in 2010 to promote research and teaching in contemporary history and politics, and to engage in research on current political and constitutional reform issues.

For more information, see:

http://www.kcl.ac.uk/research/groups/ich/centres/cpcs.html

Constitution Unit Publications

- Russell, M. (2010) 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999, and the Lessons for Bicameralism,' *Political Studies* 58, pp. 866-885
- Russell, M., and Benton, M. (2010) '(Re) assessing Parliamentary Policy Impact: The Case of the Australian Senate,' *Australian Journal of Political Science* 45 (2), pp. 159 – 174

Publications Received

- Erdos, D. (2010) 'Smoke but No Fire? The Politics of a 'British' Bill of Rights,' *Political Quarterly* 81 (2), pp. 188-198
- House of Commons Library Note. *Reform of the House of Lords: the Coalition Agreement and further developments* (July 2010). Available at: **http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-05135.pdf**
- House of Commons Library Note. *Referendum for Wales: extending the scope of Assembly Powers* (September 2010). Available at: **http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-05685.pdf**
- Johnston, R., et al. (September 2010). Drawing a new Constituency Map for the UK. British Academy. Available at: **http://www.britac.ac.uk/policy/Constituencies-bill.cfm**
- Keating, M. *The Government of Scotland: Public Policy Making after Devolution* 2nd Ed. (Edinburgh University Press, 2010)
- Wilson, R. *The Northern Ireland Experience of Conflict and Agreement: a Model for Export?* (Manchester University Press, 2010)

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