

Nations and Regions: The Dynamics of Devolution

Quarterly Monitoring Programme

Devolution and the Centre

Quarterly Report
November 2001



The Leverhulme Trust

The monitoring programme is jointly funded by the ESRC and the Leverhulme Trust

Devolution and the Centre Monitoring Report November 2001

Roger Masterman, The Constitution Unit, UCL.

Contents:

<i>Devolution and Westminster</i>	4
<i>1: HOUSE OF COMMONS</i>	4
1.1: THE NEW LEADER OF THE HOUSE:	4
1.2: DUAL-MANDATE MPS:	5
1.3: SNP-PLAID CYMRU PARLIAMENTARY GROUP:	8
1.4: THE TERRITORIAL SELECT COMMITTEES:	9
1.5: THE GRAND COMMITTEES:	11
<i>2: HOUSE OF LORDS</i>	12
2.1: PROPOSALS FOR REFORM:	12
2.2: REPRESENTING THE NATIONS AND REGIONS:	12
2.3: THE HOUSE OF LORDS – COMPLETING THE REFORM:	14
2.4: THE DEBATES ON THE WHITE PAPER ON LORDS REFORM:	15
2.5: RESPONSES IN THE PRESS:	18
2.6: THE HOUSE OF LORDS COMMITTEE ON THE CONSTITUTION:	19
2.7: HOUSE OF LORDS DEBATE ON THE BARNETT FORMULA:	20
<i>Devolution and Whitehall</i>	22
3.1: LIDDELL ANNOUNCES CONSULTATION ON NUMBER OF MSPS:	22
3.2: SUSPENSION OF THE LABOUR/LIBERAL DEMOCRAT JOINT CONSULTATIVE COMMITTEE:	24
3.3: LEADERSHIP OF THE SCOTTISH LABOUR PARTY:	24
<i>Intergovernmental Relations</i>	26
4.1: MEETINGS OF THE JOINT MINISTERIAL COMMITTEE ON DEVOLUTION:	26
4.2: REPRESENTING SCOTLAND OVERSEAS:	28
<i>Devolution and the Courts</i>	29
5.1: ANDERSON, REID AND DOHERTY V THE SCOTTISH MINISTERS AND THE ADVOCATE GENERAL FOR SCOTLAND:	29
5.2: MILLS AND COCHRANE V HER MAJESTY’S ADVOCATE AND HER MAJESTY’S ADVOCATE FOR SCOTLAND:	29
5.3: APPOINTMENT OF LORD RODGER OF EARLSFERRY	32
5.4: THE EVOLVING CONSTITUTION:	32
<i>Bibliography:</i>	35

Key Points:

- The Leaders of the House of Commons and House of Lords visited the Scottish Parliament during September 2001 with a view to seeing how working practices at Holyrood could inform proposals for reform at Westminster.
- The number of Dual-Mandate MPs has significantly decreased following the 2001 General Election.
- The Government's White Paper on House of Lords reform was widely criticised in Parliament and the press following its publication in November 2001.
- The House of Lords Select Committee on the Constitution has begun to take evidence in its inquiry titled 'Changing the Constitution: the Process of Constitutional Change.'
- The Secretary of State for Scotland announced a consultation exercise on the number of MSPs in the Scottish Parliament on 6 November 2001.
- The Labour/Liberal Democrat Joint Consultative Committee was suspended in September 2001.
- The Second annual plenary meeting of the Joint Ministerial Committee on Devolution was held in Cardiff on 30 October 2001.
- The Judicial Committee of the Privy Council handed down judgment in the first case dealing with the powers of the Scottish Parliament on 15 October 2001.
- It was announced that Lord Rodger of Earlsferry will replace Lord Clyde as one of the two Scottish Law Lords.

Devolution and Westminster

1: HOUSE OF COMMONS

1.1: THE NEW LEADER OF THE HOUSE:

On 12 July 2001, the new Leader of the House of Commons, Robin Cook, in a speech to the Hansard Society Conference, addressed the challenge that lies before him in his new position:

We must enhance the status of the House of Commons, as a representative chamber, so that it is seen as a robust and effective part of the process of government decision making.

The Leader of the House outlined that progress towards this aim should be achieved through more effective discourse between Parliament and the electorate, citing the Scottish Parliament's Petitions Committee as an example of a body which plays a 'pivotal role between the public and the Executive'.

In September 2001 Robin Cook visited the Scottish Parliament, indicating three areas in which he thought that innovations north of the border could inform proposals for the modernisation of the House of Commons:

- The strength of the Committee system;
- Family-friendly sitting hours; and
- The way the Parliament engages with the wider public.¹

Of increased importance, as pointed out by Peter Riddell of *The Times*, shortly after the publication of the Government's proposals for the second phase of Lords reform, is the role of Robin Cook and the Modernisation Committee in 'strengthening scrutiny through select committees,'² particularly in the light of recent questions surrounding the accountability of special advisers and the

¹ The Scottish Parliament, Parliamentary News Release, 'Presiding Officer Welcomes Westminster Interest in the Scottish Parliament', 10 September 2001.

² 'Lord Chancellor's deviousness could haunt new Labour,' Peter Riddell, *The Times*, 14 November 2001.

death of Cabinet Government. And indeed this is a point that Cook sees as being of vital importance to the rejuvenation of the Commons:

We will be looking at how we can strengthen the role of our select committees. The committee structures in the Scottish Parliament have a clearer and stronger lead role in areas such as legislation. Putting legislation to the Committee before it comes to its second reading has made sure there is a full, early examination of the Bills coming to the Scottish Parliament.³

The new leader of the House of Lords, the former Attorney General Lord Williams of Mostyn, also visited Holyrood during September 2001 with a similar agenda to that of Robin Cook. Lord Williams has already set up a 'leader's group' in the House of Lords with the task of improving the working practices of the House to create a more efficient and effective second chamber and sees the Government's proposed reforms to the Lords as the 'opportunity to rethink and review our working practices.'⁴ (The Government's proposed second stage of Lords Reform is detailed below.)

1.2: DUAL-MANDATE MPS:

From the devolution point of view, the main change in the new Parliament following the 2001 general election was the disappearance of all the dual-mandate MPs except for those in Northern Ireland. A total of 17 dual-mandate MPs stood down at the election, choosing to focus on their work in the devolved administrations. Both the Scottish National Party (SNP) and Plaid Cymru (PC) had faced some criticism that post-devolution they would be fielding their B-team at Westminster (although the presence of the former SNP leader Alex Salmond at Westminster suggests otherwise). For the main political parties the search has been in reverse; Labour, the Conservatives and

³ 'Cook tour provides ideas for Commons reform', *The Times*, 11 September 2001.

⁴ The Scottish Parliament, News Release, 'Lords Leader looks to Scottish Parliament for Modernisation Ideas,' 10 September 2001.

Liberal Democrats have all had to seek out new political talent to lead their parties at the devolved level.

Salmond remains the only MP at Westminster with first-hand experience of devolution to Scotland. Alun Michael, former First Secretary of the National Assembly for Wales, is now a junior minister in Department of the Environment Food and Rural Affairs (DEFRA).

Westminster MPs with experience of the devolved institutions

Formerly member of the Scottish Parliament:		
Alex Salmond	SNP	Banff and Buchan
Formerly Member of the National Assembly for Wales:		
Alun Michael	Labour	Cardiff South and Penarth

Dual-Mandate MPs in the 1997-2001 Parliament who did not contest their seats in 2001

Members of the Scottish Parliament:		
Malcolm Chisholm	Labour	Edinburgh North and Leith
Roseanna Cunningham	SNP	Perth
Margaret Ewing	SNP	Moray
Sam Galbraith	Labour	Strathkelvin and Bearsden
Donald Gorrie	Liberal Democrat	Edinburgh West
John Home Robertson	Labour	East Lothian
John McAllion	Labour	Dundee East
Henry McLeish	Labour	Fife Central
Alasdair Morgan	SNP	Upper Galloway and Nithsdale
John Swinney	SNP	Tayside North
Jim Wallace	Liberal Democrat	Orkney and Shetland
Andrew Welsh	SNP	Angus

Members of the National Assembly for Wales:

Ron Davies	Labour	Caerphilly
Ieuan Wyn Jones	Plaid Cymru	Ynys Môn
John Marek	Labour	Wrexham
Rhodri Morgan	Labour	Cardiff West
Dafydd Wigley	Plaid Cymru	Caernarfon

Member of the Northern Ireland Assembly:

John Taylor	Ulster Unionist	Strangford
-------------	-----------------	------------

The loss of these dual-mandate MPs has removed one of the informal links between Westminster and the Scottish Parliament and National Assembly for Wales. Although how effective the links were has been called into question – at least one MP has commented on the fact that dual-mandate MPs from Scotland, Wales or Northern Ireland rarely attended Westminster sittings.⁵ Five members of the House of Lords also hold seats in the devolved bodies in Wales, Scotland and Northern Ireland.⁶

Northern Ireland is a big exception. A majority of MPs from Northern Ireland are dual-mandate MPs, holding their Westminster seats in conjunction with seats in the Northern Ireland Assembly.

MPs holding seats in the Northern Ireland Assembly, July 2001

Gerry Adams	Sinn Fein	Belfast West
Roy Beggs	Ulster Unionist	East Antrim
Gregory Campbell	DUP	East Londonderry
Nigel Dodds	DUP	Belfast North

⁵ Interview with Westminster MP, March 2001.

⁶ Lord Selkirk of Douglas (James Douglas-Hamilton), Lord Steel of Aikwood (Sir David Steel) and Lord Watson of Invergowrie in the Scottish Parliament; Lord Elis-Thomas in the National Assembly for Wales; and Lord Alderdice in the Northern Ireland Assembly. Lords Steel, Elis-Thomas and Alderdice are all presiding officers of their respective assemblies.

Pat Doherty	Sinn Fein	West Tyrone
Michelle Gildernew	Sinn Fein	Fermanagh and South Tyrone
Seamus Mallon	SDLP	Newry and Armagh
Martin McGuinness	Sinn Fein	Mid Ulster
Rev Ian Paisley	DUP	North Antrim
Iris Robinson	DUP	Strangford
Peter Robinson	DUP	Belfast East
David Trimble	Ulster Unionist	Upper Bann

Twelve of the eighteen MPs from Northern Ireland following the 2001 UK general election also hold seats in the Northern Ireland Assembly. John Hume, the Social Democratic and Labour Party (SDLP) Member of Parliament for Foyle, resigned his seat in the Northern Ireland Assembly on 1 December 2000.

1.3: SNP-PLAID CYMRU PARLIAMENTARY GROUP:

Another change in the new Parliament is that, after discussions with the Speaker, the SNP and PC announced that they had formed a joint group in order to achieve more speaking rights in the House and better representation on Select Committees.⁷ The group, now comprising nine MPs, will be the fourth largest in the Commons, above the Ulster Unionists.

When membership of the Parliamentary Select Committees was announced on July 16 2001, the decision to form a Parliamentary group did not seem to have paid dividends with the Nationalist Parties being awarded five seats between them, the same number as they had held at the beginning of the previous Parliament in 1997. In July 2001 the newly elected Scottish National Party MP Michael Weir was awarded a seat on the Scottish Affairs Committee, while Alasdair Morgan gained a seat on the Trade and Industry Select Committee. Plaid Cymru MP Adam Price gained a seat on the Welsh

⁷ 'Welsh link up with the Scots', *The Times*, 28 June 2001.

Affairs Committee and Simon Thomas will sit on both the Environmental Audit Committee and Commons Select Committee on Catering.⁸

1.4: THE TERRITORIAL SELECT COMMITTEES:

1.4.1: The Scottish Affairs Committee:

On 17 October 2001 it was announced that Irene Adams, Labour MP for Paisley North, had been appointed as chair of the committee. On 31 October the Scottish Affairs Committee announced that it would begin work on a new inquiry focusing on Post-Devolution News and Current Affairs Broadcasting in Scotland.

On 7 November 2001 the Committee took evidence on the 2001 Departmental Report of the Scotland Office from Secretary of State for Scotland, Helen Liddell, her Minister of State George Foulkes, the Advocate General for Scotland, Dr Lynda Clark QC and the head of the Scotland Office Mr Ian Gordon (the evidence will be reported in the next monitoring report as it is, at the time of writing, only available in uncorrected form).⁹

1.4.2: The Welsh Affairs Committee:

On the 24 October 2001 the Welsh Affairs Committee announced its detailed terms of reference for its forthcoming inquiry into transport in Wales. The specific issues to be addressed will include:

- An integrated transport policy for Wales (including the interrelationship between the UK Government and National Assembly for Wales in developing such a policy);
- Railways in Wales; and

⁸ In 1997 the SNP and PC held five seats between them on the Scottish and Welsh Affairs Committees, the Trade and Industry Committee, the Environmental Audit Committee and the European Legislation Committee.

⁹ Further details of the work of the Scottish Affairs Committee can be found at:
<http://www.parliament.uk/commons/selcom/scothome.htm>

- Objective 1 funding for transport projects.¹⁰

The Government and National Assembly's responses to the Welsh Affairs Committee's Report on *Wales in the World* (as reported in the May 2001 monitoring report) were published on 24 October and 7 November 2001 respectively.

The Welsh Affairs Committee took evidence from the Secretary of State, Paul Murphy MP, and the Head of Department, Alison Jackson, on 29 October 2001. The topics under discussion included the Wales Office Departmental Report 2001 (the evidence will be reported on in the next monitoring report as it is, at the time of writing, only available in uncorrected form).¹¹

1.4.3: The Northern Ireland Affairs Committee:

The Northern Ireland Affairs Committee has announced that it will conduct two new inquiries. The first, announced on 18 October 2001, concerns the proposed introduction of an aggregate tax in Northern Ireland and has the following terms of reference:

To inquire into the special effects which the introduction of an aggregate tax on the United Kingdom would have on the building and building supplies industry in Northern Ireland due to its land border with the Republic of Ireland, where there is no such tax; and to report with recommendations.¹²

The second, on the financing of terrorism in Northern Ireland, will address the following issues:

¹⁰ For further details see: Welsh Affairs Committee, Press Notice No. 4 of Session 2001-02, 24 October 2001.

¹¹ Further details of the work of the Welsh Affairs Committee can be found at: <http://www.parliament.uk/commons/selcom/welhome.htm>

¹² Northern Ireland Affairs Committee, Press Notice No. 3 of Session 2001-02, 18 October 2001.

To inquire into the financing of terrorist and paramilitary organisations in Northern Ireland; the sources of such finance and methods of distribution; and the measures being taken to interrupt and reduce the flow; and to report with recommendations.¹³

1.5: THE GRAND COMMITTEES:

Neither of the territorial Grand Committees, nor the (English) Standing Committee on Regional Affairs, have yet met during the new Parliament.

¹³ Northern Ireland Affairs Committee, Press Notice No. 4 of Session 2001-02, 24 October 2001. Further details of the work of the Northern Ireland Affairs Committee can be found at: <http://www.parliament.uk/commons/selcom/niahome.htm>

2: HOUSE OF LORDS

2.1: PROPOSALS FOR REFORM:

Prior to the publication of the White Paper on the second stage of reform of the House of Lords reports suggested that the Government's plans envisaged Members of the Scottish Parliament sitting in the upper house. A report in the Scotsman quoted a government insider as saying:

There were two options being considered. One was to elect regional representatives to serve in a reformed House of Lords and the other was to allow representatives from the devolved assemblies to sit in the Lords. The first option was seen as impractical and ministers are now considering the second option very seriously.¹⁴

According to the same newspaper the following day MSPs were 'cautious' in welcoming the suggested proposals.¹⁵ Simultaneously the suggestions were being denied by Government sources in Whitehall who claimed that the Government intended to follow the report of the Wakeham Commission.¹⁶

2.2: REPRESENTING THE NATIONS AND REGIONS:

The Senior Law Lord, Lord Bingham, observed in October 2001 that:

While members of the House of Lords are drawn from all parts of the United Kingdom, the House is unusual in its lack of any formal representation of the constituent territories of the nation. The United States Senate, giving equal representation to Wyoming with under half a million inhabitants and California with nearly 30 million is perhaps the classic example of territorial representation. Here, with disappearance of Scottish representative peers, territorial representation may even be said to have diminished.¹⁷

Indeed in January 2000 the Royal Commission on Reform of the House of Lords chaired by Lord Wakeham had recommended that the upper house

¹⁴ 'MSPs to sit in House of Lords,' *The Scotsman*, 15 October 2001.

¹⁵ 'MSPs lukewarm on plans to join reformed Lords,' *The Scotsman*, 16 October 2001.

¹⁶ 'Seats in Lords for MSPs ruled out,' *The Times*, 16 October 2001.

should contain an elected minority to represent the nations and regions of the UK. The report suggested that:

The reformed second chamber should be so constructed that it could play a valuable role in relation to the nations and regions of the United Kingdom whatever pattern of devolution and decentralisation may emerge in the future.¹⁸

Based on a chamber comprising 550 members the Wakeham report proposed three models:

Model A:

The regional members should be selected on the same day as a general election, using a system which we have called ‘complementary’ voting. Under this system the votes cast for the parties’ general election candidates would be accumulated at regional level and the parties would secure a number of regional members for each region proportional to their share of the vote in that region.

There would be 65 regional members who would be selected on a ‘staggered’ basis, with the ‘complementary’ voting system being applied to one third of the twelve nations and regions at each general election.

Model B

There should be a total of 87 regional members, elected by thirds at the same time as each European Parliamentary election (with one-third of the nations and regions voting for regional members at each European election). The system of election should be the same as that used for electing United Kingdom MEPs, although a majority of those supporting this model would prefer the ‘partially open’ list system of proportional representation (PR).

¹⁷ Lord Bingham, ‘The Evolving Constitution,’ 4 October 2001.

¹⁸ Royal Commission on Reform of the House of Lords, *A House for the Future*, (January 2000) Cm 5291, pp.59, 183 (at paragraphs 6.5 and recommendation 25 respectively).

Model C

The regional members should be directly elected on a regional basis, using a form of 'partially open' list PR. Sixty-five regional members would be elected at the same time as each European Parliament election and serve for three terms, giving a total of 195 regional members in the reformed second chamber.¹⁹

2.3: THE HOUSE OF LORDS – COMPLETING THE REFORM:

The long-awaited White Paper on the second stage of reform of the House of Lords was published on 7 November 2001. *The House of Lords – Completing the Reform*²⁰ proposed that in an upper house consisting of 600 members 120 (20%) should be elected, loosely following the Wakeham Commission's Model B. Wakeham's model A was seen as offering only a token elected element, while Model C apparently offered 'more than ... required to ensure effective representation of the nations and regions.'²¹

On the basis that the Government's proposed upper house would be slightly larger than that proposed by the Wakeham Commission (600 rather than 550 members) the White Paper proposed an elected membership of 120, adding that it would be beneficial to the balance of the House if the elected and independently appointed memberships were equal.²²

On the issue of constituencies the White Paper suggested that 'the regional members should be identified through elections in multi-member constituencies, identical to those for the European Parliament.'²³ European

¹⁹ Royal Commission on Reform of the House of Lords, *A House for the Future* (January 2000), Cm 4534.

²⁰ *The House of Lords – Completing the Reform* (London: The Stationery Office, November 2001), Cm 5291.

²¹ *Ibid*, paragraph 45.

²² Wakeham had proposed an appointed membership of 20%.

²³ *The House of Lords – Completing the Reform*, paragraph 48.

Parliamentary constituencies are the same as the nations and administrative regions of the UK and are, in the words of the White Paper, 'suitable' for elections to a second chamber designed to represent the nations and regions. The method of election would be on the basis of regional lists, the fact that this method is proportional again makes it 'suitable' for elections to a second chamber (although quite why this is so is not explained).²⁴

On the subject of the timing of the proposed elections to the House of Lords the White Paper went against Wakeham's suggestion of combining them with the European Parliamentary elections, but instead favoured holding them at the same time as the general election to ensure high turn-out, adding:

It would mean that the issues taken into account were national or local ones, since people would be voting at the same time for both Houses of Parliament, consistent with the role that both Houses play in considering and giving their consent to the Government's programme and calling it to account.

2.4: THE DEBATES ON THE WHITE PAPER ON LORDS REFORM:

The White Paper was introduced in the House of Lords by the Leader of the House and former Attorney-General, Lord Williams of Mostyn. Responding to the proposals for the Conservative Party, Lord Strathclyde began by criticising almost every aspect of the Government's proposals and concluded his diatribe by saying:

These are shoddy proposals that were cooked up in the Cabinet Office over a decanter of port and are fit only to get a divided Cabinet past the end of today. The Government should be ashamed of this document. It demeans this House, it demeans Parliament, and, worst of all, it demeans the Government themselves.²⁵

²⁴ *The House of Lords – Completing the Reform*, paragraph 48.

²⁵ House of Lords Debates, 7 November 2001, cols. 209-212.

Baroness Williams of Crosby, the newly elected Leader of the Liberal Democrats in the House of Lords, echoed the general concerns of the Conservative leader, and added her own over the small elected element of the House of Lords as proposed by the White Paper. Detailed discussion of the document was rather limited as the White Paper had been made available to only the Leaders of the parties prior to the debate.

The White Paper was introduced in the Commons on 7 November 2001 by the Leader of the House, Robin Cook, and was immediately criticised by the opposition member Eric Forth (Bromley and Chislehurst), who suggested that the Conservative party was not satisfied by the elected element proposed by the Government. The irony of the criticism was not lost on Mr Cook:

In 18 years, the Conservatives never once proposed that there should be a single elected Member of the House of Lords and never once made a single proposal for reform. Now we are invited to believe that they want a more democratic House of Lords than that proposed.²⁶

Mr Paul Tyler, the Liberal Democrat member for North Cornwall, chose to focus on the Government's 1997 manifesto commitment to make the House of Lords more 'democratic and representative':

Does the Hon. Gentleman also recognise that an element of indirect election from the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly, the Greater London Authority and the English regional authorities, which we hope will be created soon, would ensure greater democratic legitimacy?²⁷

Mr Cook responded that it would be open to the devolved administrations to respond to the consultation, and were there sufficient demand for such a step it would be taken into account during the formulation of the Government's response. He went on to say that the Liberal Democrat aim of a wholly elected House of Lords was flawed in that it would undermine the current

²⁶ House of Commons Debates, 7 November 2001, cols. 241 and 244.

²⁷ *Ibid.*, col. 245.

relationship between the two Houses of Parliament based on the primacy of the House of Commons (a point emphasised by the terms of reference of the Wakeham Commission and reiterated by the Prime Minister in his foreword to the White Paper).²⁸ And yet there exists significant support for a second chamber either largely or wholly comprising elected members - an early day motion tabled by Fiona Mactaggart on 15 October 2001 had, by 20 November, gained the support of 165 MPs.²⁹

Peter Mandelson, the former Secretary of State for Northern Ireland, entered the debate with two questions, the latter of which might have been better asked in 1997 of the Labour administration's entire constitutional reform agenda:

Will the Government think imaginatively about ways of accommodating within the arrangements that they make for regional government in England the representation of people from those regional bodies in a newly composed House of Lords? Does he agree that we need creativity and more joined-up thinking carrying through constitutional reform if we are to achieve the new politics and the reinvigoration of our political institutions that so many of us want?³⁰

In the Commons Robin Cook repeatedly stated that, following consultation, work on the second stage of Lords reform would be by way of consensus.³¹ It

²⁸ *Ibid*, col. 246. See also the Prime Minister's comments in the forward to the White Paper (Cm 5291): 'The Royal Commission rightly set the issue of *membership* in the context of *functions*. It argued that Parliament does not require, and would be ill served by, a new second chamber seeking to challenge the role of the House of Commons as the pre-eminent voice and representative of the people.'

²⁹ The EDM was worded in the following terms: 'That this House supports the democratic principle that any revised Second Chamber of Parliament should be wholly or substantially elected.'

³⁰ House of Commons Debates, 7 November 2001, col. 249.

³¹ The consultation period ends in January 2002.

would appear that, with the Liberal Democrat aspirations to a wholly elected chamber and the ‘Guy Fawkes option’ as advocated by Dennis Skinner, the only consensus that exists is that the number of elected members proposed by the White Paper falls well short of expectations. In the words of Lord Alexander of Weedon:

Lord Richard QC, a former Leader of the House, has cogently argued that to have any impact there should be at least half elected members. I agree, and would like to see them come from the regions of the entire UK. In a House of some seven hundred members, of whom three to four hundred attend regularly, it is hard to see the proposed small number of elected members making any difference at all.³²

And as a senior member of the Wakeham Commission, Lord Hurd of Westwell, suggested during the short Lords debate in which the White Paper was introduced, if the majority of ‘MLs’ are political appointees then consensus will prove hard to come by:

...I have the feeling that no Bill will pass through the House because the parties are so deeply divided on the question of composition. We shall be left to proceed more or less as we are, and imperfect as we are, for several years to come.³³

2.5: RESPONSES IN THE PRESS:

Perhaps the most damaging of the many criticisms of the White Paper was that from Lord Wakeham, author of the report on which the Government’s proposals were meant to be based. On the BBC’s *Breakfast with Frost* programme the former Conservative cabinet minister said:

First of all I wanted a wholly independent appointments commission. I wanted an end of Tony’s cronies or any politician’s cronies; I wanted

³² Lord Alexander of Weedon QC, The Denning Society Lecture, ‘The Constitution We Deserve?’

³³ House of Lords Debates, 7 November 2001, col. 221.

people appointed on an independent basis. And they seem to have gone soft on that.

Secondly, I wanted the elected element in the House of Lords to be there for a long time rather than a short time because I did not want them to be rivals of the House of Commons. The House of Lords has got to be a revising chamber and separate from the House of Commons. I think their idea of less than 15 years, something like 10 years or even 5 years would be very damaging.

And the third thing is that we proposed safeguards in the House of Lords in our proposals which would have stopped any government changing our constitution about dates of elections, things of that sort.³⁴

Lord Wakeham was not alone in voicing his concerns over the White Paper, with reports throughout the press echoing his disquiet.³⁵

2.6: THE HOUSE OF LORDS COMMITTEE ON THE CONSTITUTION:

The House of Lords Select Committee on the Constitution is in the process of taking evidence for its second inquiry titled, 'Changing the Constitution: The Process of Constitutional Change.' The Committee is focusing on the preparation of constitutional legislation, the involvement of various Government ministers and departments and the co-ordination of the process across Whitehall, especially in the light of the changes to the Whitehall machinery dealing with constitutional matters in the wake of the 2001 general election.

Some specific issues will be addressed during the Committee's inquiry, including:

³⁴ Quoted in 'Blair's adviser on Lords launches attack on reforms,' *The Independent*, 12 November 2001.

³⁵ See for example: 'Building a house of cards,' *Financial Times*, 8 November 2001; 'A charter for patronage: Labour bottles out on real Lords reform', *The Guardian*, 8 November 2001; 'This timid tinkering with the House fails to increase its legitimacy,' *The Independent*, 8 November 2001.

- Have the changes made in Whitehall [following the 2001 general election and detailed in the August 2001 Devolution and the Centre Monitoring Report] settled down?
- Are those who need to contact Government on constitutional matters easily able to do so?
- What is the process of ensuring collective accountability and joined-up government on constitutional matters?
- What are the parliamentary mechanisms for the scrutiny of constitutional bills, and are they effective?
- What lessons can be learnt from the practice of other countries?

The Committee heard evidence from the Leader of the House of Lords, Lord Williams of Mostyn, and the Leader of the House of Commons, Robin Cook MP, on 14 November 2001, and from Professor Robert Hazell, Director of the Constitution Unit, and Peter Hennessy, Professor of Contemporary History, QMW, on 21 November 2001.

The Committee's next inquiry, into Institutional Relations in the Devolved UK, will begin in 2002.

2.7: HOUSE OF LORDS DEBATE ON THE BARNETT FORMULA:

Following his comments in the press about the outdated nature of the Barnett Formula (see the February 2001 Devolution and the Centre Monitoring Report), its creator, Lord Barnett opened a debate on the case to review the formula in the House of Lords on 7 November 2001. The Labour peer, Lord Morgan, reflected on how the formula demonstrates the failure of the centre to embrace devolution:

...the Barnett formula illustrates how centralised is our system – how it works contrary to devolution. It is based on grants from the Treasury and power at the centre. It illustrates why the United Kingdom has

been slow to devolve, and how devolution is still not observed in the spirit, although it is in the letter.³⁶

Baroness Carnegy of Lour lamented the fact that the Government had not revisited the Barnett formula prior to embarking on the road to devolution, and added that policy divergence and the impact of Westminster decisions on the devolved administrations will only serve to heighten tensions between the centre and the nations of the UK.³⁷

However, the formula was not criticised from all sides, with a number of Lords feeling that despite the weaknesses of the Barnett arrangements, it was too early in the process of devolution to put in effect such a radical change as altering the system of finance. The Earl of Mar and Kellie suggested:

The ongoing evolution of that union state has led us to devolution, a finely balanced package of subordinated autonomy. The devolution scheme represents one of four options for Scotland, the others being a return to direct rule, a federal constitution and independence from the United Kingdom. The devolution package should not be tampered with. Its funding by grant from this Union Parliament must be maintained and must be generous. Otherwise, demand will evolve for federalism or independence.³⁸

³⁶ House of Lords Debates, 7 November 2001, col. 232.

³⁷ House of Lords Debates, 7 November 2001, col. 250.

³⁸ House of Lords Debates, 7 November 2001, col. 252.

Devolution and Whitehall

3.1: LIDDELL ANNOUNCES CONSULTATION ON NUMBER OF MSPS:

In response to an oral question from John Robertson MP, the Secretary of State for Scotland announced that the Government would conduct a consultation exercise into the number of MSPs sitting in the Scottish Parliament.³⁹ Section 86 of the Scotland Act requires that the Boundary Commission determine the level of Scottish representation at Westminster by applying the electoral quota for England (which would result in the reduction of Scottish seats at Westminster from 72 to around 58). Such a review would result in changes to the Scottish Parliament's constituencies as the Scotland Act provides that these should be the same as those at Westminster (although with separate constituencies for Orkney and Shetland).⁴⁰ The corresponding reduction in the size of the Scottish Parliament would see a reduction from 129 MSPs to around 100 MSPs. The Parliamentary Boundary Commission for Scotland is currently conducting a review of the Westminster constituencies, and is expected to announce its provisional recommendations in early 2002 (with a final report to be published between December 2002 and December 2006). The previous Secretary of State for Scotland, John Reid, had indicated that the Government may not enforce the corresponding reduction to the number of seats in the Scottish Parliament if a good case could be made in favour of maintaining the number of 129 MSPs.⁴¹

Announcing the forthcoming consultation exercise Helen Liddell stated:

...the Scotland Act is designed to produce a reduction in the number of MSPs in the 2007 election and thereafter, following the anticipated

³⁹ House of Commons Debates, 6 November 2001, col. 91.

⁴⁰ Scotland Act 1998, Schedule 1.

⁴¹ See M. Russell and R. Hazell, 'Devolution and Westminster: Tentative steps towards a more Federal Parliament', in R. Hazell (ed.) *The State and the Nations: The First Year of Devolution in the United Kingdom*, p. 201, n. 33.

reduction in the number of MPs. The Government have made it clear that we would take into account the experience of the first years of the Scottish Parliament's operation and be pragmatic in our response to that.⁴²

The consultation document will take into account the following points:

1. the demands of the Scottish Parliament Committee system and the consequential workload of MSPs;
2. the relationship as constituency representatives between MPs, MSPs and councillors and issues which might arise from co-terminus boundaries;
3. the implications for the structure and operation of political parties if boundaries cease to be co-terminus;
4. the implications for local authorities and electoral administrations in relation to the conduct of the elections.⁴³

But discussion of the reduction of the number of MSPs has already identified concerns about the capabilities of the Committee and consultation work of the Scottish Parliament following such a reduction, a point brought up in the Commons by John Thurso, MP for Caithness, Sutherland and Easter Ross.⁴⁴ Indeed, opposition to such a reduction from those in Scotland manifested itself during August 2001 when Iain MacWhirter of *The Herald* suggested that the UK Government would lose any dispute over the number of MSPs at Holyrood:

The constitution may ultimately be a power reserved for Westminster. But when it comes to the crunch, Number 10 will not risk a

⁴² House of Commons Debates, 6 November 2001, col. 91.

⁴³ Scotland Office Press Release, 'Liddell announces consultation on size of Scottish Parliament,' 6 November 2001.

⁴⁴ Ibid, col. 92. See also 'Liddell launches review of MSP numbers', *The Herald*, 7 November 2001.

constitutional crisis merely to placate Labour's piqued Scottish contingent at Westminster.⁴⁵

3.2: SUSPENSION OF THE LABOUR/LIBERAL DEMOCRAT JOINT CONSULTATIVE COMMITTEE:

It was announced on 20 September 2001 that the Labour/Liberal Democrat Joint Consultative Committee was to be suspended. A statement issued by Charles Kennedy and Tony Blair indicated that 'the Committee has done useful work and it remains available to resume its work if further constitutional items become ready for discussion.'⁴⁶ Reports indicated that the Government's reluctance to hold a referendum on proportional representation for Westminster elections and Mr Kennedy's wish to increase the standing of the Liberal Democrats as an opposition party had led to the formal severing of links.⁴⁷ The Committee, set up by the former Liberal Democrats leader Paddy Ashdown and Blair in 1997, with the terms of reference 'to consider issues of joint interest to the Government and the Liberal Democratic Party,' has met only twice since Mr Kennedy took over as leader of the Liberal Democrats in 1999.

3.3: LEADERSHIP OF THE SCOTTISH LABOUR PARTY:

Press reports in Scotland have indicated dissatisfaction at perceived interference from London in the process to succeed Henry McLeish as leader of the Scottish Labour Party.⁴⁸ The Chancellor, Gordon Brown, has come under scrutiny for being one of McLeish's most vocal supporters in the UK Government and for allegedly being at the centre of a 'Stop Jack' campaign in an endeavour to prevent Jack McConnell replacing the recently resigned First

⁴⁵ 'Labour will lose any fight to cut MSPs down to size', *The Herald*, 29 August 2001.

⁴⁶ 'Lib-Lab committee disbanded,' <http://news.bbc.co.uk>, 20 September 2001.

⁴⁷ 'Kennedy cuts Lib Dem links with Labour Party,' *The Independent*, 12 September 2001; 'Kennedy to end Labour link after PR disappointment,' *The Times*, 12 September 2001.

⁴⁸ See for example: 'Why Brown must loosen his iron grip on Scotland,' *The Herald*, 9 November 2001.

Minister.⁴⁹ Senior Labour figures based in London have distanced themselves from such allegations, notably Robin Cook and Helen Liddell, the latter going as far as saying that she would not vote, being in the unique position as Scottish Secretary of having to work with the winner.

⁴⁹ 'Chancellor mounts 'stop Jack' campaign,' *The Herald*, 9 November 2001.

Intergovernmental Relations

4.1: MEETINGS OF THE JOINT MINISTERIAL COMMITTEE ON DEVOLUTION:

The first meetings of the Joint Ministerial Committee on Devolution since 1 March 2001 (see the May 2001 monitoring report) were held in October 2001. A meeting of the JMC (Health) took place in London under the Chairmanship of the Secretary of State for Health, Alan Milburn MP. There was no press coverage of the event and no communiqué was issued. More significant however was the second annual plenary meeting of the JMC in Cardiff on 30 October (the first had taken place in September 2000 and was reported in the November 2000 monitoring report).

The second plenary JMC meeting reviewed the progress of devolution over the past year and was attended by the Prime Minister, the Deputy Prime Minister, the three heads of the devolved assemblies and the three territorial Secretaries of State. A joint press release was issued under the banner: 'Devolution is delivering.' The Prime Minister commented that devolution is now a 'settled part of our political landscape', and that, in partnership with the UK government, 'each of the devolved bodies has been able to meet the particular needs of the people they serve in a democratic and accountable way.' It is of note that a revised version of the Memorandum of Understanding, which sets out the principles of co-operation between administrations and outlines the terms under which the JMC will meet, was agreed during the course of the meeting.

The press release summarised the main findings of the meeting as:

- For the most part, communication and consultation between the UK Government and the devolved administrations had worked well. Close relations had been developed on matters of common interest, and it had been possible to take effective joint action where necessary. The

importance of close working relationships had been reaffirmed through events in recent weeks. The devolved administrations have a vital role in terms of emergency planning, health and in the case of Scotland, police and justice matters and there has been extremely close co-operation between the administrations in these areas;

- However, more remained to be done to improve understanding and spread best practice. Recognising each other's roles and interests, and the legitimate differences between them, went a long way towards building and maintaining close and mutually beneficial relationships;
- Ministers themselves had a key part to play in this. There were a number of effective mechanisms for inter-Ministerial liaison, both inside and outside the JMC framework. But personal and bilateral contacts were at least as important. Experience demonstrated that these could and should transcend party barriers.⁵⁰

The meeting also allowed time for discussion of the Government's proposed White Paper on English regional governance. Each of the devolved administrations indicated that they supported the Government's plans for extending devolution to the English regions where the demand existed.

The meeting also gave Prime Minister Blair an opportunity to praise the development of devolution in Wales. The Prime Minister highlighted the achievements of the National Assembly, making specific reference to successes regarding primary school education, record investment in health services, confident handling of the foot and mouth outbreak and the fact that half of the Assembly and a majority of the National Assembly's cabinet are

⁵⁰ Joint Ministerial Committee, 30 October 2001, Joint Press Statement, 'Devolution is Delivering.'

women – ‘a level that puts virtually every other parliament in the world to shame.’⁵¹

4.2: REPRESENTING SCOTLAND OVERSEAS:

Press reports have indicated a growing tension between the Helen Liddell and Wendy Alexander, the Scottish Executive’s Enterprise Minister. In a report in *The Scotsman* titled ‘Liddell lays claim to ambassador role,’⁵² it was alleged that during a Scottish Affairs Committee evidence session on 7 November Helen Liddell ‘delivered another public put-down to Wendy Alexander...when she repeated her ambition of being Scotland’s sole ambassador abroad.’ Indeed the Secretary of State for Scotland has spoken recently on the promotion of Scotland overseas, and attended an event in New York in October 2001 where she discussed her desire to ‘strengthen existing cultural ties, boost Scottish tourism and create business opportunities.’⁵³ However, Alexander was, apparently, ‘privately furious that the Scottish Secretary had awarded herself such a plum role in a move that was interpreted as a slap-down to [her] ambitions.’⁵⁴

⁵¹ Prime Minister’s Speech on the Conflict in Afghanistan, 30 October 2001 (available at <http://www.pm.gov.uk>).

⁵² 8 November 2001.

⁵³ Scotland Office Press Notice, ‘Scotland and America – Strengthening the Bond,’ 19 October 2001.

⁵⁴ *The Scotsman*, 8 November 2001.

Devolution and the Courts

5.1: ANDERSON, REID AND DOHERTY V THE SCOTTISH MINISTERS AND THE ADVOCATE GENERAL FOR SCOTLAND:

Judgment in the case of *Anderson, Reid and Doherty v The Scottish Ministers and the Advocate General for Scotland* was handed down by the Judicial Committee of the Privy Council on 15 October 2001. The case raised the issue of whether the first Act passed by the Scottish Parliament (the Mental Health (Public Safety and Appeals) (Scotland) Act 1999) was within the competence of the Scottish Parliament and was the first heard under s.29 of the Scotland Act 1998. As Lord Hope observed, ‘the Court is being asked for the first time to strike down a provision which the Parliament has enacted.’⁵⁵ The appeal, by three mental health patients, was based on the claim that the Act was in breach of Article 5 of the ECHR. It was dismissed by the Judicial Committee. The case is notable for being the first time that the Judicial Committee has acted as a proto-constitutional court under the powers of the devolution Acts of 1998.

5.2: MILLS AND COCHRANE V HER MAJESTY’S ADVOCATE AND HER MAJESTY’S ADVOCATE FOR SCOTLAND:

To fill the void created by the transfer of the Lord Advocate and Solicitor General to the Scottish Executive, the Scotland Act 1998 created the post of Advocate General for Scotland to advise the UK government on matters of Scots law. The post’s first incumbent (and only one to date), is Dr Lynda Clark QC, MP for Edinburgh Pentlands. Under the Scotland Act the Advocate General also has various powers regarding proceedings involving ‘devolution issues’ as defined by Schedule 6 of the Act:

- The Advocate General may initiate proceedings for the determination of a ‘devolution issue’ under the Scotland Act (or the Government of Wales Act 1998) in the Scottish Courts;

⁵⁵ [2001] UKPC D5, at paragraph 3.

- Should a ‘devolution issue’ under either of the above Acts be raised in litigation in Scots courts, the Advocate General has the right to be notified and subsequently has the right to choose to become involved in the proceedings;
- Where the Advocate General has become a party to such a case, he or she may demand that the ‘devolution issue’ in question is referred to the Judicial Committee of the Privy Council for determination.
- In addition the Advocate General may refer a bill of the Scottish Parliament to the Judicial Committee for a ruling on the competence of the Parliament to pass such a bill.⁵⁶

In the case of *Mills and Cochran*⁵⁷ discussion over the interaction between the Scotland Act 1998 and the Human Rights Act 1998 raised the issue of whether an issue under s.6 of the Human Rights Act could be directly addressed by the court without notification of a ‘devolution issue’ having to be made in circumstances where the Lord Advocate is alleged to have acted incompatibly with the ECHR. The argument of the Advocate General was that a dispute over whether an act of the Lord Advocate is incompatible with Convention rights is necessarily a devolution issue under the terms of the Scotland Act, Schedule 6, paragraph 1(d) which states that devolution issues include:

...a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention Rights or with [European] community law.

The court, comprising the Lord Justice General, Lord Coulsfield and Lord Caplan, agreed, saying that if a court is asked to determine whether or not any act, or omission, on the part of the Lord Advocate is in breach of the Convention then a devolution issue is automatically raised (based on the Lord

⁵⁶ For a more detailed analysis of the role of the Advocate General see N. Burrows, *Devolution* (London: Sweet and Maxwell, 2000), especially pp 158-159; and also Scottish Affairs Committee Minutes of Evidence, 7 November 2001, questions 29-36.

⁵⁷ Judgment available at: <http://www.scotcourts.gov.uk>

Advocate being an officer of the Scottish Executive), as a result of which the Scotland Act requires that the case be brought to the attention of the Advocate General.

The Advocate General also submitted that the coming into force across the UK of the Human Rights Act did not create a new avenue through which such an issue could be raised without creating the requirement to notify the Advocate General.⁵⁸ The court again agreed, stating that it saw no reason why the coming into force of the Human Rights Act across the UK should alter provisions in the Scotland Act regarding the role of the Advocate General, adding:

There is also...force in the argument that the particular and detailed provisions dealing with devolution issues are part of the constitutional settlement embodied in the Scotland Act and that requirement should not therefore be avoided or circumvented.⁵⁹

Two interesting arguments against the position of the Advocate General were raised. The first was that under s.7 of the Human Rights Act 1998 there exists a right to 'directly' challenge any unlawful act which breaches the terms of the Convention and so the court is bound to take into account the provisions of the Convention (regardless of other domestic procedures). The second was that having Scots cases involving human rights issues automatically becoming devolution issues would allow the possibility of the Judicial Committee of the Privy Council becoming the final court of appeal for a wide range of Scots criminal law issues. It was in its response to this second suggestion that the court voiced the concerns of many Scots lawyers – namely that final appeals on a number of issues of Scots criminal law are now being heard in London, by the Judicial Committee of the Privy Council, by judges with little

⁵⁸ The provisions of the Human Rights Act had been in force in Scotland prior to October 2000 by virtue of the Scotland Act.

⁵⁹ *Mills and Cochrane*, at paragraph 20.

experience of Scots criminal law. The High Court of Justiciary carefully observed:

The Privy Council would be involved in any such question in its role as a constitutional court and would doubtless approach any issue on that basis only, without entering further than necessary into questions of substantive criminal law.⁶⁰

5.3: APPOINTMENT OF LORD RODGER OF EARLSFERRY

Lord Rodger of Earlsferry has been appointed to the House of Lords, following the retirement of Lord Clyde (as reported in the August 2001 monitoring report). Lord Rodger will sit as one of the two Scottish Law Lords. Lord Rodger held the positions of President of the Court of Session (the highest Scots court dealing with matters of civil law) and Lord Justice General of Scotland (the Senior Judge hearing Scots criminal cases) since 1996. The Lord Chancellor had earlier announced that the process of selection of the Scots Law Lords would involve consultation with the Secretary of State for Scotland, the Scottish Justice Minister, and the Lord President of the Court of Session.

Lord Rodger's replacement as Lord President of the Court of Session will be Lord Cullen, formerly Lord Justice Clerk. Lord Gill becomes Lord Justice Clerk. The appointments highlight what some see to be an unresolved issue in the devolution arrangements – that the UK Prime Minister retains control over the two most senior judicial posts in Scotland.⁶¹

5.4: THE EVOLVING CONSTITUTION:

In a lecture given by Lord Bingham at the Law Society on 4 October 2001 the Senior Law Lord reviewed the Blair Administration's programme of constitutional reform and offered his thoughts on three principles embodied

⁶⁰ *Ibid.*

⁶¹ For further details see: 'Two new men take the legal helm', *The Herald*, 14 November 2001.

in the changes made to the UK constitution since 1997: the devolutionary principle, the representative principle and the principle of judicial independence. For our purposes, the devolutionary principle is of most relevance (although some of Lord Bingham's thoughts on the representative principle are mentioned during the discussion of House of Lords reform above).

The devolutionary principle allows that:

...decisions affecting the life and activities of the citizen should generally speaking be made at the lowest level of government consistent with economy, convenience and the rational conduct of public affairs.

The devolutionary principle, as Lord Bingham observed, clearly provided the justification for the Scotland, Northern Ireland and Government of Wales Acts of 1998 (and the Greater London Authority Act 1999). Lord Bingham chose to focus most of his discussion of the devolutionary principle on England and the problems which devolution to Scotland, Wales and Northern Ireland poses for England. The Senior Law Lord reflected on the 'English Question,' the fact that 'there is an obvious lack of symmetry in an arrangement which prevents English MPs voting on a large range of matters devolved to Scotland, but permits Scottish MPs to vote on the same matters relating to England.' More importantly however, Lord Bingham discussed one of the more topical solutions to the democratic deficit that exists in England post-devolution, elected regional government, on which he offered three 'tentative' conclusions:

- (1) it appears that the level of interest in and enthusiasm for elected regional assemblies varies considerably from one region to another.
But
- (2) the somewhat artificial boundaries of the regions as currently drawn do not necessarily raise an insuperable objection. [...] Thus

(3) if there were to be effective devolution to the regions, a very wide range of choices would have to be made, not only concerning boundaries (although these would doubtless be the subject of controversy) but also and more importantly concerning powers, numbers, relations with existing organs of local government and, above all, the overriding questions of how regional administrations would be financed and what, if any, tax raising powers they would have.

Bibliography:

Alexander of Weedon, Lord, *The Constitution We Deserve?*, Denning Society Lecture given at Lincoln's Inn, 30 October 2001.

Bingham of Cornhill, Lord, *The Evolving Constitution*, Lecture given to JUSTICE, 4 October 2001.

Burrows, N., *Devolution* (London: Sweet and Maxwell, 2000).

Hazell, R. (ed.), *The State and the Nations: The First Year of Devolution in the United Kingdom* (Thorverton: Imprint Academic, 2000).

Lord Chancellor's Department, *The House of Lords – Completing the Reform* (November 2001), Cm 5291.

Royal Commission on the Reform of the House of Lords, *A House for the Future* (January 2000), Cm 4534.

Russell, M. and Hazell, R., *Commentary on the Wakeham Report on Reform of the House of Lords* (February 2000), London: Constitution Unit.