

Monitor 45

Constitution Unit Newsletter

June 2010

Election 2010: Test of the new Cabinet Manual

So, we have a hung Parliament and a Conservative/Liberal Democrat coalition government. The Constitution Unit has been planning for this moment for a long time. In 2002 we published Ben Seyd's *Coalition Government in Britain: Lessons from Overseas*. And last year we published *Making Minority Government Work: Hung Parliaments and the Challenges for Westminster and Whitehall*, with the Institute for Government. Both reports provide essential guidance for the months and years to come.

The 2009 report led to the Cabinet Office deciding to produce a new Cabinet Manual, and to publish before the election the key chapter on Elections and Government Formation. That made clear that the Queen has no discretion in deciding whom to appoint as Prime Minister. It is up to the parties first to work out who can command confidence in the new House of Commons, and the Queen then invites that person to form a government. That helped avert any press speculation that it might be up to the Queen to decide. The new guidance also made clear that in the meantime Gordon Brown remained in office as the incumbent Prime Minister. But – under a new convention proposed in our report – he led a caretaker government, which could not take decisions which might tie the hands of future governments.

The other new development was that the civil service supported the political parties in their negotiations, drawing on practice in Scotland and New Zealand. Small teams of civil servants were assigned to each of the parties, and could draw upon policy advice from senior officials all around Whitehall. Had the media and the markets given the negotiators more time, the coalition agreement could have been costed by Whitehall and subjected to some minimum feasibility testing. But the external pressure for an early announcement was intense, and the initial coalition agreement published on 12 May is an uncoded merger of the two manifestos. After asserting the overriding importance of reducing the deficit, it contains a list of policy commitments which involve or imply increased public spending.

The Cabinet Manual should also provide essential guidance on how to make the coalition arrangements work in day to day practice. Ben Seyd's report shows that this depends crucially on mutual trust and understanding, but also on agreed procedures for information sharing and consultation between the coalition partners. These include procedures for joint signing off on policy proposals; additional resources for the Deputy Prime Minister, who is central to such arrangements; the need to decentralise coalition coordination as much as possible, to avoid bottlenecks at the centre; formal and informal dispute resolution procedures; and a pool of trusted special advisers to help resolve coalition management issues.

Constitutional reform remains high on the agenda. Nick Clegg is in overall charge of political reforms, and will plan and introduce the legislation on electoral reform and fixed term parliaments and all the other constitutional changes. These political reforms with their minimal budgetary costs have a better chance of being implemented than other more expensive policies.

Top priority for the Liberal Democrats was electoral reform. Both Labour and Conservatives offered a referendum on AV. It is not a proportional system, and so a disappointment for the Lib Dems; but if set alongside a second chamber elected by PR, it could make a lot of sense.

David Cameron's Cabinet

Prime Minister – **David Cameron** (Con)
Deputy Prime Minister – **Nick Clegg** (Lib-Dem)
Chancellor – **George Osborne** (Con)
Foreign Secretary – **William Hague** (Con)
Home Secretary & Minister for Women and Equality – **Theresa May** (Con)
Defence Secretary – **Dr Liam Fox** (Con)
Lord Chancellor & Secretary of State for Justice – **Ken Clarke** (Con)
Leader of the Lords – **Lord Strathclyde** (Con)
Business Secretary – **Vince Cable** (Lib-Dem)
Health – **Andrew Lansley** (Con)
Education – **Michael Grove** (Con)
Work and Pensions Secretary – **Ian Duncan Smith** (Con)
Energy and Climate Change – **Chris Huhne** (Lib-Dem)
Environment – **Caroline Spelman** (Con)
Communities and Local Government – **Eric Pickles** (Con)
Culture, Olympics, Media & Sport – **Jeremy Hunt** (Con)
Chief Secretary to the Treasury – **Danny Alexander** (Lib-Dem)
Transport – **Phil Hammond** (Con)
International Development – **Andrew Mitchell** (Con)
Scottish Secretary – **Michael Moore** (Lib-Dem)
Welsh Secretary – **Cheryl Gillan** (Con)
Northern Ireland Secretary – **Owen Paterson** (Con)

Not full cabinet positions:

Attorney General – **Dominic Grieve** (Con)
Leader of the Commons – **Sir George Young** (Con)
Cabinet Office Minister – **Francis Maude** (Con)

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Prospects for reform

Issues of political and constitutional reform were central to the creation of the new government coalition, with the Liberal Democrats' commitment to electoral reform being particularly key. It was on this that Gordon Brown tried to coax the Lib Dems away from the Conservatives, but the Conservatives ultimately offered enough to strike a deal.

The coalition agreement published on 12 May included a sizeable section on "political reform". This obviously includes traces of both parties' manifestos, but also commitments found in neither. And some earlier commitments are notable by their absence.

The biggest news was on electoral and Lords reform. The Lib Dems wanted PR for the House of Commons and a PR-elected Lords. The Conservatives wanted to retain first past the post, and saw Lords reform as a lower priority. Ironically the compromise on the first of these issues was around the policy in Labour's manifesto: a referendum on AV for the House of Commons. This is not a proportional system, but would be likely to deliver more Lib Dem seats, and would enhance voter choice. The agreement is fragile, and allows the Conservatives to campaign against a change if and when a referendum is held. Its success may therefore depend to some extent on whether Labour politicians defend the policy. Otherwise the Lib Dems could look very isolated, and a referendum be painted a costly waste of time. Both parties are also committed to a smaller House of Commons, but will face concerted resistance from Labour on this.

On the Lords the Conservatives have conceded PR, which they didn't previously want. The prospects for this reform still look difficult (see Parliament section below). But the combination of an AV-elected House of Commons and a PR second chamber, despite being the outcome of inter-party fudge, could make a lot of sense (as the Unit's Meg Russell pointed out in the Guardian on 10 May).

The highest profile issue since the coalition deal has been the proposal for fixed term parliaments, cemented by a requirement for 55% of MPs to vote for a dissolution. This is a real concession by the Conservatives, meaning Prime Minister Cameron could not call an early election without support beyond his own party. But it has caused much confusion and concern, perhaps due to hasty decision-making and insufficiently clear explanation at the start. It is now confirmed that the 50% threshold for a vote of no confidence would remain. But questions will continue to be asked, and the legislation may face a bumpy ride. In considering it MPs might ask whether fixed terms of four years rather than five would be a better norm.

Other issues in the coalition agreement include implementing the Wright Committee reforms 'in full' (see Parliament below), the power of recall over MPs 'found to have engaged in serious wrongdoing', measures against electoral fraud, and tightening up on lobbying. More controversial will be proposals to reform party funding rules, which will be resisted by Labour if this threatens their reliance on trade union donations.

On devolution, the coalition promises to implement the Calman commission proposals in Scotland, and to facilitate a referendum on further devolution in Wales. They also promise a commission on the West Lothian question. This falls well short of the Conservatives' earlier commitment to enforce 'English votes on English laws' in the House of Commons. The commission will no doubt find that there are no easy solutions. On Europe, the Conservative proposal for a Sovereignty Bill has been modified in the agreement to examining

the case for such a bill. But the commitment to legislate to require any future EU Treaty that transferred competences to be subject to a referendum still stands. Here it is the Lib Dems that have moved.

Missing from the agreement is any mention of the Human Rights Act, which is a major source of disagreement between the parties. The Conservatives had threatened to repeal the Act, but the Lib Dems will want to protect, or indeed extend it. If this issue is revived, and if the policy lead goes to Dominic Grieve as Attorney General, human rights groups can rest assured that it will be ECHR plus, not ECHR minus. But that may prove too much for Conservatives to swallow.

Parliament

Wright Committee ups and downs

As reported in January's Monitor, the Select Committee on Reform of the House of Commons (chaired by Tony Wright) set out significant proposals in the last Parliament to strengthen the Commons and the role of backbenchers. Some of these were agreed before Parliament dissolved for the general election, and others are still awaited.

Despite Gordon Brown having instigated the committee, the government initially appeared reluctant to see its recommendations debated and agreed. The committee's own deadline for debate of 24 January was missed, and Leader of the House Harriet Harman came under increasing pressure to make debating time available. This included pressure by the committee itself, which called her to give public evidence on 10 February.

The initial debate conceded by the government was on 22 February, but only allowed agreement on uncontested recommendations. Here various recommendations on public outreach were agreed. More controversial issues waited until a second debate on 4 March. The government had tabled motions and standing order changes in line with the committee's recommendations on terminology and election of select committee chairs. Though contested both were agreed, meaning in the new parliament those chairing committees will be referred to as 'chairs' (not 'chairmen'), and more importantly that they will be elected by the House as a whole, within four weeks of the Queen's speech. A government motion (again reflecting a committee recommendation) that committee members would be elected by their parties was unanimously agreed.

The questions of the Backbench Business Committee and House Business Committee were more contentious. Government motions fell short on the first of these and omitted the second altogether. Amendments by committee members thus sought to bring these into line with their report. Decisions hinged on an amendment proposed by the Conservative front bench, and backed by Harriet Harman, which provided less than what the committee had asked for. When this amendment was defeated the committee's proposals on both points were agreed unanimously. The House had thus decided (in a rare example of combined backbench force against combined frontbenches) to establish a Backbench Business Committee 'in time for the start of the next Parliament' and a House Business Committee 'during the course of the next parliament'.

All that remained was for the government to table a standing order change to bring the Backbench Business Committee into effect. This was repeatedly promised by Harriet Harman. Although finally tabled, this was not debated before the general election as the government

again failed to make time. The will of the House was therefore thwarted (see web article by Meg Russell for details at: <http://www.ucl.ac.uk/constitution-unit/files/media/articles/wright-committee-reforms.pdf>). The question is whether the necessary change will be made in the new parliament. The Conservative manifesto promised action but (unsurprisingly) gave little detail. The coalition agreement promised to bring forward the Wright Committee recommendations 'in full'.

Lords reform and the election

All three parties went into the election with radical proposals for Lords reform, and this was an issue included within the Conservative/Liberal Democrat coalition agreement. Both parties' manifestos promised a mainly (Conservative) or fully (Lib Dem) elected second chamber. The coalition agreement commits to one or the other, using a proportional electoral system (which the Conservatives have previously opposed). A committee is due to bring forward proposals by December. But the obstacles to Lords reform, even with Nick Clegg in charge, remain significant. Just as Labour was divided on elections to the second chamber, so are the Conservatives: when the Commons last voted, in 2007, more Conservatives voted against a largely or wholly elected House than voted for it. Of course there are many new MPs since then, but there will still be at least some resistance. And the Conservative peers are almost united in their opposition to an elected House. Should the Lords prove difficult with respect to the new government's legislation, that may further cool opinion on the Conservative side of the coalition towards strengthening the Lords.

In the meantime, a number of new political appointments are expected to the Lords (and may indeed have happened by the time this is printed). With a large number of Labour departures from the Commons, including some senior figures, a dissolution honours list would normally be expected. In addition, the new Prime Minister will want to refresh the Conservative benches in the Lords, where the average age of peers is significantly higher than all other groups, and relatively few appointments have been made in recent years. The Lib Dem leader will also want more peers, in line with the objective stated in the coalition agreement that appointments should work towards a chamber reflecting proportionality of general election votes (at the moment the Lib Dems have only 16% of party seats, but would deserve 23%). All of this puts huge pressure on numbers in the chamber, which have risen significantly since 1999. It appears very short-sighted that the (then) opposition parties blocked the provisions in the Constitutional Renewal Bill to allow retirements from the chamber. This would have freed up valuable space.

Speaker's Conference Final Report

In 2008 the House of Commons established a new committee chaired by the Speaker known as the Speaker's Conference. The Conference was tasked with identifying ways of increasing the diversity of MPs so that Parliament more accurately reflects the make-up of British society. Although the number of female and ethnic minority MPs has increased compared to the last parliament, both groups remain underrepresented. For example, despite making up approximately half of the population, only 22 per cent of MPs in the new parliament are female. The Speaker's Conference on Parliamentary Representation published its final report in January 2010. It contains 71 recommendations designed to improve the representation of females, ethnic minorities, and those with disabilities.

Many of the recommendations focus on the role of political parties as 'gatekeepers to the House of Commons.' The report argues that greater diversity can only be achieved when the parties themselves

select candidates of different backgrounds to run for Parliament. It notes that party leaders can 'help challenge stereotypes' by ensuring that MPs from all communities have an opportunity to demonstrate their skills in prominent positions either within Government or within the party. Moreover, the report recommends that the parties should make diversity awareness training available to members involved in candidate selection. It also calls on the parties to establish formal codes of conduct for campaigning which makes clear that it is unacceptable to undermine a candidate on the basis of his or her family life, racial background, sexual orientation, health status or disability. While some progress has been made in recent years, the results of the 2010 election show that there is still a long way to go in order to make Parliament more representative of society as a whole.

The report is available at: <http://www.publications.parliament.uk/pa/spconf/239/239i.pdf>

Executive

The centre of government

January saw a flurry of reports about improving the performance of Whitehall, in particular at the centre:

- Institute for Government, *Shaping Up: A Whitehall for the Future*
- Better Government Initiative: *Good Government: Reforming Parliament and the Executive*
- House of Lords Constitution Committee, *The Cabinet Office and the Centre of Government*, HL 30.

The Institute argues that while the Prime Minister has a lot of formal power, the administrative centre is too weak. It should become smaller, more strategic and more joined up. Cabinet Office should support the PM and Cabinet in developing a whole of government strategy for each parliamentary term, with no more than 20 key goals. This strategy would be collectively owned by all Permanent Secretaries, who would create their own business plans for delivering the government's overall strategy, and be challenged by much stronger departmental boards. Much of the Institute's model is already practised in Scotland.

The BGI report goes much wider, summing up the BGI's previous reports, and focusing on Parliament as well as Whitehall. It contains strong proposals for improving the quality of legislation, by tighter procedural checks from Cabinet Office, and closer scrutiny in Parliament. As might be expected from a group of former senior officials, the report is full of suggestions for improving procedures, but light in ignoring the politics of Cabinet and its personalities which can lead to those procedures being ignored.

The Lords Committee report is the weakest of the three. It argues that the centralisation of power around the PM needs to be accompanied by greater transparency and accountability, but it fails to suggest any practical changes which might achieve this. It criticises the proliferation of Permanent Secretaries in the Cabinet Office (six), and of specialist units ('less an incubator, more a dustbin'). But on all the big institutional questions – creating an Office of PM and Cabinet, separating the Cabinet Secretary and Head of the Civil Service, scrapping the Delivery Unit or the Strategy Unit – the committee pull their punches.

Ministerial appointments from outside Parliament

When he became PM in 2007, Gordon Brown announced that he would build a 'government that uses all the talents'. Over the next two years he appointed eight junior ministers with no previous parliamentary experience, putting them in the House of Lords. The Public Administration Committee (PASC) accepted the occasional need to appoint ministers from a wide range of backgrounds and experience, but felt that each appointment should be justified to Parliament, with a statement of what the minister was expected to achieve, and a scrutiny hearing before the relevant Select Committee (*Goats and Tsars*, HC 330, March 2010). In a related report, the Procedure Committee (HC 496, March 2010) recommended that Secretaries of State in the Lords should face a Commons question period in Westminster Hall twice in each parliamentary session on an experimental basis.

Constitutional Reform and Governance Act 2010

This Act, known in Whitehall as CRAG, passed its final stages just before Parliament was dissolved. Important provisions were lost, in particular allowing retirement from the House of Lords. The Civil Service provisions survived, putting the civil service and the Civil Service Commissioners on a statutory footing, and regulating special advisers. Parliamentary scrutiny of Treaties is now regulated by statute. Big changes were made to the new Independent Parliamentary Standards Authority, in particular giving it power to set MPs' pay and pensions.

For the Explanatory Notes see: http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100025_en.pdf

Devolution

Scotland

The UK general election result has, for the first time in over three decades, produced a hung or balanced parliament. Since the UK has limited post-war experience of this outcome it is natural that commentators have begun to look elsewhere for lessons on the practicalities of minority and coalition government. Yet, there has been a notable absence of lesson-drawing from the Scottish Parliament (and the Welsh Assembly). This seems odd given that the Liberal Democrats have eight years' experience of coalition government and the Conservatives have three years' experience of supporting a minority government (suggesting that the parties involved might look to learn from their Scottish counterparts).

It is understandable that lessons should be sought from the most relevant political systems but no-one has established a definitive list that excludes Scotland (the Constitution Unit and Institute for Government's *Making Minority Government Work* includes Canada, New Zealand and Scotland). I outline two points of comparison based on the two most prized qualities of government highlighted by David Cameron and Gordon Brown: strength and stability. From 1999-2007 the Scottish Labour and Liberal Democrat coalition government provided both. Its command of parliamentary seats (57% of the 129 seats in 1999 and 52% in 2003) was reflected not only in plenary but also in its majority of all committees (see http://www.psa.ac.uk/2010/UploadedPaperPDFs/121_820.pdf). This provided particular strength for the government which, to all intents and purposes, acted as a majoritarian government in the UK mould, passing an extensive

programme of legislation (including annual budget bills) with virtually no effective opposition. Its impressive party whip and the high degree of voting cooperation within the coalition also ensured stability (if anything, Labour party dissent and in-fighting was more worrying than disagreements between the parties).

Overall, the experience was heartening for a Scottish Labour party that prized above all else a 'settled programme' and feared the prospect of political embarrassment from ambushes led by the SNP that they loathed so much. This was followed from 2007 by an SNP minority government (36% of seats) which, although less stable, has still been able to last well beyond the international average (14 months compared to 18 for coalitions and 30 for single party majorities) and should complete a full 4-year term. Its minority status has also made it relatively 'weak' although there have been surprisingly few instances of real problems. It loses many non-binding motions, has had to forego some legislation that it does not have parliamentary support for (including the referendum on independence bill and a bill to introduce local income tax), came under sustained pressure on the Lockerbie issue and had an annual budget bill voted down (a new, but virtually the same, bill was passed soon after), but no event has affected its status.

Overall, the approach taken by the other parties is that the SNP may often be doing the wrong thing but it has the right to try. Of course there are qualifications to each tale which make direct comparisons difficult – e.g. the Scottish Parliament already uses PR and there is an assumption that coalition or minority will always occur, the Liberal Democrats are closer ideologically to Labour, the Scottish Liberal Democrats appeared less constrained by their membership (and the 'triple lock' in particular), the SNP is popular and no-one wants another election, the rules on dissolving governments are different – but such reservations apply to all comparisons of two things that are not identical.

The Scottish case is also important because there is a tendency to assume that its politicians still operate in the 'Westminster mould' despite their access to new institutions and the symbolism of their non-adversarial chamber. As such, perhaps the most telling lesson comes from the unwillingness of politicians or parties in Scotland to 'rock the boat' for fear of being blamed for an extra election during a time of economic crisis. Ironically, economic instability may provide the platform for a significant period of political stability.

Paul Cairney, University of Aberdeen

Wales: The Referendum Approaches

Politics in Wales since January 2010 have been dominated by two issues: the UK general election, and a referendum on primary legislative powers for the National Assembly.

On 9 February the National Assembly passed a motion triggering a referendum on legislative powers, by 53 votes to 0. This was in fact a unanimous vote – the non-voters all had good practical reasons for their absence. Part of the reason for the motion was public opinion, which has shown strong, and increasing, public support for a fully legislative Assembly. Opinion polls in February and March showed a lead in support of around 20 percentage points.

Another part was timing, and the awareness that the referendum needed to be triggered then if it were to happen in the autumn of 2010, as many in the National Assembly support. The goal of most Welsh politicians is to have the 4th Assembly, elected in 2011, take up

those legislative powers, and for that to be known before the elections so legislative proposals can figure in the campaigns. The lead times involved mean that a trigger vote any later than February would probably cause the referendum to be deferred. As there is general agreement that a referendum could not be held at the same time as the National Assembly elections due in May, the other options would be a poll in March 2010 (awkward) or September 2011 (late).

The passing of the resolution passed the ball to the Secretary of State to decide whether to submit the call for a referendum to Parliament, and to decide on such issues as timing and the referendum question. These process issues are complex, and call for co-ordination between the Wales Office, Welsh Assembly Government and Electoral Commission, and also local election administrators. However, at this point referendum plans ran into UK-level politics, and in particular a moratorium on referendum preparations and campaigning laid down by Peter Hain for the duration of the UK election campaign. Therefore, no tangible progress has been made in preparing for a referendum since the February vote, to mounting concern of some in Wales. Whether there will in fact be an autumn referendum is a matter for Cheryl Gillan, the new Conservative Secretary of State, who has to decide by 17 June at the latest. Her party's election manifesto committed the party to 'not standing in the way' of a referendum; favourable, if not a ringing endorsement of holding one.

Meanwhile, the problems with the present arrangements became apparent with the rejection by Parliament, just before its dissolution, of the second attempt to pass a legislative competence order concerning housing. This saga has been underway since 2007; while much in the proposed order has changed since then, what has remained consistent – and what led to Parliament's rejection of it – was whether the National Assembly's powers should include right-to-buy for council housing, something opposed by the Conservatives and some Labour MPs. This is hardly a good omen for the working of the LCO system now different parties hold in office in London and Cardiff.

Alan Trench is author of the 'Devolution Matters' blog: <http://devolutionmatters.wordpress.com/>

Northern Ireland

If Stephen Twigg look bemused when he won Enfield Southgate from Michael Portillo in 1997, Naomi Long, deputy leader of the Alliance Party of Northern Ireland, appeared shell-shocked as she took East Belfast from the Democratic Unionist Party leader and Northern Ireland first minister, Peter Robinson, 13 years later.

Unusually for her non-sectarian party, Long speaks in working-class cadences in a constituency whose shipbuilding and aerospace traditions gave a strong vote to the Northern Ireland Labour Party in the 1950s and 60s. Such voters had been alienated by the tax-farming behaviour of Robinson and his wife and former fellow MP and assembly member, Iris, who had employed all their children and an in-law at Westminster and acquired the soubriquet of The Swish Family Robinson during the expenses scandal. It was further antagonised by revelations about relationships between the Robinson household and property developers.

This proved rather more dramatic 'change' than that promised by David Cameron. His project to unite 'modernising' Conservatism with the Ulster Unionist Party—not a cauldron of progressive political innovation—had been ill-starred. The determination of the UUP to keep little 'Ulster' in the party name had led to the forbidding circumlocution Ulster Conservatives and Unionists: New Force (UCUNF). The plan was to crack the mould of communalist politics by standing UCUNF candidates in each of the 18 Westminster seats, including in

Fermanagh / South Tyrone and South Belfast where so doing would guarantee victory to Catholic incumbents, respectively from Sinn Féin and the SDLP. But communalism prevailed in the former case, though after a nail-biting sectarian stand-off the devolved agriculture minister, Michelle Gildernew, prevailed over the pan-Protestant candidate by just four votes.

'UCUNF if you want to, but the lady's not for CUNFing,' Lady Sylvia Hermon, the UUP's only outgoing MP, was said to have quipped when the liaison was formed. Hermon made clear she would not be standing again in North Down under that banner, having often voted with Labour at Westminster. The constituency has a history of 'independent unionist' Protestant representation and Hermon romped home.

South Down saw a change of personality rather than party, with the SDLP leader and devolved social development minister, Margaret Ritchie, easily defeating her SF rival and education minister, Caitriona Ruane, in a constituency with a strong moderate-Catholic political tradition. Ritchie took over the leadership of the party in February from the Foyle MP, Mark Durkan, defeating the South Belfast MP, Alasdair McDonnell, in the internal contest.

Both of the latter retained their seats, with Ritchie spurning an appeal by the SF leader, Gerry Adams, to accept pan-Catholic candidacies in South Belfast and Fermanagh / South Tyrone. Ritchie has tried to build bridges with the UUP but her cause has not been assisted by the party's implosion.

The UUP leader and minister for enterprise, Sir Reg Empey, migrated to South Antrim to try to win a seat for the party, but lost out to the outgoing DUP MP, Rev William McCrea, and looked set to fall on his sword at time of writing. Ritchie now urgently needs progressive Protestant interlocutors to give her conciliatory politics a credible interlocutor on the 'other side'.

Protestant politics may however be pulled in the other, fundamentalist, direction. While the DUP saw off a challenge from *ultras* in the Traditional Unionist Voice, the two communalist blocs did nevertheless consolidate in monocultural rural Ulster.

SF marginally increased its vote to become the largest party, as in the European Parliament election of 2009, retaining its five Westminster seats. From these it will continue to abstain—which did not prevent it claiming substantial expenses for property rental in London in recent years. The DUP, minus Robinson, has eight.

Northern Ireland has, evidently, some way to go to resolve its dual-mandate problem and Ritchie immediately stepped down from her devolved position. And eyes now turn to the prospective assembly election of May 2011. The risk is that this turns into Fermanagh / South Tyrone writ large, because of a little-known clause inserted, apparently at the behest of the DUP, into the legislation paving the way for renewed devolution in May 2007. This ensured that the largest party in the assembly would unilaterally propose the first minister, replacing the previous joint election of first and deputy first minister as a partnership with 'cross-community support'. This would mean little in practice, as the first minister and deputy first ministers are *de facto* co-equal. But symbolically even liberal Protestants willing to accept a Catholic first minister would likely balk at the man who was northern commander of the IRA when Northern Command authorised the Enniskillen Remembrance Day bomb in 1987, in which 11 Protestant civilians died. And that could threaten another collapse of power-sharing.

Robin Wilson, Queen's University Belfast

Human Rights

JCHR Report on Counter-Terrorism Policy and Human Rights

On 9 March 2010, the Joint Committee on Human Rights (JCHR) published its report, 'Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In'. The broad aim of the report was to identify the most pressing human rights concerns in the area of counter-terrorism policy and to offer suggestions as to how they may be addressed. It focuses on five issues: whether there is a 'public emergency threatening the life of the nation'; complicity of UK officials in torture; the use of secret evidence; pre-charge detention powers; and democratic accountability for counter-terrorism policy.

The report questions whether the UK still faces a real emergency more than eight years after the Government first declared one following the September 11 terror attacks. The concern of the JCHR is that the Government's approach means that the UK is in a permanent state of emergency which has had a 'deleterious effect on public debate' about the necessity of counter-terrorism measures. The JCHR recommends an independent inquiry into allegations of complicity in torture, especially in light of the publication of the full High Court judgment in the Binyam Mohamed case. It also calls for an immediate review of the use of secret evidence and special advocates as well as the necessity of detaining terrorism suspects pre-charge for up to 28 days. Finally, the report calls for greater parliamentary oversight of counter-terrorism policies. In particular, it recommends that the Intelligence and Security Committee be made 'a proper parliamentary committee, with an independent secretariat, independent legal advice and access to an independent investigator'. It remains to be seen whether the new government will implement any or all of the Committee's recommendations.

The report is available at: <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/86/86.pdf>

Information Policy

The Future of FOI

Transparency is now lauded as the solution to a range of problems with Britain's political system. It is also seen as a way of making Britain's bureaucracy more responsive. Below are some of the key issues around openness and Freedom of Information to look out for in the coming months.

Proactive disclosure and IT

There is now a consensus that Information technology and openness can work together and that releasing more information online is one of the keys to increasing transparency. Both Labour and Conservatives have pledged to 'set government data free'. In 2010 Labour launched access to hundreds of government data sets through data.gov.uk with help from Tim Berners-Lee. In April, for the first time in their 260 year history, Ordnance Survey maps became free for personal and commercial use. Mayor Boris Johnson has launched a similar initiative aimed at providing data for London living and the Conservatives have pledged to introduce a new 'right to data' to further expand access to government data. This interface is one that is likely to increase in importance.

Publication of Spending and Salaries

Borrowed from innovations in the US, such as the Missouri Accountability Portal, this policy solution supports the detailed publication of government spending. This publication allows 'armchair accountants' to find waste and, it is hoped, encouraged spending restraint and lower public expenditure.

The Conservatives are the leading supporters of this policy. They have pledged to proactively publish every item of government or quango spending over £25k as well as spending by the European Union. Further commitments include publishing online the names and salaries of central government and quango managers earning over £150,000 per year, and the salaries of the 35,000 most senior civil servants.

At local level, MOJ guidelines currently compel councils to publish salaries over £150k. Under Conservative plans, local councils will be required to publish online every item of spending over £500, and the names and remuneration packages of staff earning over £60,000. In a drive to cut back on bureaucracy, current central monitoring will be replaced with publication by local authorities of comparable standardised data. There has already been some move towards this with innovations such as 'oneplace' on the Direct.gov website which allows comparison of local authorities along a number of performance indicators.

Expansion of FOI

The scope of FOI is another important area. The Act allows the scope of the Act to be expanded or contracted. It currently covers 110,000 public authorities but it has been suggested that FOI could be extended to cover a range of other public bodies or private bodies engaged in work on behalf of a public authority. After lengthy consultation the Labour government decided to expand the Act to include the Association of Police Chief Officers, Academy Trusts and UCAS. The Tories have pledged to include a range of other organisations currently excluded, including Network Rail, Northern Rock and the Carbon Trust. The Scottish government is currently engaged in a consultation on expanding its FOI and its decision may influence what happens with the UK FOI.

Policy deliberation

One of the ongoing concerns about FOI is the possibility that disclosure can hinder 'free and frank' exchange of views. At the heart of this is the need to protect Cabinet discussion and maintain 'collective responsibility'. Unlike other FOI regimes, Cabinet documents are not wholly excluded from FOI, though in reality little is released. Nevertheless it provokes deep concern and, as reported in previous issues, the Labour government twice used its veto to prevent the release of Cabinet minutes relating to Iraq and Scottish devolution. The Conservatives also expressed concern over maintaining space for private Cabinet discussion. Future requests for similar material may highlight the issue again and the government may consider changing the Act to exempt Cabinet documents entirely.

The Cost of FOI

No one is sure exactly how much FOI costs. An, albeit much criticised, attempt by Frontier Economics estimated it to be around £160 million per year, equivalent to the costs of the Royal parks. Whatever its actual costs, FOI is not seen as an essential 'frontline' service and is likely to suffer in any future round of spending cuts. Fewer resources could see requests and appeals taking longer to process, putting pressure on the whole system which is already currently struggling

with a backlog of cases. FOI could become trapped in a mutually reinforcing cycle of neglect, lack of use and declining importance.

The Future of FOI?

FOI is here to stay. However its future is not certain. In some ways, FOI may strengthen or even grow. Transparency is increasingly seen as one of the keys to a healthier political system and better governance, particularly as it goes hand in hand with the Information Revolution. Moreover, FOI can experience a honeymoon with new politicians and new ministers who wish to make a break with the past and have nothing to hide. However, FOI brings costs. High profile political disclosures can cause tension and temper enthusiasm. Financially FOI can suffer when budget cuts severely impair its operation. FOI and transparency policy can wax and wane according to the preferences and political will of individual ministers. We shall report in the coming months on how FOI is progressing.

Constitution Unit News

Ministers outside Parliament

Gordon Brown appointed eight ministers from outside Parliament (the 'Goats'), and put them in the House of Lords. This raised concerns about their democratic legitimacy, and their accountability (see p. 4). The Unit has started a six month research project into the subject, and recruited Dr Ben Yong to lead the research.

The project will investigate the case for appointing ministers from outside Parliament, and their accountability, by asking:

- What are the main arguments for having ministers from outside Parliament?
- How many such ministers have been appointed?
- What were their skills and experience? Are there any patterns?
- How could Ministers from outside Parliament be made accountable to Parliament?
- Should all ministers be accountable to both Houses?

We will look at two broad groups of comparator countries:

- *Westminster parliaments*, but on the whole the Westminster tradition is for ministers to be drawn from Parliament.
- *European parliaments*: where ministers can be drawn from outside parliament (Germany, Italy); and where ministers leave parliament when appointed to the government (France, Netherlands).

The project is funded by a generous donation from Peter Scott CBE QC.

Influence of Select Committees

The Parliament Team at the Constitution Unit has recently started a research project examining the impact and effectiveness of House of Commons Select Committees. The research will measure direct forms of influence including the take-up of committee recommendations by government, and use interviews to get to grips with more subtle, indirect forms of influence.

One of the innovative features of the project is that it involves a team of parliamentary clerks and committee specialists who have generously offered some of their time during the election period and

the summer recess. Since early April the team of academic and parliamentary staff have been collaborating to devise a scheme for measuring committee influence, and have been gathering and coding data on committee inquiries and recommendations.

During the summer the team will conduct media analysis and analyse parliamentary debates. This will be followed up by interviews and quantitative analysis during the autumn.

The project is funded by the Nuffield Foundation, and will run until January 2011. Meg Russell is the Principal Investigator, supported by Meghan Benton and Kristina Wollter.

Liaison Committee's Report on Pre-Appointment Scrutiny Hearings

In September 2009 the Constitution Unit was commissioned by the Cabinet Office and Parliament to evaluate the use of pre-appointment scrutiny hearings by select committees for senior public appointments. The project was carried out by Peter Waller, an honorary senior research associate, and supported by Mark Chalmers, a researcher at the Constitution Unit. The report, 'An Evaluation of Pre-Appointment Scrutiny Hearings', was submitted to the Liaison Committee for consideration in February 2010 and the Committee's recommendations were published in March.

The Unit's report concluded that the introduction of pre-appointment hearings increased democratic scrutiny of public appointments and provided greater reassurance to the public that key public offices are appointed on merit. The Liaison Committee concurred with this assessment and stated that it supported the continuance of pre-appointment hearings on a permanent basis. It recommended that the guidance relating to the hearings process be consolidated in a single document 'containing precise indications of the purpose and possible content of pre-appointment hearings'.

The Committee also recommended that a formal list of criteria governing the posts subject to pre-appointment hearings be established and agreed between the Government and the Liaison Committee. In addition, it stated that departments should consult the relevant select committee on the job specification prior to the start of the recruitment process. It is now for the new government to decide whether to implement the recommendations. The coalition's programme for government states that 'we will strengthen the powers of Select Committees to scrutinise major public appointments'. However, it is unclear whether this means granting select committees a veto over public appointments.

The Liaison Committee report is available at: <http://www.ucl.ac.uk/constitution-unit/research/parliament/pre-appointment-scrutiny.htm>

New Staff

Andrew Thornton joined the Unit in May, providing part-time research support to Meg Russell.

Dr Ben Yong also joined the Unit in May, and is leading the research on the appointment of ministers from outside parliament (see above).

Interns

As always, the Constitution Unit is grateful for the hard work and diligence of its interns: Luke Heighway, Ayesha Mehta, Stanley Obeyesekere, Mariya Stamenova, Will Hazell, and Kristina Wollter.

Bulletin Board Constitution Unit Newsletter

Publications Received

- Bechler, R. *The Convention on Modern Liberty: The British debate on fundamental rights and freedoms* (Exeter: Imprint Academic, 2010).
- Bingham, T. *The Rule of Law* (London: Penguin Books Ltd., 2010).
- Blick, A. and Jones, G. *Premiership: The development, nature and power of the office of the British Prime Minister* (Exeter: Imprint Academic, 2010).
- Eichbaum, C. and Shaw, R. (eds.) *Partisan Appointees and Public Servants: An International Analysis of the Role of the Political Advisor* (Cheltenham: Edward Elgar Publishing Ltd, 2010).
- Gordon, R. *Preparing British Politics: A Blueprint for Constitutional Change* (London: Hart Publishing Ltd., 2010).
- Hix, S., Johnston, R. and McLean, I. *Choosing an Electoral System* (London: British Academy, 2010).
- Howe, M. *Safeguarding Sovereignty: A Bill for UK Constitutional Rights in the EU* (London: Politeia, 2009).
- Quin, J. *The British Constitution, Continuity and Change – an inside view* (Durham: Northern Writers, 2010).
- Renwick, A. *The Politics of Electoral Reform: Changing the Rules of Democracy* (Cambridge: Cambridge University Press, 2010).
- Select Committee on the Constitution. *Referendums in the United Kingdom. 12th Report of Session 2009-10, HL Paper 99* (London: House of Lords, 2010).

Constitution Unit Publications

- Russell, M. and Benton, M. '(Re) assessing Parliamentary Policy Impact: The Case of the Australian Senate', *Australian Journal of Political Science* Vol 45(2): 159 – 174.
- Seyd, B. *Coalition Government in Britain: Lessons from Overseas* (London: The Constitution Unit, 2009).

Featured Publication

Does FOI work? The impact of the Freedom of Information Act on central government in the UK

Published by Palgrave Macmillan July 2010
Professor Robert Hazell, Dr Ben Worthy and Mark Glover

Based upon a two-year project jointly funded by the ESRC (RES 062 23 0164) and Ministry of Justice, this book is the first in-depth, systematic study of the objectives, benefits and consequences of FOI, anywhere in the world. Based upon interviews across eight different government departments as well as media analysis, a survey of FOI requesters and case law, this book offers a unique insight into the impact of FOI in Britain.

For more information view our project site at: <http://www.ucl.ac.uk/constitution-unit/research/foi/projects/whitehall.htm>

Forthcoming Events

- Rt Hon Baroness Hayman (Lord Speaker), Wednesday 23 June, 12pm.
- Andrew McDonald (Chair, Independent Parliamentary Standards Authority), June, IPSA and MPs – a new expenses regime. Government Information Policy Seminar Series (subscription only).
- Dr Ben Worthy and Gabrielle Bourke (Constitution Unit), Tuesday 12 June, FOI and local government: research from the Constitution Unit. Government Information Policy Seminar Series (subscription only).

FOI Live 2010, Tuesday 6 July

FOI Live is a conference for those involved in all types of work across the field of information rights, from FOI to Data Protection, information sharing and records management. Building on the success of previous years, FOI Live gives delegates a unique chance to meet with a range of people from across the information rights community, including key figures from government and the Information Commissioner's Office. During the conference delegates will hear from senior representatives, hear what's new in the world of information policy and have your questions answered in a special Q&A session. The programme ends with a drinks reception where delegates can network and chat with the speakers.

More information about FOI Live 2010 and how to register is available at: <http://www.ucl.ac.uk/constitution-unit/events/2010/conferences/foilive10.htm>

Full information on Constitution Unit events is available at: <http://www.ucl.ac.uk/constitution-unit/events/index.html>

CU in the News

Constitution Unit staff have appeared widely in the media throughout the election campaign and into the new government. Robert Hazell had extended coverage on ITV, BBC and Channel 4 News advising on a hung parliament and coalition government. Our publication *Making Minority Government Work* has proved the must-have companion for journalists and practitioners. Its co-author, Mark Chalmers, has also been occupied doing media work especially with international broadcasters.

All of our media appearances, on radio and TV are available to view on our website at: <http://www.ucl.ac.uk/constitution-unit/media/index.htm>

We have also produced a number of articles for the written media, appearing in the national broadsheets and other publications.

- Cameron should look to Australia for coalition tips (Mark Bennister, *The Guardian* 15.05.10)
- How to square the electoral reform circle (Meg Russell, *The Guardian* 10.05.10)
- Keep calm and carry on talking: Whitehall has been preparing for this for months (Robert Hazell, *Sunday Times* 09.05.10)
- Don't get your hopes up for electoral reform within one parliament (Robert Hazell, *The Guardian* 08.05.10)
- Whichever way you look at it, Clegg calls the shots (Robert Hazell, *Mail on Sunday* 02.05.10)
- A memo to Nick Clegg (Robert Hazell *The Guardian* 26.04.10)
- Nick Clegg: the power balancer (Robert Hazell, *The Guardian* 19.04.10)



The Constitution Unit