DELIVERING CONSTITUTIONAL REFORM: THE COLLECTED BRIEFINGS OF THE CONSTITUTION UNIT

Introduced by
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INTRODUCTION

by Robert Hazell

Delivering Constitutional Reform: the Collected Briefings of the Constitution Unit

The new Parliament will see major upheavals in the constitutional landscape. Tony Blair has promised 'the most extensive package of constitutional change ever proposed'. Labour's programme includes commitments for a Scottish parliament; a Welsh assembly; regional government in England; a strategic authority for London; reform of the House of Lords and of the House of Commons; a referendum on electoral reform; proportional representation for elections to the European Parliament; a Freedom of Information Act; and incorporation of the European Convention of Human Rights, as the first step towards a British Bill of Rights.

It is a long and daunting agenda. But now the new Government has been elected the debate is no longer about whether to introduce these reforms, but how. That is the task the Constitution Unit was set up in 1995 to address, with the focus strongly on implementation. These 12 briefings, published between April 1996 and April 1997, summarize the main body of our work. Seven of the briefings first appeared as summaries of Constitution Unit reports; the remainder were published as stand-alone briefings. They offer a route map for the new government on how to implement its constitutional reform programme; and are published here by the Public Finance Foundation as a series of practical guides on how the constitutional programme might unfold. The briefings have been updated to May 1997 to reflect the early decisions of the new Government in its first month in office.

We decided to focus on implementation because more than enough had been written by reformers on the need for a Bill of Rights, alternative models for the House of Lords, or alternative electoral systems; but very few commentators had focused on how to achieve these reforms. Yet the history of previous attempts at reform suggested that it was the implementation rather than the design stage which was the key constraint. Reform of the House of Lords has been under discussion since the 1920s; as has reform of the electoral system. There has been no lack of blueprints; but very little sense of how to get from here to there.

The failure of Dick Crossman's Bill to reform the House of Lords in the 1960s, and of the Callaghan Government's attempt at devolution in the 1970s, should provide sharp reminders for the new Labour Government of how easy it is for constitutional measures to get bogged down and derailed. The Maastricht debates offer a more recent reminder of the difficulties any government can face. The difficulties are exacerbated

by the doctrine of parliamentary sovereignty, which makes it hard for parliamentarians to adjust to the idea of power being shared between institutions.

Another difficulty lies in the nature of our unwritten constitution, which technically should make constitutional reform easier to achieve, but politically can make it harder. It is harder because there is no settled procedure for constitutional change; unlike under a written constitution, which prescribes the procedures for its own amendment. 'Unconstitutional' becomes a term of abuse instead of a term of art. There is no agreement about when a referendum might be required; nor about the appropriate parliamentary procedure for constitutional bills, discussed in our very first report, *Delivering Constitutional Reform*.

We tackled procedure first because that is the swamp which has engulfed so many previous constitutional reforms, given the sheer amount of Parliamentary time they can absorb. It is promising that the new Government is determined to tackle Parliamentary reform early in the life of the new Parliament. Parliament will be invited to establish a special Select Committee on Modernizing the House of Commons, with the legislative process being the subject of its first enquiry. Our report addresses the central issue which the Select Committee must consider with regard to constitutional bills, which is how to make the legislative process more efficient without diminishing the quality of parliamentary scrutiny.

That first report, which was jointly written by Katy Donnelly and Nicole Smith, exemplifies the Constitution Unit's general approach of painstaking research, coupled with a sharply practical focus. From an initial list of dozens of possible changes we gradually whittled our recommendations down to the three changes which appear in the briefing. This process of sifting and testing was carried out in numerous discussions with parliamentary clerks, parliamentary counsel and other experts on parliamentary procedure; and with civil servants who have been in charge of constitutional bills. All the Unit's reports were firmly grounded on a wealth of practical experience, based on interviews, private seminars and comments on drafts from a wide range of practitioners.

For our three reports on devolution (*Scotland's Parliament*; *An Assembly for Wales*; *Regional Government in England*), we established three consultative groups. Each was chaired by a former civil servant, and composed mainly of practitioners rather than academics, local authority chief executives, people from the Scottish Office or Welsh Office, or with backgrounds in business or quangos. The local government input was vital in ensuring that our proposals meshed with the needs of the new unitary authorities in Scotland and in Wales, and with the local authority-led growth of regional planning associations in the regions of England.

The same mix of practical and academic expertise is to be found in the Commission on the Conduct of Referendums, which we established jointly with the Electoral Reform Society. Its chairman was Sir Patrick Nairne, who devised the rules for the only nationwide referendum in the UK when he was a Second Permanent

Secretary in the Cabinet Office in 1975. The practical focus of the exercise is expressed in the 20 organizational guidelines appended to the Commission's report, which are reproduced in the briefing.

The briefing on *Introducing Freedom of Information* is based on work which I carried out for the Cabinet Office on a Civil Service travelling fellowship in the 1980s, when I studied the introduction of the new freedom of information laws in Australia, Canada and New Zealand. It sets out the policy choices which will face the new Government as it drafts the provisional White Paper on freedom of information, now that the EC Data Protection Directive is to be implemented in separate legislation.

The briefing on *Changing the Electoral System* also brings out the decisions the new Government will have to make fairly early in its life, if it is to hold the promised referendum on electoral reform during the term of this Parliament. A crucial piece of machinery will be an independent electoral commission, whose role and functions are examined in the briefing on *Establishing an Electoral Commission*. Its relations with government and with Parliament are examined in the final briefing, *Constitutional Watchdogs*, which looks at the general question of how to reconcile the independence and accountability of the growing number of bodies charged with safeguarding different aspects of the democratic process. Recent examples are the Nolan Committee and its two offshoots: the Commissioner for Public Appointments and the Parliamentary Commissioner for Standards. But in future such bodies might include a Human Rights Commission, an Information Commissioner, and an Appointments Commission for the House of Lords: all bodies recommended in the Unit's earlier reports.

Our reports do not cover the whole range of constitutional issues likely to arise in this Parliament. The main omission is Europe, which will dominate much of the new Parliament's business; starting with the Amsterdam summit in June 1997 which should conclude the current Inter-Governmental Conference (IGC) on the future of the European institutions. Any treaty amendments flowing from the IGC will require legislation, which will need to be introduced during the first session, alongside the devolution legislation; and which may prove to be as controversial as the Maastricht Bill in 1992. But not nearly as controversial as legislation to take us into the single European currency, if the Government decided that we should seek to join EMU in the first wave. That would be seismic: seismic in terms of its own huge importance; and seismic in terms of its impact on the rest of the legislative programme, much of which would have to give way to EMU-related legislation.

The other omission in our series of reports is anything on local government. Here there was nothing we could fasten onto in the public statements of the political parties. The Unit did not itself seek to make policy or advocate any particular constitutional reforms. We merely took the known commitments of the political parties and worked out how best to implement them. And, in the field of local government, there were no constitutional proposals to work on, beyond regional assemblies (covered in our report on *Regional Government in*

England) and ratifying the European Charter on Local Self-Government, which had already been well worked up by the local government associations.

Apart from these two omissions, the Unit's briefings should provide a comprehensive guide to the constitutional reform programme in the new Parliament. We are very grateful to the Public Finance Foundation for bringing them together in this collected form, as a series of practical guides for busy practitioners. Our briefings can also be found on our website at http://www.ucl.ac.uk/constitution-unit/. Each briefing highlights the key issues which the new Government will need to address, and outlines the implications for other layers of government and the rest of the political system. For anyone who wants more detail, copies of the Unit's full reports can be obtained from all good bookshops or ordered direct from Central Books, 99 Wallis Road, London E9 5LN; tel.: 0181 986 4854, fax 0181 533 5821, e-mail mark @ centbks.demon.co.uk.

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BRIEFING 1

DELIVERING CONSTITUTIONAL REFORM

There is currently a real prospect of constitutional reform in the UK. The level of interest in constitutional change has brought it into mainstream political debate. However, the debate about it has tended to focus on the substance of reform rather than the means of achieving it. It is vital that serious thinking about how to implement reform is begun well in advance.

Planning Ahead

In the run up to the 1997 General Election, the Labour Party and Liberal Democrats included the same key elements in their programmes of reform—although they did not agree on the detail of how best to tackle them. These include:

- Devolution to Scotland and Wales.
- Reform of the House of Lords.
- Freedom of information legislation.
- Incorporation of the European Convention on Human Rights and development of a domestic bill of rights.
- Regional government in England.
- Reform of parliamentary procedures.
- (At least a referendum on) electoral reform.

Debate about constitutional reform has tended to focus on the substance of reform rather than the means of achieving it. But if it is to be successful, it is vital that serious thinking about *how* to implement reform is begun well in advance. This is particularly true in respect of the far-reaching programmes of reform proposed by Labour which, if implemented, will represent change at a pace and of a significance unprecedented in British constitutional history. A government which intends to pursue constitutional reform needs to start thinking about how it is going to do so now.

Whitehall

The success or otherwise of wide-ranging constitutional reform will depend to a significant degree on the effectiveness of Whitehall—Ministers and civil servants—in tackling the policy agenda prescribed by a reforming government.

Planning the Legislative Programme

In planning the legislative programme, constitutional bills will have to compete with other programme bills—the main constraint is the amount of Parliamentary time available for the Government's main programme bills. There will be political and practical pressures to proceed at different speeds for different items on the constitutional reform agenda. This will depend on: the level of political commitment to a particular measure (and whether clear public commitments on timing have been made); the amount of preparation necessary; and the inter-relation with other measures.

A Minister in Charge of Constitutional Reform

Within the current Whitehall structures there is no one Minister with responsibility for constitutional matters. But a reform programme will need central strategic leadership from a senior Cabinet Minister: within the new Government this looks likely to be Lord Irvine, the new Lord Chancellor. The title is unimportant, what is key is that the Minister commands the support of the Cabinet as a whole, and has no other policy responsibilities that would require legislation, so that his or her sole priority in the bidding process would be to secure a place for constitutional reform measures.

The provision of central strategic leadership need not supplant the responsibility of departmental Ministers for taking most of the individual measures through Parliament, particularly in the case of piecemeal legislation. The essential point here is to ensure a Minister and a body of officials have an overview of the whole programme, and recognize the inter-relations between constitutional reform measures, rather than simply providing a tactical response unit when specific measures run into difficulties.

Co-ordination and the Machinery of Whitehall

Government must also establish machinery which ensures high level co-ordination of policy input by all interested departments; and that the process of preparing for and legislating on constitutional reform is kept at the front of Government's priorities. The structure of Whitehall and Cabinet committees may need to be reshaped to give effect to the reform programme. Within Cabinet, this will be achieved by the creation of a new strategic committee chaired by the Prime Minister; and by the creation of a new committee responsible specifically for co-ordination of constitutional matters, starting with devolution, which is chaired by the Lord Chancellor.

Westminster

The time taken by constitutional measures to pass through Parliament tends to be greater than for other bills—in part because of their complexity and the controversy they may attract and in part because of the use of the committee of the whole House.

A Committee of the Whole House

At least five of the measures listed above are likely to be considered 'first class constitutional issues'. By convention, such measures are considered on the floor of the House at committee stage. Most other public bills which have been read a second time are automatically committed to a standing committee. Taking the committee stage on the floor of the House allows all Members to take part in the debate and is intended to allow for full debate of particularly significant bills. However, a committee of the whole House is potentially a major pressure point for constitutional bills.

First, it brings out the confrontational and party political characteristics of parliamentary debate. The main weapon of the Opposition—and other opponents of a bill—is to delay progress through raising points of order, filibustering, and tabling numerous amendments. The size of a committee of the whole House offers considerable potential for delay in this manner.

Second, time on the floor of the House is at a premium. In a typical session a government has between 50 and 60 programme bills. The amount of legislative time any government has on the floor of the House to deal with all these bills is around 400 hours in each session. Previous major constitutional bills have taken as long as 100-200 hours on the floor of the House. Assuming a desire to have a significant legislative programme of non-constitutional measures, under the current system of parliamentary time allocation, there is likely to be time for *two constitutional bills per session* at the most.

Use of the Guillotine

Of course a government could decide to introduce a guillotine motion to limit time spent on a constitutional bill. However, guillotine motions generate considerable resentment in the House—they mean that large sections of a bill may receive little, or no, scrutiny—and have to be used with caution. Although there are precedents for the use of the guillotine on constitutional bills, opposition to a guillotine motion on an issue of constitutional importance will be particularly fierce. The use of a guillotine could damage the democratic credentials of a reforming government, and serve to undermine the legitimacy and durability of the constitutional reforms themselves. Indeed, the only occasion since the Second World War when a government has lost a guillotine motion was over a constitutional bill—the Scotland and Wales Bill 1977.

Changes to Procedure

Serious consideration therefore needs to be given to changes in parliamentary procedure. The key is to ensure that enough time is given for parliamentary consideration and that this time is effectively used for the scrutiny of the legislation. There are essentially two different areas in which alternative procedures, or reform of existing procedures, could ease the passage of a constitutional bill while meeting demands for adequate scrutiny:

- To take some stages of a bill off the floor of the House by using another committee forum.
- To alter the control of time, either by limiting the amount of time which can be spent on a bill or by removing some of the constraints on time.

Three proposals which would achieve these aims are:

- Partial referral of bills to a standing committee: this would reduce the amount of time that a bill takes on the floor of the House, but would allow full debate in a standing committee.
- Automatic advance timetabling of all bills, which would ensure that all parts of a bill were looked at and would minimize incentives for filibustering.
- Selective use of carry over, which would mean that the time spent debating a bill in one session would not be wasted if the bill did not complete its passage in that session.

Part of a Package of Parliamentary Reform

Changing Parliamentary procedure simply to facilitate or enhance the quality of a constitutional reform programme is potentially a high risk strategy. The political nature of parliamentary procedure means that changing the rules that govern the game is fraught with controversy. Any government initiating procedural change must be content to live with those changes in opposition.

It is important that changes in parliamentary procedure are part of a wider process of parliamentary reform, which is coherent and desirable in its own right. Reform of parliamentary procedure has a relevance which goes beyond constitutional bills and there is no shortage of suggestions for ways in which the workings of Parliament could be improved. The desire to secure the passage of a large legislative programme should therefore be seized as an opportunity to implement wider parliamentary reforms.

Consultation, Consensus and Inquiry

There is a strong expectation that constitutional reform be based on broad public and cross-party consultation. If there is the necessary political will, and party unity can be assumed or manufactured, there is every reason to regard the Whitehall-Cabinet Committee route as the most efficient way of developing policy. But getting

legislation on the statute book is not all. 'Efficiency' also includes making constitutional reforms endure beyond the lifetime of a particular government: coherence and legitimacy are equally important.

Benefits of Consultation

Those interested in embarking on constitutional reform in the UK this century have nearly always attempted to engage with other political parties and consult outside of political élites. The benefits of consultation can be that it:

- Produces more widely acceptable policy and technically accurate legislation.
- Allows for the strength and nature of opposition to be assessed.
- Provides a means for building support for a measure; educates the public and MPs about the issues involved.
- Lends weight and authority to the position that the Government takes.

Mixed Success

However, history also shows that few attempts at consultation have resulted in legislation which had cross-party support. In some cases failed efforts to achieve consensus may even have hindered the passage of the legislation. This can be because consultation:

- Is usually entered into as a defensive act, resorted to only when the usual political channels fail.
- Produces compromises which are unworkable in legislation.
- Identifies and entrenches opposing views.
- Forces a government onto the defensive.
- Provides a focus for opposition to a measure.
- Makes a government look indecisive and directionless.

Mechanisms

The absence of any fixed procedure for constitutional amendment means that there is a range of vehicles that might be used. There are essentially three categories of consultation:

- Building political consensus—for example inter-party talks, an approach which is particularly suited to tackling issues where the balance of political power is an issue.
- Calling in the experts—for example a constitutional commission, a forum appropriate for dealing with measures which require technical expertise and where there is no firm policy commitment to detail.

- Public consultation—for example referendums, desirable where a clear demonstration of wide electoral support is needed to secure the legitimacy of a measure, or as a means of providing a degree of entrenchment.

The key determinant of success in choosing a vehicle for consultation or inquiry is to have clearly identified and realistic objectives.

The Need for Preparation

Successful implementation of a constitutional reform programme will be difficult, but can be done. Tackling the volume and complexity of the legislation while ensuring coherence and adequate consultation will require political will, as well as careful and innovative thought. This is not an argument against embarking on constitutional reform, it merely underlines the value of identifying the practical problems and seeking solutions to them at the earliest point.

BRIEFING 2

REFORM OF THE HOUSE OF LORDS

After several years in which a threat to abolish the House of Lords was lurking in the political shadows, there is now a broad political consensus as to the desirability of a bicameral Parliamentary system in the UK. However, there is disagreement about whether the second chamber should be the current House of Lords. This briefing examines the ways that reform might be implemented. It concludes that reform of the second chamber cannot be considered in isolation from other constitutional changes. In the long term, the principal additional function of the second chamber is likely to be providing a voice for the regions and nations of the UK at the centre of the political system.

An Ideal Second Chamber

The Labour Party and Liberal Democrats have both made it clear that they are committed to reforming the House of Lords. Both parties aim for a second chamber whose members are chosen by election; and both parties envisage a two-step approach, with the removal of hereditary peers from the House of Lords as the first step. The Conservative Party does not advocate any major reform of the House of Lords, but limited procedural reforms were made under the last Government.

One of the difficulties in identifying the ideal second chamber is that there is no agreed role for a second chamber within the British Parliamentary system, nor any clear idea of the intended relationship between the two Houses of Parliament, to use as starting point. The second chamber is variously defined as a constitutional protector, legislative reviser, and a source of independent counsel and expertise.

Unlike many other countries with a bicameral system, the agreement between the political parties in the UK on retaining a second chamber is not influenced by the demands of a federal state, nor by a desire to address issues of regional, social or cultural dislocation.

Many, although not all, of the reasons given for maintaining a second chamber are derived from the *de facto* pursuits of the House of Lords, rather than from any more fundamental analysis of the necessary functions of Parliamentary government. In addition, a number of the arguments for retaining a second chamber in the UK represent implicit criticisms of the House of Commons: for example, providing an independent voice as a

counterweight to MPs' lack of independence from the demands of party politics. These are just as many reasons for reform of the first chamber as justifications for a second chamber.

Without common ground as to what we want a second chamber to do, and some objective evaluation of its performance of those functions, there can be little agreement on whether the current House of Lords is working as well as it might, and therefore whether and how to fix it.

Moreover, debate about the House of Lords tends to begin and end with its composition. But any satisfactory, constructive reform must start by defining the intended functions, powers and relationship with the House of Commons of a new second chamber—together these define its role within the political system. Only then will it be possible to determine the composition required to carry out those functions; exercise those powers; and fulfil that role.

International Experience

Analysis of second chambers in other countries suggests some key conditions for an effective second chamber:

- A second chamber that positively complements, rather than compensates for, the first chamber is more likely to be accepted and effective.
- The need for, and role of, a second chamber is most readily discernible in federal states like the USA, Australia, Canada and Germany; but even in these states the political authority of the second chamber will depend on its specific composition and powers.
- The composition of the chamber (whether through nomination or election) must be clearly and deliberately representative of something if the body is to have political authority.

The Impetus for Reform

Demands for reform of the existing House of Lords arise principally from dissatisfaction with two key aspects of its operation:

- The hereditary basis of membership. At the end of the 1994-95 session, 770 of the 1,190 eligible members of the House of Lords were hereditary peers.
- The predominance of Conservative supporters: of the 1,037 peers eligible to vote at the end of the same session, 476 took the Conservative Party Whip—corresponding figures for the Labour Party are 109, and for the Liberal Democrats 52.

Many regard these features of the House of Lords as fundamentally undemocratic. For the Labour Party, such constitutional concerns mix with a political concern about the implications for its legislative programme in government.

In attempting to resolve the tension between the constitutional and political imperatives for reform, the three main parties have taken different views, each coloured in part by self-interest. Their different positions also illustrate that decisions about how best to reform the House of Lords are influenced not only by the intrinsic merits of different policy options, but also by the practicalities involved in implementing reform.

The Process of Reform

Would-be reformers need to understand both the evolution, and current working, of the House of Lords, in order to:

- Appreciate that the legislation relating to the House of Lords is only a small part of the framework within which it operates—convention, practice and procedure are of equal importance. Any attempt to reform the House of Lords by legislative means should bear this important fact in mind.
- Recognize the complexity of the relationship between functions, powers and composition.
- Tackling composition without creating knock-on effects may be difficult.

Whether reform involves one, two or more stages may be irrelevant. What is more important is that a clear set of goals is established and each stage of reform is directed towards achieving them.

Consultation

The creation of an elected second chamber is likely to involve a process of political negotiation, which attempts to establish shared objectives. Crucial to the progress of reform will be clear political direction and terms of reference. The very fact that a Government wishes to promote reform means that it has already identified deficiencies that it wants to remedy, and these should be clearly stated.

A variety of mechanisms has previously been used to consider reform of the House of Lords and other constitutional measures, for example inter-party conference; joint committee or conference of both Houses; Royal Commission; Speaker's Conference. But history suggests strongly that consultation is not always a problem-solver. In particular, a Royal Commission is not an appropriate mechanism for resolving the tension between political and constitutional goals that is implicit in finding a long-term solution for the House of Lords.

The most productive way forward for a government seeking to build consensus around long-term reform of the House of Lords would be first to convene a party leaders' conference on the *principles* of reform. The terms of reference might be to determine:

- The functions appropriate to the second chamber.
- The powers appropriate to the second chamber.
- The role of the second chamber in relation to the House of Commons and other tiers of government—local, regional, and international.
- The basis on which to select members of the second chamber.
- The balance of party power, if not predetermined by the basis of selection.

The agreed principles would then be remitted to the Government for further development of the scheme, to be published for wider consultation before introduction as legislation.

Functions of a New Second Chamber

It seems probable that, save for the judicial role of the Law Lords, the current functions of the House of Lords will persist in a reformed second chamber, and be supplemented rather than completely revised. Thus, in addition to the existing work of the House of Lords in scrutinizing European legislation prior to enactment, for example, a new second chamber might be charged with extending liaison with the European Parliament and/or conducting pre-legislative scrutiny of domestic legislation.

The House of Lords, and any replacement, will remain a second chamber responsible for checking, delaying and resisting—but not preventing—the actions of the government of the day. It is also likely to have an enhanced role of constitutional surveillance.

In the context of wider devolution, the principal additional function of a new second chamber is likely to be to provide a voice for the regions and nations of the UK at the centre of the political system.

Powers of a New Second Chamber

Removing the hereditary peers will remove one of the inhibitions on the House of Lords' use of its present powers. There may be a resurgence in the authority of the House of Lords and a willingness to use long-dormant powers of delay or veto on primary and secondary legislation, which may prompt further reform sooner rather than later.

The credibility of a predominantly elected second chamber (and its ability to attract high-quality candidates) will also depend on the extent of its powers, which should therefore include the power to delay non-financial legislation for at least as long as the one year currently permitted.

Composition of a New Second Chamber

Enhancing the Current Chamber

A number of non-legislative changes to the composition of the House of Lords could be initiated immediately—for example, introducing an attendance requirement, making the system of appointments more transparent, and the balance between the parties more equitable. Such reforms might prove attractive to the Conservative Party as part of their policy of incremental enhancement of the House of Lords, and as a counter-proposal against the prospect of more radical reforms from Labour and the Liberal Democrats.

A Nominated Chamber

The Labour Party is likely to face Parliamentary, public and media dissatisfaction with a limited measure to remove the hereditary peers. There will be pressure to establish a constructive agenda of reform for the interim nominated chamber, to ensure that it is sustainable in its own right.

The extent to which a Labour Government would embrace such changes will depend on:

- The degree of support they can secure in Parliament without taking such measures.
- Whether the Labour Party wishes to turn the chamber into a working chamber, in which peerages are jobs, rather than honours.

Recommended options for a 'democratic' nominated chamber include:

- The appointments system could be reformed to provide for peers to be chosen by party lists, but with public nominations invited for cross-benchers; recommendations to the Queen would ultimately be the responsibility of the Prime Minister, but he or she could be required to seek the advice of an advisory body of Privy Councillors. Criteria for decisions on appointments could be published.
- Party strengths could be determined in the short term on the basis of the party of government having a majority of one over the nearest opposition party (this would require the creation of some 60 new Labour peers on taking office). In the longer term, party strengths could be determined on the basis of nominations proportionate to votes cast in every general election, as proposed by the Labour/Liberal Democrat Joint Consultative Committee on Constitutional Reform; but this would need to be accompanied by some mechanism to limit the number of peers created.

An Elected Chamber

Labour and the Liberal Democrats both intend to move to an elected chamber in due course. There are obvious attractions, not least the legitimacy and authority that are derived from the electoral mandate. But there are also difficulties in deciding on the exact form of election. Foremost amongst these difficulties is that by enhancing the democratic legitimacy of the second chamber, it could become a rival to the House of Commons—unless its powers and functions are clearly defined.

The creation of a rival chamber may not be considered a negative outcome in itself—but in political terms is critical, as any reforms to the House of Lords will need to be agreed to by the House of Commons. The following factors would need to be considered in defining and distinguishing an electoral system:

- The form of representation—direct or indirect.
- The units of representation.
- The total number of members.
- The possible retention of a nominated element.
- Who might seek election.
- The likely party structure.
- The tenure of office and timing of elections.
- The electoral system.

BRIEFING 3

SCOTLAND'S PARLIAMENT: FUNDAMENTALS FOR A NEW SCOTLAND ACT

This briefing considers what legislation for Scottish home rule might look like; what other changes would be needed in the UK political system to make devolution work; and how Scottish devolution might relate to other proposed constitutional changes.

Lessons from the 1970s

Legislation for Scottish home rule is likely to be based on the proposals of the Scottish Constitutional Convention (SCC) but there are lessons to be drawn from the experience of preparing the Scotland Act 1978:

- Despite a formidable commitment of Ministerial and official time between February 1974 and July 1978, the resulting Scotland Act was widely regarded as unsatisfactory. The Act was repealed following a change of government and never brought into force.
- Officials worked hard to meet Ministers' wishes, but the Cabinet was divided. The Bill was viewed as a political expedient to counter nationalist sentiment in Scotland (and in Wales) and Parliament reacted accordingly.
- The Parliamentary debates were dominated by doubts about the feasibility of legislative devolution in principle within a unitary state. The 1977 Bill was a stronger package than the 1976 version and fared better as a result.

Success this time round will require leadership from the top, political commitment throughout the Government (and therefore in all Whitehall departments), a Minister in charge of preparing the legislation with a clear view of what is required (rather than simply a brief to reach lowest common denominator consensus), and a coherent picture of how this reform fits into a package which will benefit the whole of the UK, not just Scotland and Wales.

Allocation of Legislative Competences

The 1978 Act sought to define with great precision the legislative competences of the devolved assembly by reference to statutes then in force in Scotland. This was a mistake. No allocation of powers is without its grey areas—but the 1978 Act failed adequately to acknowledge this. As a result it was impossible to understand without reference to other legislation, it would have been difficult to use in practice, and it would have required frequent amendment. Instead:

- The Act should list only powers retained at Westminster rather than those devolved.
- Express provision should be made for Westminster to legislate outside its areas of retained competence in certain circumstances, for example to comply with international obligations, or when the Scottish Parliament requests Westminster legislation; and for the Scottish Parliament likewise to be able to encroach on Westminster's retained powers when necessary—with their consent.
- These arrangements will apply mostly to European legislation: it will be necessary to reconcile UK membership of the European Union (and liability for non-implementation of EC law) with an overlap of legislative competence between the EC and Scotland.

Resolution of Disputes

However tightly the legislation is drawn, disputes about the precise scope of the Scottish Parliament's competence will arise. They might be resolved, or avoided, by:

- Scrutiny of bills in advance of introduction by the Scottish law officers and the Speaker of the Scottish Parliament.
- Provision for a direct challenge to Scottish acts on *vires* grounds following Royal Assent but before entry into force (this period to be a maximum of one month except in cases of urgency).
- Provision for indirect challenges—where devolution points occur in the course of other cases—to be referred to the final court of appeal for an opinion (by analogy with the Article 177 procedure for taking advice on points of EC law).
- Provision for the direct challenge of executive acts of the Scottish executive at any time.
- The final court of appeal for devolution disputes should be the House of Lords.

Entrenchment

The Scottish Constitutional Convention's (SCC) proposed Westminster declaration will introduce a political hurdle to repeal or significant amendment of the devolution legislation. The same effect—a political one—might be achieved by including a declaratory clause, or a clause specifying special procedures for amendment, in the bill itself.

A referendum has also been canvassed as a possible entrenchment measure. There is no constitutional doctrine which requires a referendum: previous referendums in the UK have generally been held when the normal political process has broken down because of party splits etc. The 1979 referendums were of this sort.

The choice whether to hold a referendum on the question of Scottish devolution will be a political one. Strong and explicit popular endorsement of the principle of establishing a Scottish parliament might add to the political inhibitors in the way of repeal or emasculation of the devolution legislation. If obtained in advance, a positive referendum result might also smooth the passage of the legislation through Parliament. But in those circumstances the referendum itself would require a short bill. No referendum result could be binding on the Government; nor on the Scottish people, who would reserve the right to pass judgement on the Parliament in the light of experience once it had come into operation.

Financial Arrangements

The arrangements proposed by the SCC are a sensible basis on which to establish the Parliament, but do not promise stability in the longer term. The Barnett formula, which determines changes in the Scottish Office budget each year by reference to changes in equivalent English spending plans, is under pressure in any event and could not provide a basis for financing eventual English regional government. The bill should aim to promote greater stability (and longer term applicability throughout the UK) by specifying mechanisms for keeping the funding formula under review and making adjustments when necessary.

The key will be the establishment of an independent commission to gather reliable data about spending levels and to relate them to relative need. The commission might conduct a periodic UK needs assessment, say every five to ten years, to inform periodic review of the funding formula. The first such assessment might commence immediately following the establishment of the Parliament. The commission would make recommendations to central government for approval by the Westminister Parliament. It would also provide an independent audit of the results of applying the formula in practice.

Autonomous revenue raising powers are essential to achieve a sense of fiscal responsibility and accountability to the Scottish electorate. The proposed power to vary the basic rate of income tax is intended to spread any tax

change widely and visibly. Achieving those aims in practice might require tighter definition, since both the level of the basic rate and the income range to which it applies will be determined by Westminister. The proposed variation of three pence in the pound will have no significant macroeconomic effects for the UK as a whole.

The Parliament will need capacity to borrow for revenue smoothing purposes (an overdraft facility) in order to function effectively. Assigned revenues might find a place in a longer term settlement, but only once reliable data are available and familiar.

The European Union

The overlap of legislative competence between the EU and the Scottish Parliament will make it imperative for Scotland to find ways of effective participation in the framing of EC legislation, in Brussels and in London:

- By direct representation in the European Parliament and the Committee of the Regions, and the establishment of a government office in Brussels.
- Through the negotiation of an intergovernmental agreement with the UK guaranteeing consultation over new legislative proposals, also covering levels of representation in the EC institutions, and attendance at all relevant EC and working group meetings, and at intergovernmental conferences to review the treaties.
- By establishing sound procedures for legislative scrutiny and exchange of information within the Scottish Parliament, including with Scottish MEPs.

Central Government

The Secretary of State for Scotland will have a key role to play in the early period, not least in interpreting the devolution settlement to his or her colleagues. But the role may diminish, and—although it will still be open to the Prime Minister to fill it—will be difficult to justify once the Parliament becomes established.

The West Lothian Question will still be asked so long as one Scottish MP remains at Westminster. The only two genuine answers—no representation at all, and 'in and out' (Scottish MPs taking no part in Commons business dealing only with the rest of the UK)—are unjust or unworkable.

A political response might lie in reducing Scotland's representation at Westminster. But there are practical difficulties involved in implementing *any* change with so many other relevant factors to consider—Wales, Northern Ireland, conflicting Boundary Commission rules, the speed of development of English regional government. The question might be remitted to a Speaker's Conference, perhaps to set political guidelines for subsequent review by a UK electoral commission. It might prove impracticable to reach a conclusion with a referendum on change in the Westminster electoral system in prospect.

There will be numerous channels for communication and negotiation between the two administrations. A joint council of the two governments might nevertheless prove a useful forum in the early years. Scottish—and other—MPs at Westminster might join a Scottish affairs select committee to monitor the devolution settlement. In time, its terms of reference would expand to cover other devolved territories and regions, i.e. 'devolution affairs'.

Local Government

The bill should contain a commitment to the Scottish Parliament maintaining a strong and effective system of local government. But there would be little value, and some risk, in including a specific reference to 'subsidiarity'—which could at most be taken only as a guide for the court in construing any piece of legislation—or any attempt to specify a division of responsibilities. The Parliament might instead negotiate a concordat with local government establishing criteria against which to judge any proposed change in local government's powers, and embodying rights of negotiation, information, consultation etc. on matters such as the allocation of finance.

To encourage co-operative working, the Parliament should be able to second local councillors onto relevant committees—without voting rights, and councillors should be allowed to stand for the Parliament.

Economics and Industrial Policy

The scope for Scotland to pursue an independent economic or industrial policy within the context of UK policy—which will become increasingly shaped by the European Union—is limited. There will be advantages in the ability to review the institutions of economic development (Scottish Enterprise, Highlands and Islands Enterprise, the local enterprise companies etc.), in an enhanced capacity for strategic planning, in giving incentives and support for small and medium-sized enterprises, and in fostering a closer relationship between business people and decision-makers: geographically—the presence of the decision-makers in Edinburgh, and psychologically—potentially the presence of local business people among them.

But control of macroeconomic policy will remain at Westminster, and the risk of competitive bidding between UK nations and regions argues for the framework of incentives to inward investment and domestic regional investment to be set by central government too. The EU dimension is significant, especially given the rules on matching EU grant funding (additionality) and the gap between the level of state aid permitted under EU rules and the lower (cost per job) limits set by the UK Government. Tolerance and mutual accommodation will be required to preserve the benefits for Scotland of the present UK regional assistance regime.

The Transition

As much preparation as possible should be carried out in advance of Royal Assent. But even then it might be up to nine months before elections could take place. The first meeting of the Parliament could be held shortly thereafter, with a further three months of running in operations—settling standing orders, committee structure, dry-running operations with the Scottish Office—before full powers are transferred.

Concluding Observations

Devolution to Scotland would open up to scrutiny parts of the political system which have remained relatively hidden to date: distribution of resources, of inward investment, of gains from European policies, and the attitude of Whitehall Ministers and departments to Scottish issues. This new visibility will require a greater political trust and tolerance at the centre—and in the regions—and a new appreciation of the nature of the British state as a *union* rather than a *unitary* state. Devolution is a loosening of control, which carries risks. But breaking the central monopoly on the design of public policy could bring overall benefits through the encouragement of competition, diversity, and wider participation in the political process all round.

BRIEFING 4

AN ASSEMBLY FOR WALES

This briefing was based on a detailed study by the Constitution Unit on how a Welsh assembly could be established, its powers and funding, and its relations with local government in Wales, Westminster, Whitehall and the European Union.

Proposals for a Welsh assembly go back 100 years. The last Labour Government legislated for an assembly in the Wales Act 1978, but it was rejected by four to one in a referendum in 1979. Labour, the Liberal Democrats and Plaid Cymru still support the creation of an assembly. The assembly proposed by Labour would have executive powers only. The Liberal Democrats and Plaid Cymru both propose a Senedd with law-making and revenue-raising powers. All three parties are now agreed that the assembly should be elected by proportional representation.

Public opinion surveys in Wales suggest that some 45% are in favour of an assembly with 30% against and 25% don't knows. Of the 70% in favour and undecided, 50% want an assembly with limited legislative and revenue raising power, 60% want proportional representation, and 70% want a referendum on the issue.

Lessons from the 1970s

The Wales Act 1978 proposed an assembly with executive powers only. It set out a complex scheme of legislation which gave no clear picture of what powers were being devolved. It would have created an uneven patchwork of devolved powers, varying with the degree of discretion conferred by existing statutes, none drafted with devolution in mind. It might not have created a stable settlement.

Devolution in the 1990s

From Labour's policy statements the main objectives for an assembly appear to be:

- To make the Welsh Office and quangos more directly accountable.
- To reflect the distinctive needs and cultural identity of Wales.

- To remedy the democratic deficit which led to the introduction of the poll tax and changes in education and the health service which had no support in Wales.
- To give Wales a strong and distinctive voice in Europe.
- To provide the new unitary authorities with strategic direction and support.

Role and Functions of an Assembly

The classic functions of a democratic assembly are making laws; controlling government expenditure and taxation; and providing democratic scrutiny. The Liberal Democrats and Plaid Cymru both propose a Senedd with law-making powers. Labour's assembly would have powers of secondary legislation, which would vary with the degree of discretion conferred by statutes passed at Westminster.

If the assembly is to develop—or preserve—separate policies for Wales in local government, education or the health service, it will need legislative powers. Otherwise it will be dependent on the legislation passed at Westminster and prepared by Whitehall, where the Government may have a different agenda and other priorities.

The assembly should also be able to call Welsh political leaders to account more frequently and effectively than does Westminster.

Powers of an Assembly

Executive Devolution

If the policy is one of executive devolution, this could be achieved by listing in detail all the powers transferred, as in the Wales Act 1978, which would take a lot of time to negotiate in Whitehall; or transferring all the executive powers exercisable by the Secretary of State for Wales, without itemizing them.

Labour have proposed that an executive assembly should have *limited legislative power* to restructure quangos and local government and to legislate on the Welsh language. The assembly could legislate on these topics if its general powers of delegated legislation were extended in these areas to include power to amend Acts of Parliament (by so-called 'Henry VIII clauses'); but this would need safeguards and might require confirmation by Westminster.

Legislative Devolution

Legislative power could be devolved in all subjects currently the responsibility of the Welsh Office. Westminster would need to retain a degree of legislative responsibility in three circumstances: to protect the interests of the rest of the UK; to enforce international obligations; and to protect the integrity of the common legal system.

Westminster would still be able to legislate even in devolved subject areas, because of the supremacy of Parliament; but the history of Stormont suggests such intervention would be rare.

There could be phased devolution with the transfer of legislative power in stages, on the model of the Northern Ireland Constitution Act 1973. Legislative power might initially be conferred in such fields as local government, housing, Welsh language, arts and culture; and gradually be extended to education, health, social services, etc.

The legislation could:

- Define the powers reserved to Westminster (as in the Government of Ireland Act 1920).
- Define the legislative powers devolved to the assembly (as in the Scotland Act 1978).

It is easier to define the powers reserved; but this would not be possible with phased devolution, which would have to define the legislative power transferred at each stage.

Structure of the Assembly

The Wales Act 1978 conferred executive power on the assembly and its committees following the local government model. The assembly was required to establish multi-party committees, with the leaders of the committees forming an overall executive committee. The local government model involves all members in decision-making; but it has been criticised for its cumbersome committee structure, slow decision-taking, diffusion of responsibility, and relegation of real policy-making to the party caucus.

A more effective alternative could be the cabinet model, with an executive separate from the assembly. This would produce quicker decisions and sharper accountability, but would give less of a role to backbenchers.

The Assembly and Central Government

The Secretary of State for Wales will have a vital role in implementing the devolution legislation and setting up the assembly and Welsh executive. He or she will also help to establish smooth working relations between the new Welsh government and Whitehall. Thereafter the office is largely redundant: the Welsh administration will deal direct with Whitehall departments. Any residual liaison function could transfer to a Minister with overall responsibility for relations with the nations and regions of the UK.

The question of Welsh representation at Westminster is likely to arise just as sharply as it did in the 1970s. It cannot be ignored, particularly since Wales is already over-represented (at 40 seats, when its share proportionate to population would be 33). It would be wrong to exclude Welsh MPs altogether; and impracticable to allow them to vote only on non-devolved matters. One response may be to offer a review of Scottish and Welsh

representation once the devolved assemblies are established; another would be to consider the matter in the context of any change to the electoral system for the House of Commons.

Quangos

The creation of a Welsh assembly will provide the opportunity to review the whole framework and accountability of quangos. They have caused public concern in Wales because of their inadequate accountability; the people appointed to their boards; and lapses in their internal management. But it is only a few high-profile executive bodies which have given rise to that concern. In many areas there are sound reasons for retaining quangos with a degree of operational independence. The majority are specialist bodies operating in technical fields where the assembly and its executive would need independent expertise and advice.

The Assembly and Local Government

Constructive relations between the assembly and local government could be greatly helped by:

- A new agreement about the system of local government finance.
- A concordat respecting the role of each tier, and consultative and other procedures.
- Co-option of local authority members onto assembly committees.
- Dual membership, permitting councillors to stand for the assembly.

Europe

The Welsh assembly and executive will want to maximize Welsh influence in Brussels. This will continue to be done largely through UK Ministers and departments, because the UK is the member state. The Welsh executive will need to negotiate a co-operation agreement with the UK Government providing for:

- A continuing flow of information.
- Participation in preparatory meetings.
- The right to send observers to working group and European Council meetings on devolved matters.

The Welsh assembly will need to establish procedures for monitoring and scrutiny of developments in Europe. It should welcome the Welsh MEPs and co-opt them onto its European Affairs Committee.

Electoral System

All parties envisage an assembly of 60-100 members. Labour originally proposed elections by 'first past the post', but early in 1997 adopted a limited form of proportional representation: the additional member system in a 60-member assembly, with 40 members elected by 'first past the post' and 20 additional members to provide proportionality. 'First past the post' is more concerned with producing strong government, and proportional representation with producing a representative assembly.

The Liberal Democrats have proposed using the single transferable vote, already used for certain elections in Northern Ireland; and Plaid Cymru the additional member system, but with 40 rather than 20 additional members to ensure proportionality.

The assembly is unlikely to sit more than 100 days a year, so that membership of the Welsh assembly may not be a full-time occupation. There should be no restriction on MPs and local government councillors standing for election. Dual membership can be left to find its own level determined by the workload and the views of constituents.

Finance

Additional staff will be required for the assembly itself; to service the executive members; to manage the split with the Secretary of State, and greater separation from Whitehall; to respond to additional demands from the assembly; and the greater expectations of the public. It is difficult to quantify how many additional staff would be required; in the 1970s the estimate was 1,150. Every 100 additional staff of the Welsh administration will cost around £3M. The annual running costs of the assembly itself have been estimated at around £15M.

In the long term, devolution may require a change to the whole system of determining public expenditure in Wales. The current system, whereby the Treasury determines the Welsh block (the 'Barnett formula'), might not survive the greater scrutiny involved in an external transfer mechanism between different administrations. If it does come under pressure, it might need to be replaced with a regular needs assessment exercise conducted by an independent commission.

If the Welsh assembly is to have responsibility for making real choices about the level and nature of public spending in Wales, it will need power to raise some of its own revenue. The yield may not be significant, and it may create the gearing problems evident with local government; but without some revenue-raising power the Welsh assembly will have no fiscal accountability to the Welsh people. This might be a power which needs to be conferred later, once the assembly has become established.

Entrenchment

It is impossible within the Westminster tradition of sovereignty to find satisfactory ways of formally entrenching the powers or the existence of the Welsh assembly. More effective than legal entrenchment might be political entrenchment by a referendum. If a referendum is offered, it might be better to hold it in advance of the legislation (as proposed for Northern Ireland) rather than afterwards (as happened in 1978). It could help decide the question of principle whether Wales wants an assembly.

A second form of political entrenchment would be to strengthen Welsh representation at Westminster, not in the House of Commons but in a reformed House of Lords.

The Timetable for Implementation

Scotland dominated the devolution debates in the 1970s. In the 1990s, Wales risks being overshadowed by Scotland again. The risk is that much greater if both Bills are introduced in the same session.The timetable for introducing devolution legislation for Wales will depend on:

- The political priority attached to it.
- The links with Scotland.
- The way the legislation is framed.
- Whether there is a referendum held in advance.

A referendum would require separate legislation; if this passed swiftly, the overall timetable might be delayed by six months or so. In the 1970s it took over two years to prepare the first Scotland and Wales Bill.

BRIEFING 5

REGIONAL GOVERNMENT IN ENGLAND

There is a growing interest in regional government, stimulated by pressures from Europe, from local government, the new Government Offices for the Regions. This briefing takes these developments and proposals as its starting point and defines the key choices about objectives and practical means of implementation.

Regional Government in England

Current proposals for regional government in England are a response to: growing dissatisfaction with highly centralized government; a decline in the autonomy of local government and a perceived failure to address regional economic development and strategic planning needs. Discontent with rule from London has been reinforced by 17 years of single party government at Westminster, while interest in regional government in England has been boosted by the prospect of wider constitutional change: a regional dimension in European Union affairs; and—most acutely—the possibility of a Scottish parliament, Welsh assembly and an authority for London.

Both the Labour Party and the Liberal Democrats have put forward plans for democratic regional assemblies in England, although their proposals differ as to the speed of change, the role and functions of assemblies and their long term constitutional status. The Conservative Party has not traditionally supported regional government, but in the last two years of government carried out its own regional initiative in creating Government Offices for the Regions, integrating the regional administration of central government functions.

The Case for Regional Government

A workable and durable regional tier requires clear analysis of the reasons why it is to be established and the role and functions it is to perform. Arguments advanced in favour of regional government are both democratic and functional.

Democratic

Regional identity requires democratic recognition:

- For those parts of England where the national governing party commands little support, there is a need to provide a regional means of satisfying the political disfranchisement felt.
- The *de facto* layer of regional administration through Government Offices, agencies and quangos which has grown up which needs democratic supervision in the region.

Functional

Local authorities and other representative bodies agree that there are certain functions whose effective operation need areas larger than local authorities but smaller than England as a whole. These are identified as:

- Strategic land use planning.
- Transport.
- Economic development.
- Putting together, and implementing, programmes for EU funding.

Options for Change

The test of seriousness of a government's purpose in establishing a new regional tier will be its willingness to take positive steps to devolve power to local government or new regional bodies. Democratic control at a sub-national level could be increased in a number of ways:

- Restoring local government powers and functions.
- Regional Parliamentary assemblies composed of MPs and perhaps MEPs.
- A confederation of local authorities through appointed (or elected) representatives.
- Directly elected assemblies.
- A body based on the rationalization and merger of bodies operating in the region which are of a strategic nature (police, health, regional arms of selected quangos and other agencies).

These are not mutually exclusive, but most promising at regional level are the models of indirectly elected *regional chambers* (a confederation of local authorities) and directly elected *regional assemblies* (an independent tier). These broadly equate to the bodies proposed by the Labour Party and, in the case of assemblies, to the regional authorities proposed by the Liberal Democrats. The Liberal Democrats now propose a gradual development of assemblies triggered by regional referendums.

Some Basic Objectives

Chambers need to meet the basic objectives of utility and credibility; they should have a coherent group of powers and responsibilities which would continue to make sense even if the transition to directly elected assemblies were never made. The functions should be sufficient to give a fair test of a distinct step on the road to regional devolution.

In addition, considerations of equity, distribution of power and clarity need to be kept in mind when establishing both chambers and assemblies. National standards may need to be balanced against regional autonomy. The relationships between new regional bodies and existing institutions must be clear and well understood if they are to be useful and command support.

Process of Establishment

It is a major leap to directly elected and powerful devolved assemblies in England. Given the necessary political will, it would be possible to move straight to directly elected assemblies. However, the uneven support for regional government points to a period of transition which could vary considerably from region to region and would involve the establishment of chambers as an interim stage. A key choice, with practical implications, is between a process of rapid transition and one which allows for a staged process of development. *Rapid transition* would establish the regional chambers as essentially preparatory to an early move to directly elected assemblies; legislation would be needed to provide for regional assemblies from the outset—the role of the regional chambers, being transitional only, would be less significant. *Staged transition* would assume that the chambers are potentially a permanent state and certainly one that is self-contained; the creation of regional assemblies later would depend on demand.

Regional Chambers

A credible national pattern of chambers would need a number of decisions by the Government on the following issues.

Functions

The functions of regional chambers would be likely to include strategic co-ordination of land-use planning, transport, environmental and economic development and European funding bids. Central to this approach would be the development of a regional strategy. Such a strategy would be linked with strategic planning guidance and transport plans for the region. Regional development agencies—if established—would have a key role in implementation; as would partnerships with the Government Office, and with other regional actors: regional quangos, the business community, the voluntary sector, and training and educational bodies.

The other main function proposed for chambers is democratic oversight of quangos and related bodies at a regional level. As quangos are responsible to and funded by central government, a decision to make them regionally accountable would require a review of terms of reference initiated by the Government to establish whether, and if so how, they are to be more responsive to regional requirements.

Two main models for democratic oversight of quangos have been advanced: scrutiny and partnership. There is an inherent difficulty in proposing that the chambers should act in partnership with regional quangos and other agencies, while at the same time scrutinizing them and possibly invoking sanctions as a consequence. Partnership would be easier to secure with a collaborative version of the scrutiny role.

The Government Offices for the Regions exist to co-ordinate and deliver central government functions in the regions: their instructions and resources are provided by Ministers. Even with the establishment of a regional tier of government, there will be a continuing need for central government presence in the regions. These central government operations can give an account, but cannot be called to account by indirectly elected regional chambers; their accountability must follow their lines of political control upwards to Whitehall and Ministers.

Boundaries

If progress is to be made quickly, there is a strong case for adopting an existing pattern of boundaries for the chamber stage. Where there are differences between the boundaries of the Government Offices and regional associations, a short period of consultation should be provided for deciding about Cumbria, Merseyside and the north west; and the south east. Assuming that a new strategic authority is established for London, a key requirement in the south east is that the regional structure should provide for effective resolution of the major land use planning decisions of the region as a whole, including London.

Representation

Membership of the chambers should provide a sense of regional ownership of the chambers, ensuring the representation of sub-regional interests, of different types of local authority and reflecting the political balance of the region. A decision is required on how to provide for the representation of non-elected members in recognition of the need for chambers to work with partners in the business and voluntary sectors, as local authorities have increasingly done in recent years.

Finance

The strategic and deliberative nature of chambers' functions means their expenditure would be small, but greater than that of the existing regional associations. They should be financed, if there is legislation, by precepting on local authorities, and be subject to the same rules on expenditure limitation as existing local authorities.

Is Legislation Required?

A white paper could support progress to regional chambers by publicly committing the Government and including a clear statement of intent about further stages. However, without some legislative backing there would be significant limitations on what chambers could achieve. They would lack the authority which legislative establishment provides, funding would depend on voluntary agreement and the extent of their activities must derive from their constituent local authorities' powers and could be disputed. There would be substantial advantage in giving legislative backing to chambers at an early stage. This need contain only minimum provisions for establishing chambers—unless a prior decision had been made to proceed to assemblies.

Regional Assemblies

Direct election of regional assemblies would make significant devolution of central government functions feasible. Direct election of a regional body would produce lines of decision-making and accountability that would make possible the exercise of executive powers at a regional level. Without clear definition of such powers, it is doubtful whether a transition from indirectly elected chambers to directly elected assemblies would be justified or would command enough support from the electorate in the regions.

Functions

There is a number of possible models for regional assemblies, including different degrees of decentralization. Further public debate is needed before decisions are made. A fundamental decision will be the extent to which central government is prepared to give up powers to a regional tier. Directly elected bodies could, in theory, take on only the functions of regional chambers, but little would be gained by the time and effort involved. There could even be a net loss because, unlike chambers, assemblies would not provide a forum for local government co-operation. A second major decision is how far the assemblies would assume the function of allocating resources between local authorities: the latter would not welcome this.

In legislating for regional assemblies, a decision would need to be taken about whether variation between the regions could be tolerated and, if so, in which areas and to what extent. It would be necessary to determine whether there are areas of activity or issues relating to the composition, structures and organization of assemblies which demand uniform treatment; and whether there are items where variation would be possible or even positively desirable.

Boundaries

The main decision required in relation to boundaries is whether the same boundaries should be maintained for chamber and assembly stages; and if there is a change, who should decide the new boundaries and how.

Proposed boundaries could be subject to a referendum, which in some regions may be the only practical way in which decisions about boundaries could gain sufficient recognition to safeguard their long-term acceptance.

Representation

The geographical distribution of party political support strengthens the possibility of one-party domination at regional level. There is therefore a strong case for electing regional assemblies by a system of proportional representation.

Finance

The method of funding regional assemblies needs to be appropriate in light of their functions. Funding should follow functions allocated to the assemblies. There are various feasible sources of finance for regional assemblies, principally: a block grant from central government, a regional income or sales tax, a precept or a combination of these.

Legislation

The uneven progression to regional assemblies which seems likely will make framing the legislation difficult. In particular, it would have to accommodate the establishment of assemblies at different times, and may also need to allow for the creation of assemblies with different sets of powers.

BRIEFING 6

DEVOLUTION IN THE ROUND

This briefing followed the Constitution Unit's briefings on devolution to Scotland, Wales and the English regions. It highlights the key points from the first three briefings and sets them in the context of a wider programme of constitutional reform.

Rolling Devolution

Although some have proposed the immediate introduction of a federal system for the UK, the political realities, Parliamentary constraints and different degrees of enthusiasm suggest that a rolling programme of devolution is more likely.

The motivations for devolution in Scotland, Wales and the English regions are different. Scotland and Wales already have administrative devolution to the Scottish Office and Welsh Office, which allows a degree of policy and spending autonomy. Through the Government Offices for the Regions the first steps have been taken towards administrative devolution to the English regions. In Scotland and Wales, the pressure is now to introduce an element of democratic choice and local accountability. That feeling is present in some English regions, but not all. Both feelings—a wish for greater autonomy, and for greater democracy—are likely to grow in England if Scotland and Wales set the pace.

Devolution need not be uniform. Although the principle of equal political rights for all throughout the UK is attractive, it is breached in practice already through different degrees of administrative devolution in the UK and special arrangements in Northern Ireland. Other European countries live with lopsided devolution; and the UK did so for 50 years with Stormont. But devolution for Scotland and Wales alone may be difficult to sustain politically if it encourages, as it will, demands for similar treatment for some or all of the English regions.

A rolling programme of devolution would allow different parts of the UK to move at their own speeds depending on local demand. Devolution can embrace different settlements for Scotland; for Wales; and as between the different regions of England.

Scotland then Wales

In the 1979 referendums the Scots voted by a narrow margin for the Scottish assembly proposed in the Scotland Act 1978; but the Welsh rejected the proposed Welsh assembly by four to one.

Opinion polls suggest that demand is still greater in Scotland, and the work of the Scottish Constitutional Convention has built a strong civic consensus for change. Wales needs to have a wider debate of the kind generated by the Convention about the functions and powers of a Welsh assembly. To allow time for that debate there is a case for legislating first for Scotland which would:

- Prevent the Scottish proposals overshadowing the Welsh proposals.
- Enable cross-fertilization from the Scottish experience.
- Allow more time for consultation and preparation of the Welsh legislation.

The English Regions

The English regions could also have a rolling programme of devolution. It would be possible to establish directly elected regional assemblies in one step; but it seems more likely that some regions will be ready for this earlier than others, depending on local demand. This points to a period of transition which could involve the establishment of indirectly elected regional chambers (of representatives from local authorities) as an interim step. Ultimately, it might be possible to accommodate a pattern under which assemblies existed in some English regions and not in others; or assemblies with varying functions and powers.

Northern Ireland

Any new assembly created in Northern Ireland will have implications for devolution in other parts of the UK, in terms of its structure; powers; electoral system; and consequential changes to central government. But any new assembly will be designed to operate in the special circumstances of Northern Ireland: here too there does not have to be a uniform pattern across the UK.

Design of the Legislation

The sovereignty of Parliament should enable greater flexibility in a devolution settlement in the UK than is possible in federal systems. It should be exploited.

Legislative devolution should not follow the 1978 Scotland Act model: powers retained should be specified, not powers devolved. This would make the legislation more workable in practice, more principled, more comprehensible and more durable, and probably easier to draft.

Executive devolution is possible—but if it followed the model of the Wales Act 1978 it would be technically difficult to draft. It would not allow much policy autonomy but it could have a place in a programme of rolling devolution as a step towards legislative devolution. It could be a starting point for Welsh devolution, and is a step the English regions might want to take in due course.

Passage of the Legislation

To ensure coherence and to maintain momentum for a programme of constitutional reform, including devolution, there needs to be a central unit in Whitehall charged with overseeing the devolution legislation, supervised by a strong central Minister. The policy lead can lie with the territorial departments, but a senior Minister and a body of officials need to have an overview of the whole programme, and recognize the inter-relations between different constitutional reform measures.

Reform of Parliamentary procedures will also be needed. Changes might include:

- Partial referral of bills to a standing committee, to reduce the time needed on the floor of the house.
- Advance timetabling of all bills.
- Allowing some bills to be carried over from one session to the next.

Referendums

A referendum is not necessary for constitutional reform, but might be desirable if popular consent for specific change is in doubt.

In relation to devolution, this is more likely to be the case in Wales (given the 1979 referendum result) than in Scotland. A referendum could be held in advance of the legislation, as the Government has proposed; but an advance referendum would require separate legislation. For the English regions, the referendum offers a possible way of settling the boundaries of the regions for directly elected regional assemblies. Any referendum will need to be conducted according to clear and widely agreed guidelines, if the result is to be regarded as fair.

Finance

Financial arrangements will be the key to making devolution work in Scotland and Wales. The specific financial arrangements will need to reflect the functions of different assemblies. But there are three basic principles:

- Devolved assemblies should be able to raise a proportion of their own revenue. Otherwise they will have political accountability to the local electorate but no fiscal accountability. They will constantly blame central

government for restricting their finances, while central government will constantly blame them for overspending (as we have seen with local government).

- The assemblies should have freedom to allocate the spending according to their own priorities. The element of own revenues need not be large to give some ability to vary spending decisions at the margin.
- The principle of equalization according to need across the UK should continue to apply in the allocation of public resources. This has led to regional transfers throughout the UK, governed in Scotland, Wales and Northern Ireland by the Barnett formula. That formula is based upon a needs assessment carried out 20 years ago. It will come under increasing scrutiny and pressure, and could not provide a basis for financing eventual English regional government. Any new needs assessment could in future be carried out by an independent commission, and repeated every five to ten years. The commission would make recommendations about the allocation formula, and monitor its application. Its role would be advisory: allocation decisions would remain the responsibility of the Government and be approved by Parliament.

Changes in Central Government

Rolling devolution might in time have major consequences for central government. Part of its rationale is to reduce the overload on Westminster and Whitehall. The role of the Secretaries of State for Scotland and Wales will reduce over time if assemblies with legislative power are established. Government departments will have to re-orient themselves from top-down policy making, to policy observation, co-operation and co-ordination.

There may be political pressure for reduction in the number of Scottish and Welsh MPs to offset the establishment of assemblies. If a reduction in the number of MPs is thought prudent then it should be considered either by a Speaker's Conference or by a UK Electoral Commission established to provide independent advice on electoral issues. Labour and the Liberal Democrats have both proposed establishing an Electoral Commission. The prospect of a referendum on proportional representation for the House of Commons might lead either body to recommend no change until such time as decisions on the electoral system are made.

Although reduced in the House of Commons, Scottish and Welsh representation might be strengthened in a reformed House of Lords. One possible function for the House of Lords in the future might be the role fulfilled by the upper house in federal systems: it could represent the nations and regions of the UK. This could give the devolved assemblies a stake in the institutions of central government.

Parliamentary procedure and practice in Westminster may be influenced by new practices in the devolved assemblies; new co-ordination functions may also be assumed by the House of Commons and in the House of Lords.

Co-operative Machinery

For devolution to work it needs to be underpinned by co-operative machinery as well as political will. The official level machinery should help maintain effective working between central government and the devolved assemblies when the politics is under strain. Whitehall will need to maintain the same level of contacts with the devolved assemblies as it currently does with the Scottish and Welsh Office and the Government Offices for the Regions.

Europe

There will inevitably be overlap between the competence devolved to assemblies and those where the EC has competence to legislate. Representation in the EU will continue to be through UK Ministers and Whitehall departments because the UK is the member state. To secure representation of regional interests, the devolved assemblies will need to negotiate co-operation agreements with the UK government providing, *inter alia*, for participation in policy meetings, and attendance at working group and Council meetings on devolved matters.

Local Government

The local authority associations in Scotland and Wales are strong supporters of devolved assemblies, and in England the Local Government Association has shown a keen interest in regional government. Regional government could be perceived as a threat to local government, supervising it more closely or absorbing its powers; but indirectly elected regional chambers will be drawn from and controlled by local government. Directly elected regional assemblies will be independent of local government, but would draw their powers and functions from central government. A key decision will be how far regional assemblies would assume the function of allocating resources between local authorities.

In Scotland and Wales the key to developing constructive relationships might lie in bringing local government into the central political process: local authority members could be co-opted onto the relevant assembly committees; and dual membership could permit councillors to stand for election to the devolved assemblies without having to resign from their local authority. There is a case here too for co-operation agreements setting formal criteria for consultation, financial negotiation, etc. between devolved assemblies and local government.

Electoral Systems and Cycles

Because of the political geography of the UK which concentrates support for political parties regionally, there is a risk of a regional or national assembly being dominated by one political party. That has been evident in Northern Ireland; it is a risk in Wales; and it would be a risk in a number of the English regions. Proportional representation would help to protect the interests of political minorities, and should be considered for all the

devolved assemblies. Another factor which needs to be considered is the timing of elections to devolved assemblies within the cycle of local government, Westminster and European elections; and ways of avoiding voter fatigue, and the perception that every election is a poll on the standing of the national political parties.

Loosening Central Control

Devolution takes its place in a wider package of proposed reforms to the UK political system. It will in any event itself promote further change. It will open up to scrutiny parts of the political system which have remained relatively hidden to date: distribution of resources, of inward investment, of gains from European policies, and the attitude of Whitehall Ministers and departments to national and regional issues.

This new visibility will require a greater political trust and tolerance at the centre—and in the regions—and a new appreciation of the nature of the British state as a union rather than a unitary state. Devolution is a loosening of control, which carries risks. But breaking the central monopoly on the design of public policy could bring overall benefits through the encouragement of competition, diversity, and wider participation in the political process all round.

BRIEFING 7

INTRODUCING FREEDOM OF INFORMATION

The Labour Party has a long-standing commitment to introduce a Freedom of Information Act. This briefing, looking at experience in the UK and overseas, concluded that freedom of information can lead to greater accuracy and objectivity, and improved decision-making. It need not disrupt the business of government; and civil servants can continue to offer candid and frank advice. Freedom of information needs a senior Cabinet Minister to introduce and defend it, and a strong central agency to keep other departments up to the mark.

Of all the possible constitutional reforms proposed by the political parties, Freedom of Information (FOI) is the one in the most advanced state of readiness. Good draft bills exist, including Mark Fisher MP's *Right to Know Bill 1993*; Government departments have the experience of the Code of Practice on Open Government, introduced in April 1994; and civil servants have conducted detailed studies of the operation of FOI overseas. As a result, Whitehall is well prepared to introduce early legislation.

Current Position in the UK

Unlike most Western democracies, the UK has no Freedom of Information Act. Instead, we have a patchwork of measures introduced as a result of pressures from Europe and from private members' bills. On *access to personal files*, the Data Protection Act 1984 gives individuals a right of access to computer records about themselves, but not to paper records. Access must be extended to paper records within the scope of EC competence by October 1998, when the UK must have legislated to give effect to the 1995 EC Directive on Data Protection (95/46/EC). Private members' bills (the Access to Personal Files Act 1987, the Access to Medical Reports Act 1988 and the Access to Health Records Act 1990) have granted limited access to certain personal files: to medical records, and to individual files held by schools and by local authority social services and housing departments.

The *right of access to general information* held by government is similarly patchy. The Local Government (Access to Information) Act 1985 gives a right of access to the meetings and meeting papers of local authorities. Following an EC directive, the Environmental Information Regulations (December 1992) give a right of access to environmental information. The 1993 White Paper on Open Government heralded a new departure with the

Code of Practice on Access to Government Information. Under the Code Whitehall departments will respond positively to requests for information, with a right of review by the Parliamentary Commissioner for Administration (the Ombudsman). But the Code has been given minimum publicity; it offers access to information, not documents; and the Ombudsman can only recommend, and not order disclosure.

The 1993 White Paper also promised to introduce a statutory right of access to personal files, and to health and safety information, but the previous Government did not find the legislative time to do so. Reviewing the operation of the Code in March 1996, the Select Committee on the Ombudsman was critical of the patchwork access regime in the UK, and concluded that there should be a single freedom of information act encompassing all access rights.

Overseas Models

These have been extensively studied by civil servants on travelling fellowships and by the Cabinet Office. Between them they have visited Australia, Canada and New Zealand, which all legislated in 1982; and France (1978), Sweden (1776) and the USA (1966). Australia and New Zealand have been visited by the Ombudsman Select Committee, whose members were favourably impressed by the effectiveness of the legislation there. These Commonwealth countries offer the closest models for the UK, and show that FOI can readily fit into a Westminster system. Collective responsibility is protected by the exemption for Cabinet and Cabinet Committee papers; civil service neutrality is protected by the exemption for opinion and advice; and Ministerial accountability to Parliament is strengthened through the greater flow of information.

Drafting Legislation for the UK

Link with Data Protection

The major policy options facing the new Government will be whether:

- To legislate to comply narrowly with the EC Data Protection Directive.
- To legislate to create a general right of access to personal files held by government.
- To enact a comprehensive freedom of information act, covering personal files and official information held by government.

The Government has rejected the first option, which would limit the legislation to files within EC competence. Police, immigration and most tax records would not be covered, and it would be confusing to agencies and to the public to have access to some categories of personal files but not to others.

The second option would create a wider and more public access right to personal files held by government. This will require primary legislation, which the Government has announced in the Queen's Speech. It will need to be introduced in 1997-98 to be in force by the EC implementation date of October 1998. Enforcement would be by the Data Protection Registrar or by the Ombudsman.

The third option would introduce a common access regime for personal and general files. This is the model followed in Australia, but not elsewhere. Canada and the USA have separate Privacy Acts regulating access to personal files; and New Zealand has since followed suit, in the Privacy Act 1993. The Government's White Paper, promised for July 1997, will need to explain how the access régimes for personal and general files will interlock.

Ideally there should be a single access regime, policed by a single enforcement body. This will not be possible to achieve. The broad choice lies between a single access regime for all information held by government, as in Australia; or a single access regime for all personal information held by the public and private sector, as is emerging with data protection. The latter is the starting point in the UK. The new Government will need to decide whether to build from that starting point; or whether to start afresh, and to make freedom of information the dominant regime.

Wherever the boundary is drawn, separate rights of access make for more complicated legislation, causing confusion for the public and for administrators because of the difficulty of working with two sets of rules. Looking at the current patchwork, the Select Committee recommended a single FOI Act encompassing all access rights to government information. Ideally such an FOI Act should be dovetailed with the legislation to implement the EC Directive, or should supersede it. In the time available in 1997 this might not be possible to achieve. It might be necessary for some years to live with dual access regimes for personal records held by government: to allow the legislation implementing the EC Directive to proceed, but to have a wider set of access rights under the FOI act and to allow applicants to choose which access route to use.

Agencies Covered

The Select Committee has criticised the Code for its restricted coverage. A major strategic decision is involved in deciding how wide the new legislation should extend. The new Act should aim to cover all government departments at central and regional level, bodies under their control, executive agencies, health authorities and NHS trusts, public corporations and non departmental public bodies. It may need to be extended in stages. The act should also embrace local authorities, following consultation with the Local Government Association; and should extend to devolved governments (when established) in Scotland, Wales and Northern Ireland. The wider the scope of the legislation, the harder it will be to channel complaints to a single enforcement agency; complaints about local government, for example, might go to the Local Government Ombudsmen.

Applicants and Records

Applicants should include individuals and companies with no restrictions of nationality or residence. Those jurisdictions which have sought to impose restrictions have found they can be circumvented by the use of agents. Access should be to documents, not to prepared summaries of the information sought. The definition of 'documents' should extend to any government information whether in written, visual, aural or computer-readable form; and should include access to records created before introduction of the legislation. Retrospective access has not caused any difficulty overseas. The access regime for archival records will also need to be brought into line: either by separate legislation, or by making the Public Record Office subject to the FOI Act.

Exemptions

For government to function effectively it needs to be able to think and argue in private; and to be able to assure third parties that information supplied in confidence will not be disclosed. All FOI legislation contains exemptions to protect the deliberations of government, and third party information. The standard exemption provisions cover national security and defence; international relations; law enforcement; Cabinet papers; civil service advice; legal advice; damage to the economy; trade secrets; personal information about third parties; and information protected by other statutes.

These exemptions have successfully protected those matters which governments need to keep secret. But the exemptions should be narrowly drawn, and generally based on a harm test, rather than exempting whole classes of documents (except for Cabinet papers). The exemptions should be discretionary, not mandatory, so that departments are free to release exempt information if they so choose. And they should be subject to an over-riding public interest test (as are most of the exemptions in the Code). There also needs to be an exemption for voluminous or vexatious requests; but before refusal applicants must be given the opportunity to narrow their request.

Time Limits

The Data Protection Act allows 40 days; overseas legislation generally sets time limits of 20 to 30 days. The legislation could adopt the target in the Code of responding to a request within 20 working days, with provision for extension in complicated cases. Unreasonable delay would be subject to external review.

Departmental Manuals and Guides

The Code commits departments to publish their internal guidance and similar manuals (but permits them to exclude exempt material, such as confidential instructions about the detection of fraud). FOI legislation should

contain a similar requirement: publication of departments' handbooks and staff instructions is an important part of greater openness, and a useful discipline.

There is no need for departments to publish guides to their information holdings. Such directories overseas have been too detailed to be useful: it has proved impossible to publish a concise guide to the enormous banks of information held by government. The *Civil Service Yearbook* is an adequate guide to departmental responsibilities: it should be available in public libraries and on the Internet. Each departmental entry should give details of the department's FOI liaison officer, and the legislation should impose a duty on liaison officers to help requesters.

Reasons for Decisions

A little noticed provision in the Code is the commitment to give reasons for administrative decisions to those affected, subject to 'a few areas where well-established convention or legal authority limits the commitment to give reasons, for example decisions on citizenship applications'. This could also be included in FOI legislation; but the exceptions should be reviewed—they have not been found necessary in Australia and New Zealand, which have a similar statutory obligation to give reasons.

Right of Correction

A feature of FOI and privacy legislation is the right to require correction of personal information which is inaccurate, incomplete or misleading. Although little used, this right of correction is a useful safeguard, and should be included in a British FOI act: it is in the Data Protection Act, and will be a requirement of the EC Directive.

Official Secrets Act

FOI can be introduced without reform or repeal of the Official Secrets Act 1989. Criminal sanctions against espionage and serious unauthorized disclosures will still be required; but the Official Secrets Act could be reformed to introduce a public interest defence, corresponding to the public interest override governing the FOI exemptions.

Disclosure of information under FOI is authorized disclosure made with the authority of the FOI act. Unauthorized leaks will generally be dealt with not by prosecution but under the civil service disciplinary code, by suspension or dismissal.

Appeals Machinery

The choice of review machinery is central to FOI legislation: it is the right of appeal which makes the right of access effective. There are basically four models:

- The courts.
- The Ombudsman.
- An FOI commissioner.
- A specialist tribunal.

Overseas experience suggests that review should not be by the courts, because of their expense, delays and lack of expertise. Tribunals can also become adversarial and legalistic, and hence costly. The review machinery needs to be:

- Speedy, informal and cheap.
- Effective, with a power to order disclosure.
- Expert, producing good case law.

An FOI commissioner with order-making powers represents the best model. The commissioner would need powers to see the information in dispute, to summon witnesses and enter premises; to hold hearings when necessary (like a tribunal); to mediate; to issue binding orders; and to publish case law. Overseas experience shows that three-quarters of cases can be disposed of by mediation.

The FOI commissioner could be an independent body, or the office could be combined with that of the Ombudsman; or with the Data Protection Registrar. The Registrar:

- Would only be appropriate if the legislation were confined to access to personal files.
- Is not primarily interested in access, which forms only 10% of her complaints caseload.
- Has expressed her preference that individuals 'should be able to secure their own remedies and compensation by suing in the courts' (*Our Answers*, July 1996).

The Ombudsman might therefore be more suitable. Whether he could combine the office of FOI commissioner depends in part on caseload. At present, this is very slight. In 1994-95, the Ombudsman received only 44 complaints under the Open Government Code of Practice, while he had 1,709 complaints in his general jurisdiction, and 1,784 complaints as Health Service Commissioner. But overseas experience suggests the number of FOI complaints could eventually grow to between 1,500 and 2,000. The Ombudsman would require extra resources; and might be uncomfortable with an order-making power, which could make his decisions more susceptible to review by the courts.

The EC directive requires a right of appeal through the courts against the enforcement authority's decisions. Overseas jurisdictions have a limited second stage of appeal, usually to a tribunal or the courts.

Introducing the Legislation

FOI legislation is an administrative law reform, not linked to any wider constitutional change. It could be introduced early in the new Parliament. It would not count as a 'first class constitutional measure' whose committee stage had to be taken on the floor of the House of Commons: the Right to Know Bill 1993 went to Standing Committe.

FOI needs a senior Minister to defend the legislation in Cabinet when it begins to bite, and a strong central agency to keep other departments up to the mark. There will be an important continuing demand from departments for advice, on everything from legal interpretation to basic administration and the keeping of statistics. In other countries a central FOI unit has been critical in getting the legislation off to a strong start, and providing training at all levels and a support network for FOI liaison officers in departments. The Machinery of Government division in the Cabinet Office currently plays a co-ordinating role, but would need to give a stronger lead; it can only do this with strong Ministerial backing.

FOI in Practice

Likely Number of Requests

The Code has attracted a small number of requests because few people are aware of it. In 1994 (a nine-month period) the Cabinet Office estimated there were 2,600 requests; but, of these, 831 were to the Employment Service, and 1,059 to the Welsh Office (the Scottish Office reported 45). Following efforts to achieve more consistent reporting, the Cabinet Office reported 1,353 requests under the Code in 1995.

An FOI Act would attract a much higher volume because the legislation creates its own publicity. But it is important not to over-estimate the initial number of requests: in Australia and Canada the number of requests built up steadily over the first three years. The early years in Australia and Canada may be a better guide to the likely volume of FOI requests than the UK's experience of the Code or than more recent overseas figures, because the UK will have to go through the same learning curve. Extrapolating from their experience suggests that with proper publicity and a liberal charging regime the UK might receive 50-70,000 requests in the first year, rising to 60-120,000 in the second. Eighty to ninety per cent of these requests are likely to be for personal files, concentrated on a few big casework departments: DSS and the Benefits Agency, the Immigration Department, Inland Revenue, MoD (for pensions and employment records). Of more general requests, a high proportion may come from business: in Canada business users represent 40% of requesters for general government information, and for some US agencies the proportion is as high as 80%.

Staffing and Resources

Over time processing FOI requests becomes considerably more efficient. Australia estimated an average of 35 staff hours per request in the first year, falling to an average of 18 hours in the third. But the number of requests doubled, so that total costs remained the same. In Canada, no staff increases were authorized when the legislation was first introduced; but the legislation had an *opportunity* cost, because the civil servants working on FOI had to be taken from other functions. After three years, the total number of FOI staff in Canada was about 250. The marginal cost in the UK would therefore depend on the extent to which the Government was prepared to increase staffing allocations in departments, either upon introduction of the legislation or subsequently. No additional staff were authorized upon introduction of the Code. The Canadian and Australian figures suggest that Whitehall departments might need to allocate between 500 and 1,000 civil servants to cope with the equivalent of federal FOI requests; with further staff needed to handle the equivalent of provincial and state requests.

Fees and Charges

The volume of requests will be significantly affected by the Government's charging policy. In Australia and Canada most personal files were available free of charge; and the maximum fee under the Data Protection Act is £10. When after three years Australia increased the charges for general information, the number of requests fell significantly. The Government will need to decide whether charges are to be used to keep requests within manageable bounds. If so, charges should be levied for all stages in processing requests: search time, consultation with third parties, reviewing the file for exemptions, and for copying.

But no charge should be levied for advising on the availability of information. To provide an incentive to applicants to narrow their requests, there could be a threshold of two to five hours' free time, as some departments currently offer under the Code. The charging rate could differ between requests for personal files and general information: the majority of requests for general information will come not from individuals but from businesses, the media and organizations.

Conclusion: the Impact of FOI

The Select Committee summarized the benefits of FOI as:

- Greater accuracy and objectivity of personal files.
- Improved decision-making by Ministers and civil servants.
- Informed public debate on the issues of the day.

There is a further benefit which is worth recording. Governments collect vast quantities of information for their own purposes; FOI helps make governments more aware of the value of their information holdings to others. In every country, government is the largest single research organization. What FOI helps to stimulate is a market in government information: a market in which people can request what they want to know, rather than what government thinks they ought to know.

BRIEFING 8

HUMAN RIGHTS LEGISLATION

The idea of a bill of rights has found increasing public support. In the Joseph Rowntree State of the Nation survey in 1995, four out of five people agreed that Britain needs a bill of rights to protect the liberty of the individual. This briefing lists the key decisions that will need to be taken to incorporate the European Convention of Human Rights, and to develop a domestic bill of rights in the UK.

The UK was one of the first countries to ratify the European Convention on Human Rights (ECHR), but it has never been incorporated into our law. Successive UK governments have adopted the position that compliance can be achieved without incorporation. Technically, incorporation of the ECHR is not difficult. There are, however, different ways of achieving the goal of incorporation, and decisions have to be made between competing options. The successful development and implementation of a domestic bill of rights may prove more complex than incorporation of the ECHR. It would depend on the extent to which a domestic bill of rights' provisions exceeded the UK's existing human rights obligations.

Objectives

The case for incorporation of the ECHR rests on the need to provide effective remedies within the domestic legal system for the individual whose basic rights and freedoms are infringed. This need is made all the more important because the effects of enlargement of the Council of Europe will be to increase the existing five to six year average delay in cases reaching the Court in Strasbourg.

Policy decisions about the respective roles of the executive, legislature and judiciary in enforcing the ECHR will depend on the political objectives of incorporation. These objectives might include:

- Reducing the number of cases lost by the UK at Strasbourg.
- Allowing the courts scope to develop the common law through human rights norms.
- Paving the way for a domestic bill of rights.
- Promoting a 'rights culture'.

These are not mutually incompatible; but a clear view of the key objectives is required.

Entrenchment

In other countries, and in particular those with a written constitution, bills of rights usually have a special status, both superior to ordinary legislation and less susceptible to amendment. There is no precedent within the British constitution for formally entrenching legislation in this way.

However, the issue of entrenchment is not an obstacle to incorporation of the ECHR:

- Bills of rights in other Commonwealth countries have demonstrated that the traditions of Parliamentary sovereignty can co-exist with a degree of entrenchment.
- In the UK, Parliamentary sovereignty has been used to give a superior status to EC law. The European Communities Act 1972 has enabled the courts to declare invalid existing and subsequent UK legislation which is inconsistent with EC law.
- The UK is already bound by the ECHR in international law: when the European Court of Human Rights rules that a particular law or provision is in contravention, the Government must act to remedy the situation.

Certainly, any statute incorporating the ECHR into domestic law could be reversed by a future UK Parliament, so to that extent it would not be 'entrenched'. But the incorporating statute could assert that the ECHR's relationship with other laws could be different from that of 'ordinary legislation'. This would not undermine the doctrine of Parliamentary sovereignty—because the nature of that relationship could subsequently be changed if Parliament ever so desired.

Relationship between ECHR and Other Laws

In most cases, it will be perfectly easy to interpret domestic laws in such a way that they comply with the ECHR. The experience of other countries suggests that direct challenges to the validity of primary legislation are likely to be extremely rare. When they do occur, the incorporating statute could:

- Simply be a tool of interpretation for the courts—where it was impossible to interpret legislation consistently with the ECHR, the legislation would nevertheless be applied (as in New Zealand).
- Empower the courts not to give effect to pre-existing legislation that was inconsistent with the ECHR and require that all subsequent legislation should be construed as consistent with the ECHR unless manifestly impossible (as in Hong Kong).

- Empower the courts not to give effect to pre-existing legislation *and* legislation enacted after incorporation, if inconsistent with the ECHR, subject to Parliament having the power to insist that legislation should be applied 'notwithstanding' the inconsistency (as in Canada).

The report recommends that the incorporating statute should require conformity between the ECHR and:

- The common law.
- All subordinate legislation, past and future, with a power for the courts not to give effect to inconsistent provisions.
- All *existing* primary legislation, with a similar power not to give effect to inconsistent provisions—in accordance with the existing convention that if an Act of Parliament is inconsistent with an earlier one, the courts are required to uphold and give effect to the more recent provisions.

As regards *future* primary legislation, the political and constitutional traditions of the UK will require an active 'political' role in the protection and furtherance of human rights, to complement the judicial role. Any judicial powers to disapply primary legislation must be subject to Parliamentary override. This might best be achieved by protecting legislation from implied repeal by including a 'notwithstanding' clause as in Canada. If this option is not favoured, the Hong Kong model could be adopted.

The incorporating statute should require UK courts to have regard to the judgments of the European Court of Human Rights and decisions of the Commission at Strasbourg. In order to limit the number of adverse decisions at Strasbourg, such judgments should be binding on all domestic courts.

The Role of the Courts

Little substantial change would be required within the judicial system. Ordinary courts and tribunals should be able to hear ECHR issues, in the same way as all courts can consider matters of EC law. No separate procedures or special jurisdiction is required. There is no need to establish a constitutional court; nor is it necessary to have a judicial appointments commission as a concomitant of incorporation.

The incorporating statute should bind the government and all public authorities; and private bodies exercising public powers. The scope of applicability could subsequently be extended in the light of developing Strasbourg jurisprudence. ECHR rights should be capable of being asserted by companies as well as by individuals.

There is no need for a special filter to weed out unmeritorious cases. Most ECHR issues will be raised by way of collateral challenge in cases that would anyway have come before the courts—for example in criminal trials. 'New' ECHR cases will mainly be by way of judicial review, which is already subject to a leave procedure. That

existing procedure, plus the costs of litigation, will provide a sufficient filter. The Law Commission recommendation that the courts should have discretion to award costs out of central funds in public interest cases should be implemented, and additional means of securing affordable access to the courts should be considered.

Enforcement by Government

The active participation by all three branches of government—executive, legislature and judiciary—is necessary to ensure the effective protection of human rights. Within Whitehall, implementation of an incorporated ECHR should be the responsibility of a senior Cabinet Minister; and there needs to be a unit in one of the central departments to drive the 'enforcement culture'. Human rights impact statements should be produced by departments before submitting legislation to Cabinet committees and, where appropriate, published to accompany draft bills.

Enforcement by Parliament

In addition to the existing procedures for scrutiny of legislation by Parliament, a new or existing committee should be given responsibility for ensuring compliance with human rights standards—both the ECHR and other international obligations. This might be taken up by the House of Lords Delegated Powers Scrutiny Committee or a new Joint Committee of both Houses of Parliament. Bills should be referred to the committee at an early stage in their Parliamentary passage—certainly before committee stage. Any additional legislative scrutiny will need to be matched by wider arrangements for timetabling of bills to ensure that the legislative programme is not unduly delayed. A specialist human rights committee might also undertake research and inquiries leading to reports; and monitor the activities of government departments in relation to human rights standards including, but not limited to, the ECHR.

Enforcement by Independent Bodies

In cases of maladministration affecting human rights issues, the Ombudsman could provide a very useful adjunct to litigation in the courts, at no cost to the complainant. If necessary, the incorporating statute could include a provision that maladministration includes non-compliance with the ECHR. The Government should also establish a human rights commission. Initially, its primary functions should be public education and litigation—bringing proceedings in its own name and assisting individual complainants. The commission should be free-standing and not merged with existing anti-discrimination quangos. It should be accountable to Parliament rather than to a government department.

The Process of Incorporation

The incorporating bill would almost certainly count as a 'first class constitutional measure' whose committee stage in the House of Commons would need to be taken on the floor of the House, under current conventions. The Constitution Unit suggested in its report *Delivering Constitutional Reform* that these procedures would need to be reviewed, with a view to referring the detail of constitutional bills to standing committee.

The Government should conduct a review prior to incorporation to determine whether existing reservations and derogations should be preserved; and whether or not to ratify those protocols so far unratified by the UK. The statute would also need to provide for any future derogation to have effect within our domestic law.

The Government will also need to assess the resource implications of incorporation, including: the extent of costs likely to be incurred by public authorities for failure to comply with the Convention, i.e. costs over and above those already incurred as a result of decisions of the Strasbourg organs; the costs of a human rights commission; the costs of the increase in publicly-funded litigation; and the likely volume of cases.

But access to remedies should not be restricted on the grounds of cost, and the potential impact on the courts should not be overestimated. Incorporation of the ECHR is unlikely to give rise to a large number of cases that would otherwise never have been brought before the domestic courts.

The Wider Context

Incorporation of the ECHR raises a number of additional issues over the longer term. These include:

- The cumulative case for a constitutional or supreme court if other significant constitutional reforms are implemented.
- The possible development of different bills of rights within devolved nations.
- The future relationship between the ECHR and EC law—including the prospect of accession by the EU to the ECHR, on the agenda at the current IGC.

Developing a Domestic Bill of Rights

Drafting a domestic bill of rights will involve discussion not only of its contents but of the enforcement mechanisms. There are two distinct aspects to the development of such a bill—the production of a skeleton bill, drawing on international standards, and the use of a consultative forum that engages the public as well as Parliamentarians. A commitment to the development of a domestic bill of rights should be included either in the legislation incorporating the ECHR or in a White Paper; with the consultation processes and timetable being

declared as soon as possible. But ultimately, the successful adoption of a bill of rights will depend upon it having genuine political backing within the Government; deft political execution of the process of development; and positive reactions to the operation of the ECHR in practice.

The recurring objection to entrenching a bill of rights in the UK has been its possible impact on Parliamentary sovereignty and the possible politicization of the judiciary. These fears are likely to be greater in relation to a domestic bill of rights, newly created, as compared to the rights set out in a 50-year-old instrument; but they might be lessened if the ECHR has been seen to operate without threat to the constitutional fabric. There would also be every advantage in relying on the international human rights instruments that already bind the UK as the basis of a domestic bill of rights.

BRIEFING 9

REPORT OF THE COMMISSION ON THE CONDUCT OF REFERENDUMS

Referendums now stand high on the political agenda. The independent Commission on the Conduct of Referendums was established in April 1996 by the Constitution Unit and the Electoral Reform Society in order to examine the problems involved in their conduct and to set out organizational and administrative guidelines. This briefing explains the Commission's conclusions, and sets out 20 guidelines for the conduct of referendums.

The Conduct of Referendums

As recently as 25 years ago, referendums were commonly said to be unconstitutional. The people, it was held, have no direct part to play in the legislative process. Since then there have been four referendums in the UK. The argument that they have no place in our constitutional tradition is hard to sustain. Yet their use remains controversial. The UK constitution is 'unwritten', with the doctrine of Parliamentary sovereignty at its heart. Referendums will therefore continue to have an uncertain place within our system of government.

Proposed Referendums

Current proposals for the use of referendums relate to major constitutional issues: change to the form of government in Northern Ireland, Scotland and Wales, a possible change to the electoral system, further developments in the European Union, and regional government in England.

Popular support for referendums is high. Nearly 30 years ago a poll found that 69% of respondents believed that the UK should adopt the regular use of referendums. The 1995 MORI/Joseph Rowntree Reform Trust survey reported 77% of respondents in favour of the use of referendums on certain issues. More recent polling data has shown strong support for referendums on the introduction of a single European currency (66%) and, in Scotland and Wales, on proposals for a Scottish parliament (69%) and on proposals for a Welsh assembly (70%).

The Use of Referendums

There has been only one nationwide referendum in the UK—on 5 June 1975. The country voted on whether to remain in the European Community on the terms renegotiated by the Labour Government. It resulted in a two to one majority in favour of staying in the Community.

Three regional referendums have been initiated by UK governments within the last 25 years. The Northern Ireland Border Poll was held in 1973, following the collapse of the Stormont Parliament in 1972. The Ireland Act 1949 provided a guarantee that the constitutional status of Northern Ireland would not change without the consent of its Parliament, and with the Stormont Parliament prorogued this was transmuted into a 'consent of the people' test. Electors in Northern Ireland were asked whether they wished the province to remain in the United Kingdom or to join the Irish Republic. Of those voting, 98.9% chose to remain within the United Kingdom, while only 1.1% voted to join the Irish Republic. The parties representing the Nationalist minority had advised electors to boycott the poll and the turnout was 58.7%. This limited the referendum's value as an exercise in popular consultation.

In 1979, referendums were held in Scotland and Wales on the Labour Government's devolution legislation. In Wales, devolution was rejected by a vote of four to one, even though it was supported by three of the four political parties in Wales—Labour, the Liberals and Plaid Cymru—parties which had gained around 75% of the vote in the October 1974 General Election.

In Scotland, the outcome was controversial. There was a majority for devolution: 51.6% for, and 48.4% against. However, during the Parliamentary proceedings on the Scotland Act, a clause had been inserted on the initiative of a Labour backbencher, George Cunningham MP. This provided that, unless 40% of those entitled to vote voted in favour, the Government had to lay an order before Parliament which, if passed, would repeal the Act. With a turnout of 62.9%, the 'yes' vote was 32.9% of the electorate. This was short of the 40% required. The Labour Government accordingly tabled an Order repealing the Scotland and Wales Acts (Parliament did not vote on an Order repealing the Act until after the change of Government in May 1979). The outcome of the referendum produced lasting resentment; it was felt that the rules had been biased against advocates of a Scottish assembly.

Constitutional and Legislative Framework

Almost alone among the world's democracies, the UK has no codified constitution. In other countries it is the constitution which determines which issues must be referred to the electorate; and it is the constitution which defines what is 'constitutional change'. In the UK there is no authority by which to decide what should be referred to the electorate, and no accepted way of defining a 'constitutional issue'. The four referendums which

have been held in the UK could be seen as constitutional issues. However, major constitutional changes have previously been made without the use of a referendum, for example the Parliament Acts of 1911 and 1949. During the 1992-1993 controversy over the UK's acceptance of the Maastricht Treaty, Baroness Thatcher and other opponents argued for a referendum, but both Conservative and Labour leaders cited constitutional principles to block a move they feared might lead to the Treaty's rejection. Given the UK's uncodified constitution, the question of when a referendum should be held is likely to continue to be determined by the Government and Parliament in the light of policy factors or political expediency.

Referendums in the UK also need to be considered in the context of the doctrine of Parliamentary sovereignty. Before 1975, it was widely held that a referendum would be inconsistent with the sovereignty of Parliament; since Parliament could not delegate its decisions to another body. That view appears to have lost its validity. If Parliament has sovereign power, it must have the power to call a referendum. The referendums so far held in the UK have been advisory, with Parliament formally retaining its right to reject the verdict. In practice, however, it has been accepted that Parliament could not ignore a decisive expression of popular opinion. Perhaps the best formulation of the constitutional position was made by Edward Short, as Lord President of the Council and Leader of the House, before the 1975 referendum. He declared that 'The Government will be bound by its result, but Parliament, of course, cannot be bound'.

The use of referendums is likely to remain controversial. It has been argued that referendums divide parties and produce inconsistent government, and are likely to be invoked as a weapon against progressive legislation. A further argument made against referendums is that, by giving decision-making to the electorate, they detract from the representative role of MPs. It can be claimed that this not only undermines Parliamentary sovereignty but removes the responsibility of the executive for policy and thus destroys the ability of the electorate to hold the Government to account.

On the other hand, a referendum can, theoretically, provide a limited means of entrenchment not otherwise provided for in our constitutional arrangements. This can operate by establishing precedent or convention, which may make it difficult for a government to reverse a measure, or to implement a future measure, without holding a referendum; or by establishing a statutory requirement that a referendum be held before a change may be made.

Any such entrenchment provided through a referendum is a political, rather than a legal, safeguard. In theory, Parliament could ignore precedent or pass legislation reversing any formal requirement to hold a referendum. But the political difficulties of doing so may mean that the referendum can help guard against a hasty or unwanted change. A referendum cannot, however, settle issues once and for all. At best, it can offer a considered measure of the electorate's views at the time it is held. It can give a decision an immediate legitimacy,

but it cannot settle any matter permanently as the 1975 referendum on Europe and the 1979 devolution referendums have shown. The sovereignty of Parliament means that the power to legislate against a referendum result, however overwhelming, remains, at least in constitutional theory, with Westminster.

The Role of the Commission on the Conduct of Referendums

If referendums are to be held in the future and their results accepted, they should be conducted efficiently and ensure the fair presentation of competing views. But there are no established rules, accepted by the main political parties, for the efficient and fair conduct of referendums. The Commission on the Conduct of Referendums was established to provide guidelines applicable to future referendums.

The Commission has remained strictly neutral on whether referendums are desirable, on whether they should be held on any particular issue, and on what the outcome of any particular referendum should be. The Commission as a body is neither for nor against referendums—although its individual members hold views ranging from enthusiasm to scepticism. The Commission's report is not intended to provide material for advocates or for opponents of referendums, but to provide guidelines for regulating their conduct.

The questions considered by the Commission fell into two groups. Organizational, administrative and procedural matters might be settled by a code or statute for use with every referendum. Questions of a more political character will be decided by the Government and Parliament in the circumstances of each referendum. In all referendums, however, there will be some common elements, and it would clear the ground for the discussion of the central political issues in any future referendum if the organizational and administrative framework was agreed in advance.

The Guidelines

The need for rules or guidance for the conduct of referendums is implicit in the Commission's task and explicit in its terms of reference. There are no agreed rules relating to either the circumstances under which referendums are to be held or to their organization and conduct when they are initiated. In previous referendums, rules of conduct have been prepared in an *ad hoc* manner, although guided in part by UK and international precedents. It is, however, essential that future referendums should be conducted in a manner that is regarded by all sides as efficient and fair. Administrative and organizational guidelines—acceptable to all political parties, and adopted in an appropriate form by the Government of the day—can effectively fulfil this need. To that end, in the light of a wide survey of referendum experience, the Commission commends the following guidelines:

Need for rules or guidance: Guidance should be drawn up dealing with organizational, administrative and procedural matters associated with holding a referendum. Established guidelines should include fixed rules for some matters (for example the organization of the poll, the election machinery and the count). For other

matters, on which it is impossible to determine rules in advance (for example wording the question), the guidance should state how a decision should be reached.

An independent statutory commission: The decision to initiate a referendum would normally be taken by the Government. But the conduct of referendums, i.e. their organization and administration, should in future be independent of the Government and of party political interests in order to ensure maximum confidence in the legitimacy of their results. An independent statutory commission should be established. Its members would serve for a period of years, but it would be activated *ad hoc* for each referendum. The chairman should be personally accountable to Parliament for the efficiency and consistency with which referendums are conducted. If an electoral commission were established, the functions of such a 'referendum commission' should be brought within its remit.

Legislation: If a government is planning a series of referendums, it has the option of establishing a statutory framework for the conduct of referendums through the enactment of a generic Referendum Act. Such an Act would demonstrate the Government's commitment to the efficient, fair and consistent conduct of referendums. It would provide for the establishment of an independent 'referendum commission' and include fixed rules for some matters (for example the organization of the poll and the count). For other matters, on which it is impossible to determine rules in advance (for example, the wording of the question), the Act should set out how a decision should be reached. Those matters which will be different in each referendum and are likely to be of Parliamentary concern could be dealt with through primary legislation on each occasion.

Advisory or mandatory: Whether a referendum is regarded as advisory or mandatory is a political issue. A referendum can be mandatory only to the extent that a government binds itself to accept the result. That would depend on the referendum issue, and possibly on factors such as the turnout or the size of the majority vote. Although a government could commit itself, Parliament could not be bound by the result.

Pre-or post-legislative: Whether referendums are to be held before or after legislation will be decided in the light of political factors. It will be important to give voters adequate information and sufficient time for public discussion. For a pre-legislative referendum, a White Paper should set out in detail the Government's proposals and their implications.

The electorate: Those entitled to vote should be the same as in general elections, with the addition of members of the House of Lords. Postal and proxy voting should be provided for as at general elections.

Nationwide or regional: The electorate for a referendum may be UK-wide or confined to a region, as precedents in the UK and internationally show. This would be a decision for the Government and Parliament dependent on the character of the issue.

Thresholds: The use of thresholds is a political decision. If a threshold is used, it should be a set percentage of the votes cast and not a percentage of the eligible electorate. If thresholds are set, a clear explanation of the meaning of the threshold for the electorate should be included in the public information provided.

Wording of the question: The wording of the question should be short and simple and should not be open to either legal or political challenge after the result is known. Its significance should be fully understood and it should therefore emerge from a thorough process of Parliamentary and public consultation and media discussion. The exact character of the consultation will depend on the substance of the issue; but the final decision on the wording can best emerge in the context of Parliamentary debate on the legislation which includes the text of the ballot paper.

Multi-option referendums: The choice of a multi-option referendum or a 'yes' and 'no' referendum will depend on the nature of the issue (or issues) to be put to the electorate; it will be considered by the Government and by Parliament as part of their consideration of the wording of the question. If the electorate is being asked to endorse legislation approved by Parliament, a 'yes' and 'no' referendum is appropriate. If a multi-option referendum is used, it is important that a clear outcome is achieved. Voters could be given the opportunity to record votes in favour of their second or third choice; furthermore, or alternatively, a second confirmatory ballot could be used. Multi-option referendums can be confusing for voters; clear instruction on the ballot paper will be essential.

Campaign duration: Notice of a referendum should allow sufficient time for an effective information campaign, for adequate public debate, and for practical arrangements to be made. It will be necessary to define a formal start to the campaign period (for example for accounts of expenditure, allocation of campaign broadcasts). The campaign period should be a minimum of three weeks (following general election practice), but should be no longer than six weeks.

Public information: Every household should receive a publicly funded leaflet giving general information on the holding of the referendum and statements of the 'yes' and 'no' cases relating to the referendum question. The independent commission should facilitate, on an equitable basis, preparation, production and distribution of campaign material provided by umbrella campaigning organizations. If no umbrella organizations exist, the independent commission should produce the leaflets after appropriate consultation. Poll cards giving electors notice of the referendum and information regarding the location of their polling station should be issued as with Parliamentary elections.

Campaigning organizations: The Government should formally recognize umbrella campaigning organizations if they emerge and should consider providing them with limited financial assistance. The independent commission

would be an appropriate body to handle the process of consulting campaign groups, advising the Government on the establishment of umbrella organizations, and administering any financial assistance. Those who do not want to be associated with any of the recognized campaigning organizations, or compose a group which has not been formally recognized, would be free to participate in the campaign, but would not be eligible for any publicly funded assistance.

Campaign expenditure: On balance, it is not considered practical to exercise government control over the total expenditure by those campaigning on either side in a referendum. Umbrella campaigning organizations should be required to undertake to provide accounts of monies received or spent on the campaign if they are to qualify for public money or services in kind.

Scope of government activity: Responsibility for the publication and management of information relevant to a referendum should be exercised outside of government—by the independent commission. The conventions which require the civil service to avoid engaging in political or public debate, and which limit its actions to the provision of factual information, should be maintained.

Scope of party political activity: So long as there are no national controls on political parties' spending in general elections, no legal restraint should be placed on political parties' expenditure or activity in referendum campaigns, although they may choose to stand aside.

Access to broadcast media: A balance should be maintained between the 'yes' and 'no' viewpoints rather than between the different political parties. Broadcasters should be encouraged to provide a limited amount of airtime for setting out the arguments for each option in the referendum. The content of such broadcasts would be the responsibility of any formally recognized campaign organizations. In the absence of such organizations the independent commission should appoint production companies to produce such broadcasts. Party political broadcasts should not normally be transmitted during the referendum campaign.

Date and hours: The date chosen for referendums will turn on political factors. It should allow for full public debate of the issues raised. Referendums should be normally held separately from general elections, European Parliament elections or local government elections. Arrangements for voting hours should follow general election practice subject to any changes made in the future.

Organization of the poll: The responsibility for poll organization at each polling station could be undertaken by the independent commission. If that were not established, it would need to fall to a chief counting officer. Independent returning officers should be appointed at the appropriate level. Officially recognized campaign organizations should be entitled to appoint polling and counting agents. In the absence of officially recognized

campaign organizations, political parties should be entitled to appoint polling and counting agents. The total number of polling and counting agents should be at the discretion of the returning officer.

Vote-counting and declaration of the results: In both nationwide and regional referendums, the votes should be counted and declared at ward level or at Parliamentary constituency level. Exceptions to this practice could be made if the identification of votes with a particular area could undermine the acceptance of the referendum result. Any formally recognized umbrella campaigning organizations should appoint the equivalent to election agents able to request a recount and to pursue challenges in the same way as at general elections. The independent commission should also be able to request a recount.

BRIEFING 10

CHANGING THE ELECTORAL SYSTEM

The 1997 general election was quite possibly the last UK general election to be held under the first past the post (FPTP) electoral system. Through their Joint Consultative Committee on Constitutional Reform, Labour and the Liberal Democrats have agreed on the process for a referendum on electoral reform, as well as on the initial timetable. This briefing examines the implications of this joint commitment to a referendum, and considers the process of holding a referendum and the implementation of any change to the electoral system which may result. It does not discuss the merits or features of different electoral systems.

Which Alternative System?

The 1976 Hansard Society Commission on Electoral Reform noted that: 'It has been estimated that there are at least 300 different electoral systems which either are, or have been, in use or which have been seriously considered at one time or another'. This reflects the varied historical evolution of electoral systems in different countries as much as it does the mathematical possibilities. It is also an indication of the potential for fragmentation among those campaigning for electoral reform. For an effective decision on a new electoral system to be taken through a referendum, the range of options clearly needs to be narrowed down. This could be done in one of two ways:

- A single alternative system could be put forward against the current FPTP system. The choice of alternative system to be put in the referendum could be determined through an independent advisory body, or as the result of political agreement.
- Several systems could be put to the electorate in a multi-option referendum.

An Advisory Body

In the report of their Joint Consultative Committee, Labour and the Liberal Democrats agreed that: 'A commission on voting systems for the Westminster Parliament should be appointed early in the next Parliament to recommend the appropriate proportional alternative to the first past the post system. Among the factors to be considered by the commission would be the likelihood that the system proposed would command broad

consensus among proponents of proportional representation. The commission would be asked to report within twelve months of its establishment'.

The commission would thus be asked to identify a single reform option to be run off against the existing system in a referendum. In comparison to a multi-option referendum, a referendum putting forward a straight choice between the *status quo* and a specified alternative would make the provision of public information in the referendum campaign relatively straightforward, and make a clear result more likely. It would also make the process more predictable in that there will be only two possible outcomes. For electoral reformers there would be an incentive to unite behind the single option recommended by the commission, because the only alternative on offer would be FPTP.

However, no one should underestimate the difficulty of identifying a single reform option. This is a highly political exercise; and some of those involved in the electoral reform movement are most unlikely to sink their differences. The Government will risk being denounced for having predetermined the outcome, through the terms of reference given to the commission, and by the people chosen to serve on it. The definition of the commission's task, its status and its membership, will be crucially important to the credibility of the exercise.

Terms of Reference

The choice of electoral system will depend on the criteria it is expected to meet and it may be difficult to draft terms of reference that provide sufficient guidance without predetermining the review's outcome (should the remit, for example, make any reference to the desirability of retaining single member constituencies, which would immediately favour some systems against others?). The Labour Party's Plant Committee experienced similar difficulty, which they described when explaining their working methods: 'We then attempt[ed] to establish a set of criteria against which we believe any defensible electoral system should be judged. There are many such criteria and no single system can score equally highly against them all. Hence, there cannot be an ideal system. What is necessary is to come to a view about which system or systems do best against what are taken to be the most important criteria. This has to be a political rather than a technical judgement' (*Democracy, Representation and Elections*, September 1991). This argues for the commission to be set up with very general terms of reference. Drawing on the Joint Committee agreement, these could be:

- To consider proportional electoral systems for the House of Commons, and in particular the likelihood of different systems commanding broad consensus among proponents of proportional representation.
- To recommend a single proportional electoral system to be put forward as an alternative to FPTP.
- To report within 12 months.

Status

The proposed advisory commission could take the form of a royal commission, or have the status of an advisory committee such as the Nolan Committee on Standards in Public Life. Royal Commissions have traditionally worked very slowly and have not always reached agreement. They may also produce recommendations which are politically unrealistic, so there may be little political interest or support for them. There has been a previous Royal Commission on the Electoral System, which reported in 1910. This Commission recommended the introduction of the alternative vote but its report had little impact: its publication in August 1910 found the House of Commons bound up in struggles with the House of Lords and it was not debated in either House.

The approach of any advisory body will depend on the nature of its task and the circumstances in which it is set up. The Nolan Committee was set up with a background of 'sleaze' allegations and was under pressure to work quickly. An advisory commission on an electoral system will be set up in very different circumstances. Nonetheless, the Nolan Committee has shown that where there is a political imperative for results, it is possible for an advisory body to work rapidly and to make clear and robust recommendations. It has been able to be influential because it has had cross-party political support, it has attracted considerable media and hence public interest and its recommendations have been timely. There is no guarantee that a commission on the voting system will achieve such a high political and public profile. The extent to which it does attract attention and support will depend on the political backing it is given and on the personality and the working methods adopted by its members.

Membership

The independence of an advisory commission, as signalled by its membership, will be crucial if it is to gain the confidence of those campaigning for electoral reform. As an advisory body, a commission on the voting system would not automatically come within the Nolan procedures for appointments, now embodied within the guidance issued by the new Commissioner for Public Appointments. However, the House of Commons Public Service Committee recently recommended that the Commissioner's remit should be extended to advisory bodies; it seems desirable that in appointing a commission on the voting system the Government should follow the basic principles of merit, openness and transparency. This would imply at the very least drawing up a clear job description for the members of the commission, which would sharpen up thinking about the nature of the commission's task and the kind of people needed to carry it out. In particular the following questions will need to be addressed:

- What should be the overall size of the commission? It is more likely to reach agreement on a single proportional system if it is small rather than large: half a dozen, rather than a dozen, members.

- Should it contain experts? Almost certainly yes; but most experts are well known for their support for a particular electoral system. It may be necessary openly to acknowledge this and attempt to achieve a balance of different views; or to bring in the expertise through the staffing of the secretariat, or by recruiting specialist advisers like the experts who advise Parliamentary select committees.
- Should nominations be invited from electoral reform organizations? It will be impossible for the commission to reach agreement if some of its members consider themselves to be mandated representatives of a particular view or interest. Instead organizations should be invited to submit evidence, rather than have an active presence on the commission.
- Should nominations be invited from the political parties? For the same reasons political parties should be invited to submit evidence.
- Should people be invited to represent FPTP? Logic suggests not, since the commission's task is to find a proportional alternative.
- Should the commission be a closed group of experts, or see themselves as facilitating a consultation exercise?

This last may be the most important consideration in terms of who is invited to serve on the commission and its approach to its task. The commission could not merely invite evidence but could commission opinion polls and engage in more proactive activities such as citizens' juries and public meetings. Such work would inform the commission's view as to which option was most likely to attract a broad consensus and could lay the foundations for the public education programme which would be undertaken prior to the referendum. This would leave the way open to appoint commission members from non-expert backgrounds, but skilled in facilitating public consultation, perhaps chaired by a non-partisan figure such as a judge. The commission's working methods may also need to include detailed modelling of the likely effects of different electoral systems, or at least of the one recommended, to ensure that such information is available to inform the referendum campaign.

A Multi-Option Referendum

Although in the report of their Joint Committee, Labour and the Liberal Democrats appear to have ruled out the use of a multi-option referendum, there is a risk that the advisory commission will fail to reach agreement; or that it will fail to agree on a single alternative system, and deliver a report recommending that several alternatives be included in the referendum. The Government could still decide on a single alternative; but might feel obliged to allow a multi-option referendum. It is therefore worth briefly examining some of the issues raised by a multi-option referendum.

In a multi-option referendum, several alternative reform options would be put forward. Voters would be asked to indicate their preferred system, possibly with the option of numbering all reform options in order of preference. The advantage of putting several reform options is that all reform options have a chance of demonstrating popular support and the debate has to engage the public in the detail and implications of the different options being put forward. This could, however, make the task of public information very difficult. There may be confusion amongst voters or insufficient interest to take in the details of several options. A multi-choice referendum is also likely to raise questions about differentials in resources available to the campaigns on the various options. From the perspective of electoral reformers a multi-choice referendum could make it difficult to put across a single message in support of reform and could in itself present an obstacle to change by splitting supporters of reform. This was avoided in New Zealand by a two-part referendum with a headline question on the principle of change, followed by an indication of which of four options voters preferred.

One possible disadvantage of a multi-choice referendum is that it will not necessarily produce a clear result: votes may be split evenly between options producing no clear 'winner'. One means of avoiding this is to allow preferential voting; another is to adopt the procedure followed in New Zealand, where a second referendum was held to run the most popular reform option off against the *status quo*. This would, however, be time-consuming; and with each national referendum costing around £50M, expensive.

Politically, a multi-choice referendum may also be seen as a risky approach. Leaving aside the possibility of an inconclusive result, a government committed to holding a referendum would presumably commit itself to implementing the outcome. The outcome of a multi-choice referendum would by its nature be less predictable and would not necessarily be an option that the Government felt able to support. Furthermore, it would be difficult for a government to maintain a neutral, or indeed a united, stance on the outcome of the referendum. The more options put forward, the greater the number of ways in which the party could split and the more indecisive the Government could appear.

The Referendum

Referendums need legislation to authorize the Government to spend money and to organize the referendum. Election machinery must be adapted and the cost of organizing the ballot and any grants to campaigning groups must be voted by Parliament. There are three ways in which a referendum on electoral reform could be legislated for:

1. Through stand-alone legislation concerned solely with the referendum.
2. Through 'generic' legislation authorizing a number of referendums.

- In substantive legislation to change the electoral system, with its implementation dependent on the outcome of the referendum.

Most discussions of the proposed electoral reform referendum assume that the referendum will be legislated for by one of the first two methods. With such an advisory referendum there is, of course, no guarantee that the Government and Parliament will support the legislation necessary to put its outcome into effect. With the third option, the referendum triggers the change; and the referendum and the change to the electoral system can be authorized in a single piece of legislation. However, it would require the Government to invest valuable Parliamentary time in passing legislation which might never come into force—this would be particularly unattractive to a government which was not committed to change. The advantage would be that the public debate would be informed by the Parliamentary deliberation during the passage of the bill.

There is a wider case for generic referendums legislation to ensure that all referendums are held under a common set of ground rules regardless of the issue. However, time constraints will mean the devolution referendums proposed by the Government for Scotland and Wales will be legislated for separately in the first session. Apart from these two referendums, the only other stand-alone referendum is likely to be for a strategic authority for London, also to be legislated for in the first session (the referendums on a single European currency and on regional assemblies for England are likely to be authorized in the substantive legislation on these two issues). Generic legislation authorizing referendums therefore seems unlikely.

In each previous UK referendum, rules have been drawn up *ad hoc*. The independent Commission on the Conduct of Referendums, which reported in November 1996, recommended that for future referendums there would be advantage in establishing a clear framework of rules in advance. The most effective way of achieving this would be to give responsibility for the conduct of referendums to an independent body: public confidence in the neutrality of the conduct of referendums is essential if the result is to be accepted as legitimate. This is particularly important where the interests of Members of Parliament are directly affected, as with electoral reform. The functions of such an independent body might include: advising on the wording of the question(s); ensuring adequate provision of public information; liaising with and acting as moderator between any campaign groups; allocating funding to campaign groups; acting as an ombudsman to deal with any complaints; monitoring fair access to the media; and giving guidance on the organization at each polling station. Such a body could deal solely with referendums or could be part of an electoral commission, which would bring together all aspects of electoral administration together in a single body.

If, as proposed, an independent advisory commission were tasked with devising the alternative proportional system to be put forward in the referendum, it might seem sensible to assign it the role of generating public information and education. However, the advisory commission will inevitably be closely identified with the

alternative proportional system it recommends. It would be more appropriate to give the public education function to a separate body, such as an electoral commission, which could clearly be seen as neutral.

A key decision for the Government will be whether collective Cabinet responsibility will be retained, or whether there might be a formal agreement to differ on the referendum issue during the campaign. In the 1975 European Community referendum, members of the Cabinet were found on both sides. The experience of the 1975 referendum pointed to the value of placing Ministerial responsibility for the referendum on a senior Minister not closely associated with either side: in 1975 the Lord President of the Council exercised this responsibility.

Implementation of the Result

Redrawing Constituency Boundaries

If the referendum comes out in favour of a new electoral system it is likely to involve a significant review of constituency boundaries. The extent and complexity of any boundary review will depend on the reform option chosen. Any timetable needs to allow time for a boundary review: the last review of constituency boundaries in England took four years. International comparisons suggest that more extensive use of computer modelling and increased resources could speed this process up considerably if that were necessary. Nonetheless, it is likely that at least a year will be required to complete any significant changes.

It may be desirable to include at least a preliminary boundary review as part of the modelling research undertaken by an advisory commission. This would mean that information about the likely new constituency boundaries would be available to voters during the referendum campaign, to provide a clearer picture of the implications of a new system. It would also speed up the implementation process post-referendum.

It has been suggested that a new electoral system might be phased in, to reduce the threat to sitting MPs and to extend the timetable for boundary reviews. In 1918, an attempt to phase in the Single Transferable Vote (STV) was made during the Parliamentary debates on the Representation of the People Act. A trial was proposed in 100 constituencies, but was blocked by sitting MPs in those constituencies. More recently, evidence to the Plant Committee included a proposal for phasing in an Additional Member System (AMS) system over a series of Parliaments. This could be done by reducing the number of constituency seats and introducing a corresponding number of list seats, over a number of boundary reviews. For example, if it were decided to address the current over-representation of Scotland and Wales and to focus the next boundary review on constituencies currently well under their electoral quota, it would be possible to produce 40-50 list seats for the next election (around 6% of seats). Phasing in change is unlikely to find favour because it is more likely to be blown off course and would lead to the charge that MPs had been elected under different electoral systems. It would be least

problematic with a mixed system, such as AMS, where a mixture between constituency and list MPs would be the final objective.

Party Preparation

A change in the electoral system could present the political parties with organizational difficulties. The key factor will be the time needed to select candidates for the new constituencies. It should be possible to select 'shadow' candidates prior to final boundary decisions, but a period of at least six months will be needed for any such shadow decisions to be confirmed. A further factor which parties will need to consider is changes to their campaign techniques. In an FPTP system, all campaigning strategies are geared around the targeting of winnable marginals. There will be pressure from the organizational wings of parties for time to adapt to any new system: allowing for this will need early consideration if organizational pressures are not to be a reactive force against change.

Connected Reforms

European Parliament Elections

Article 138(3) of the Treaty of Rome provides for the introduction of a system of elections to the European assembly on the basis of 'direct universal suffrage, in accordance with a uniform procedure for all member states'. Direct elections were first held in 1979, but there is as yet no uniform voting system across Europe, largely because the UK insists on retaining FPTP elections, except in Northern Ireland, which returns three MEPs by STV. Pressure for change has come from the European Parliament and from countries such as Germany and the Netherlands. The report of the Joint Consultative Committee confirmed that both the Labour Party and the Liberal Democrats support the introduction of a proportional electoral system based on regional lists (RLS). There is, however, no commitment in the Joint Committee's report to introduce the change in time for the next European Parliament elections in June 1999, nor did the change feature in the Queen's Speech.

A regional list system was put forward by the Callaghan Government in a White Paper (*Direct Elections to the European Assembly*) in April 1977 and incorporated as an option in the European Assembly Elections Bill, but was rejected by the Commons in favour of FPTP. The 1977 version of RLS is ready in legislative form and would need minimal adjustment for use in 1999. Necessary changes include:

- Accommodation of STV in Northern Ireland.
- Adaptation to new regional structures: at least to the boundaries of the new Government Offices for the Regions, with the possibility of subsequent adjustment, so that if regional government is established regional lists could cover the same regions as regional assemblies.

- The extra European Parliament seats allocated to the UK in 1993, when the UK's quota of seats was increased from 81 to 89.

A decision would also be required on the detail of how the list system would work in practice: for example, would parties determine the order of candidates on lists or would voters be able to indicate their preferences for different candidates?

An Elected House of Lords

Changing the electoral system for the House of Commons will have implications for the design of a proposed electoral system for the House of Lords. To reinforce their complementary roles, the two chambers will need to have a different franchise. Whether the system for the House of Commons is to be changed will therefore need to be resolved prior to any move to establish an elected House of Lords.

Legislation

In addition to legislation for the referendum and for any new electoral system, legislation would also be required to establish an electoral commission and for changes to the electoral system used for European elections. The timing of this legislation will depend on the target date for implementation as well as on other commitments and pressure on Parliamentary time. An electoral commission will need statutory status for the wider functions which are proposed for it and to safeguard its independence. If an electoral commission is to take on responsibility for the voting reform referendum with a view to implement any change prior to the next general election, legislation will be needed at the latest during the 1998-99 Session.

Legislation to change the electoral system for the European Parliament elections could stand alone or could be part of an inter-governmental conference follow-up bill. The IGC follow-up bill will have its own timetable set by the IGC. For the electoral system to be changed by a stand-alone bill in time for the 1999 European Parliament elections, legislation will need to be introduced in the spring or summer of 1998.

Timetables

The timing of any referendum on electoral reform will depend on the priority it is given. In the report of the Joint Consultative Committee, Labour and the Liberal Democrats stated: 'Both parties believe that a referendum on the system for elections to the House of Commons should be held within the first term of a new Parliament'. This would require a very tight timetable. If the referendum is held during the new Parliament and the vote is for change the legitimacy of the next election might be called into question if the new voting system had not been implemented. This effectively means that either the referendum must be held in time to make the change, or it must be postponed until the time of the general election in 2001-02.

The factors determining the timing include:

- The target date for the introduction of any change.
- The timing of any other referendums (and elections).
- The time needed for the advisory commission to report on an alternative proportional system.
- The time needed for Parliamentary debate and consideration of the commission's recommendation.
- The time needed for legislation (one or two bills).
- The time needed for public education.
- The time needed for the implementation of a new electoral system, if supported.
- The inevitable distraction a referendum will present to other Parliamentary and government business.
- The Government's view of the balance of political advantage, which may change during the course of the Parliament.

Another factor is cost. If the referendum is held at the same time as a nationwide poll (the European Parliament elections in June 1999, or the general election in 2001-02) there is a potential saving of up to £50M. It would also maximize turnout. The second of the New Zealand referendums on an electoral system was held at the same time as their general election, and secured a turnout of 82.6%, against the 55.2% turnout at the first, free-standing referendum of 1992. However, combining the referendum with an election risks tainting the result. The Commission on the Conduct of Referendums recommended against a combined ballot, because as the Hansard Society 1981 report *Referendums—Guidelines for the Future* pointed out: 'When referendums come frequently, and come mixed up with other issues, the public attention given to them is likely to be much less. The turnout and the decision may be shaped by the other matters being voted'.

The following timetables illustrate three possible options. The first two show the referendum being held during the next Parliament, the third at the time of the general election in 2001-02. All would require careful and determined forward planning. They are included to show how tight the timetable is likely to be, and how early the process may need to start.

Option A is very tight, in particular in the first two years. One way of easing the timetable would be to go for a post-legislative referendum, with a single bill (like the Scotland Act 1978) which legislates for the referendum *and for the change*, if approved by the referendum. This would be less of an advisory referendum in that a referendum result in favour of change would trigger the introduction of the new system. The timing in Option B for the passage of the legislation is tight, but there is more time for the boundary reviews to be completed.

Option A: Pre-legislative referendum, two bills, tight timetable.

1997	July	Establish advisory committee.
1998	January	Advisory committee reports.
	March	Introduce bill to authorize referendum and establish electoral commission.
	October	Bill receives royal assent.
	December	Electoral commission established. Six months to generate public information about voting system options in referendum.
1999	June	Referendum held on electoral reform.
	November	Depending on referendum result, legislation introduced to change electoral system.
2000	July	Bill receives royal assent.
		Nine to twelve months to redraw Parliamentary boundaries.
2001	May-September	Parties select candidates for new seats.

Option B: Post-legislative referendum, one bill, tight timetable for legislation and public information.

1997	September	Establish advisory committee.
1998	September	Advisory committee reports.
	December	Introduce bill to authorize referendum and implement change and to establish an electoral commission.
1999	July	Bill receives royal assent.
	September	Electoral commission established. Six months to generate public information about voting system options in referendum.
2000	April	Referendum held.
		Depending on referendum result, 12-18 months to conduct boundary reviews.
2001		Boundary changes implemented through secondary legislation.
		Parties select candidates for new seats.

Option C: More leisurely timetable, two stage legislation spread across two Parliaments.

1997	September	Establish advisory committee.
1998	September	Advisory committee reports.
1999	January	Government responds to advisory committee recommendation and includes legislation for referendum and electoral commission in next Queen's Speech.
	November	Introduce bill to authorize referendum and establish electoral commission.
2000	July	Bill receives royal assent.
		Electoral commission established. Twelve months to generate public information about voting system options in referendum.
2001		Hold referendum, possibly at same time as general election.
2002-04		Depending on referendum result, legislate for new system and redraw Parliamentary constituencies.
2005-06		General election under new system.

Alternatively a much more leisurely timetable (Option C) could be adopted building up to a referendum at the same time as the next general election in 2001-02. Depending on the result, the new electoral system would then be introduced in time for the following election in 2005-06. The added complication to the process would be that the general election could bring a change of government and the possibility that the new government would not be committed to implementing any change supported in the referendum.

Summary of Decisions Needed

- Is the target to change the electoral system in time for the next election (if the referendum result supports this)?
- If so, how long will it take to change the electoral system (i.e. when does legislation changing the electoral system need to be through Parliament and therefore when does the referendum need to be held)?
- What kind of referendum? Single reform option versus FPTP, or a multi-choice referendum and, if a multi-choice referendum, one stage or two; if single reform option, how is this to be determined and how long will it take?
- Will the Cabinet be allowed to divide, or have to observe collective responsibility?
- What machinery needs to be in place for referendum (and when does it need to be done)? (For example electoral commission or reformed boundary commissions?)
- Which Minister—and which department—should be appointed to lead the process?

BRIEFING 11

ESTABLISHING AN ELECTORAL COMMISSION

Although elections in the United Kingdom are free and fairly conducted, the rules governing their administration and conduct are dated and inefficient. Labour and the Liberal Democrats have proposed establishing an electoral commission as a key element in the reform of our electoral framework. This briefing examines the role and functions, and the process of establishing an electoral commission.

Attitudes to the Existing Framework

Concern about the current electoral framework is shared by all three main parties. The previous Home Secretary confirmed his intention towards the end of the last Parliament to conduct a review of the rules under which the Boundary Commissions work (House of Commons Debate, 23 January 1997); and in evidence to the Hansard Society Commission, the Conservative Party supported changes to the rules on local expenditure limits. In the report of their Joint Consultative Committee on Constitutional Reform, the Labour Party and Liberal Democrats expressed concern at the lack of progress which has been made in respect of reforms and improvements to the processes of electoral registration and voting procedures and agreed to examine what independent machinery may be desirable.

The Labour Party's Working Party on Electoral Systems, chaired by Lord Plant, considered wide-ranging reform of current electoral arrangements in its 1993 report, including a rolling register, improved provision for absent voting and the need for national limits on election expenditure; and a commitment to establish an electoral commission was included in the Party's 1993 document, *A New Agenda for Democracy*. This commitment was referred to in Labour's proposals for determining boundaries for regional government (*A New Voice for England's Regions*, October 1996). The Liberal Democrats have focused their attention on a fundamental change in the voting system for the House of Commons, but have also expressed support for the establishment of an electoral commission, a rolling register and fixed term Parliaments (*Here We Stand: Proposals for Modernising Britain's Democracy*, September 1993).

The Hansard Society Commission on Electoral Campaigns covered much of this ground in its report in 1991 and since then several academic studies have explored these issues in more detail and there have been a number of

Parliamentary debates on the subject. The key recommendation to emerge has been the establishment of an electoral commission. An electoral commission would not in itself resolve the concerns expressed about the current electoral framework, but its advocates believe it would strengthen the framework and provide a vehicle for the development of more detailed reforms.

Role and Functions

A permanent electoral commission exists in most other Westminster-style democracies. Such a commission typically has responsibility for the administration and conduct of elections and referendums. Proponents of an electoral commission have argued that it should take on all aspects of electoral administration currently the responsibility of the Home Office, Scottish Office, Northern Ireland Office and the four Boundary Commissions. It has also been suggested that an electoral commission should have a 'watchdog' role, providing a first point of access for any individual or party wishing to raise concerns about any aspect of electoral administration, including allegations of illegal practices. Less clear is how much responsibility an Electoral Commission should take for the staff involved in electoral registration (currently local authority officers) and the practical administration of elections and/or provide ring-fenced funding for these activities.

Co-ordination, Supervision and Administration

Under current arrangements, the Home Secretary, Scottish Secretary and Northern Ireland Secretary have a supervisory role in respect of elections and are responsible for reviewing electoral machinery and recommending any changes in legislation. Advocates of an electoral commission argue that it would provide a mechanism for on-going review of electoral practice which is not pursued with sufficient vigour at the moment. As an independent body it could be openly critical of any existing failings in electoral administration and more active in promoting improved standards, putting forward proposals for improvements to current practice on the basis of past experience and international best practice.

The role of an independent electoral commission may be particularly important in the context of significant changes to the voting system. These include the possible introduction of proportional representation for elections to the House of Commons, for elections for the European Parliament, and for the new Scottish Parliament and a Welsh assembly. It could also play a central role in the conduct of referendums themselves, which all parties include amongst their current policy proposals. The need for an independent statutory commission with responsibility for the administration and conduct of referendums was a key recommendation of the recent report of the independent Commission on the Conduct of Referendums. Similarly, if moves are made to limit national expenditure by political parties and/or to monitor party funding more closely (or even to provide state funds for political parties), a body independent from the Government would be necessary to take responsibility for monitoring compliance.

In England, Wales and Scotland, electoral registration and the actual conduct of elections are the responsibility of local authority electoral registration officers and returning officers. In evidence to the Hansard Society Commission, the Association of Electoral Administrators argued that local authority responsibility for electoral registration makes differences in standards inevitable. Responsibility for a national electoral registration service is therefore one of the functions which has been proposed for an electoral commission. It is, however, unlikely that this would entail the transfer of current electoral registration staff to a national agency. A more practical approach would be for an electoral commission to have a closer supervisory role than currently undertaken by government departments: key roles of an electoral commission could be public education relating to elections and electoral registration and the provision of improved training and support for registration and returning officers. In addition, the funding provided to local authorities for electoral registration could be clearly ring-fenced. Returning officers are also likely to continue to be drawn from local authority staff. Again greater consistency and improved standards could be achieved through a closer supervisory and support role by an electoral commission.

In Northern Ireland the roles of both electoral registration officer and returning officer are carried out by a chief electoral officer, who is an independent Crown official. These arrangements work well. Although it may be impractical to transfer this approach to the rest of the UK, there seems to be little point in bringing Northern Ireland into line with the rest of the UK purely for the sake of consistency.

Even if all of the current Home Office electoral responsibilities were transferred to an electoral commission, the commission would need to retain some link with a government department which had a residual responsibility for elections. Any changes to electoral law proposed by an electoral commission would still need a Minister to support and introduce the legislation: to secure a legislative slot and to steer the legislation through Parliament. Some technical changes might be achieved through secondary legislation and could be non-controversial; or, if they require primary legislation, they might sometimes follow the streamlined practice adopted for Law Commission bills. Measures which will have any impact on Parliamentary constituencies will, however, continue to be controversial, as will any provisions relating to election campaigns and expenses.

Any controversy surrounding changes to the electoral system may be reduced if proposals originate from an independent body rather than from the Government, but they will still need strong backing from the Government to get through Parliament. It would be unrealistic to force the Government to support legislation proposed by an electoral commission, but procedures could be put in place to ensure that Parliament is made aware of recommendations by the commission. The Home Secretary is currently required to place the recommendations of the Boundary Commissions before Parliament and it would be possible to require similar treatment for advice given by an electoral commission.

There may be a case for the residual responsibility for electoral matters to be moved from the Home Office to the Cabinet Office, particularly if other constitutional functions are gathered there. These might include responsibility for referendums generally, including the referendum on reform of the electoral system. The Ministerial lead could shift to the Leader of the House, whose role is less partisan than other members of the Government because of the need to work across the party divide in managing the business of the House.

Boundary Reviews

The revision of constituency boundaries for Parliamentary and European elections is currently the responsibility of four Boundary Commissions, covering England, Northern Ireland, Scotland and Wales. Each Commission is nominally chaired by the Speaker of the House of Commons, although the Speaker does not play an active part in their deliberations. In addition, each commission has three part-time members: the deputy chairman must be a High Court judge (or a Court of Session judge in Scotland) and for the English and Welsh Commissions is appointed by the Lord Chancellor, for the Scottish Commission is appointed by the Lord President and for Northern Ireland is appointed by the Lord Chief Justice; the other members are appointed by the Government in consultation with the opposition parties.

The Commissions are staffed by a small number of civil service secondees, with public inquiries being led by Assistant Commissioners who are appointed by the relevant Secretary of State. The Commissions conduct a general review of all boundaries every eight to twelve years, but can also recommend interim changes to be put into effect at the next general election. The Commissions submit their recommendations to the relevant Secretary of State, who must put them before Parliament for approval. There is *ad hoc* co-ordination between the Commissions, but the Scottish Commission works to different statutory guidelines.

There is concern across the political spectrum about the way in which the Boundary Commissions currently work. Particular points of concern have been the seemingly inevitable increase in MPs as a result of each review and the relative over-representation of Scotland, Wales and London. Furthermore, in comparison with similar exercises overseas, the Commissions' work has tended to be enormously time consuming (the Boundary Commission for England's Fourth Review started in February 1991 and was not completed until April 1995).This has resulted in two key proposals for change:

- The rules governing the Boundary Commissions' reviews should be revised.
- The four existing Commissions should be merged into a single UK electoral commission.

The Commissions currently follow rules set out in the Parliamentary Constituencies Act 1986, which specify that they should as far as possible create constituencies of approximately equal electorates. The rules set out a number of other considerations to be taken into account, such as local government boundaries, local ties and

geographical factors. It is impossible to avoid some contradiction between these considerations, and part of the Commissions' task is to try to reconcile these often conflicting aims.

Population distribution and geography ensure that there will always be a need for some degree of compromise, but despite a rule which states that the number of constituencies in Great Britain shall not be substantially greater or less than 613, there has been an inexorable increase in the number of MPs after each review. In 1950 there were 625 MPs; in 1955, 630; in 1974, 635; in 1983, 650; and, in 1997, there are 659 MPs.

The relative over-representation of Scotland and Wales results as much from historical anomaly as from any conscious policy decision, although it is exacerbated by the way in which the Boundary Commissions' rules are interpreted. The Redistribution Act 1944 fixed the minimum number of Scottish seats at 71 and Welsh seats at 35. In the new Parliament there are 72 Scottish seats and 40 Welsh ones. This produces an average of 55,043 electors per Scottish seat, 54,047 electors per Welsh seat and 69,238 electors per English seat. Any review of the redistribution of Parliamentary seats, or a merger of the Boundary Commissions, will produce calls for the distribution of seats to be re-examined. With devolution back on the political agenda, the number of Scottish and Welsh MPs will, in any case, become a matter of sharper political controversy.

The work of the Boundary Commissions is further complicated by the need to take into account the work of the Local Government Commissions which review local authority boundaries and wards. The Boundary Commissions' Fourth Reviews were based on existing local authority structures, even though changes to local government boundaries were being reviewed at the same time. This made it inevitable that there would be a poor fit between the new local authority and constituency boundaries. The final recommendations of the Local Government Commissions were not available in time for the Boundary Commissions to take them into account, and the Local Government Commissions were under no obligation to consider the use of wards in defining Parliamentary constituencies when producing their recommendations. Unless some steps are taken to co-ordinate the two processes (as was undertaken in Northern Ireland prior to the Fourth Review and is now the practice in Scotland) mis-matches will be difficult to avoid.

The merger of the four existing Boundary Commissions into a UK-wide electoral commission, operating under a single set of rules, should help to ensure a consistent interpretation of the rules across the UK and improve co-ordination. There is also a case for incorporating the Local Government Commissions' responsibilities into those of an electoral commission to ensure co-ordination of boundaries at all levels. Placing responsibility for all boundary reviews in a single body with shared resources and a proactive remit may also speed up reviews.

It would be possible to introduce a single set of rules, a more consistent approach between the different Commissions and changes to the rules to prevent a continuing increase in the number of MPs, without establishing an electoral commission; but revising the rules would itself require primary legislation. Similarly, any

reduction in the number of constituencies in Scotland and Wales requires a review of the statutory framework within which the Boundary Commissions work and, although it does not in itself point to a change in the institutional framework of the Commissions, there may be a cumulative case for an electoral commission which would support including these changes in legislation establishing an electoral commission.

Territorial Structure

Any merger of the existing Boundary Commissions needs to retain a territorial structure: because reviews are best conducted by experts with an understanding of the local political geography; and because Scotland, Wales and Northern Ireland may have devolved assemblies with different electoral systems. The Constitution Unit's reports on a Scottish parliament and Welsh assembly suggested that responsibility for those electoral systems should remain with Westminster. Even if this recommendation is not accepted, there is a strong case for having a single UK electoral commission to ensure uniformity in the elections for Westminster and the European Parliament, and to ensure that the building blocks for elections at every level so far as possible coincide, strengthening and not dividing political communities.

Both of these criteria could be met by making boundary reviews primarily the responsibility of national electoral commissioners, with final approval being made at a UK level by commissioners from all four constituent nations of the UK and chaired by a UK electoral commissioner. Each commissioner should have the power to appoint a national panel; and to appoint assistant commissioners to conduct boundary inquiries, as the Boundary commissioners currently can. In addition to primary responsibility for boundary reviews, the national commissioners should be responsible for sub-national referendums, for elections to the devolved assemblies and for local elections. Under the additional member system of elections proposed for both the Scottish parliament and Welsh assembly, regional returning officers will be required to distribute the additional seats allocated proportionally: their work could be supported and supervised by the Scottish and Welsh electoral commissioners.

Election Watchdog

Under current legislation any disputes arising from general election campaigns are decided by an Election Court made up of two judges of the Queen's Bench Division of the High Court. The judgement of the Election Court takes the form of a report to the Speaker which the House of Commons is bound to act upon (Representation of the People Act 1983). This process has been used very rarely since the 1930s and has been criticised as being both complex and costly. It has been suggested that while an electoral commission would not replace the role of an Election Court, it could provide a means by which political parties and the electorate could register their complaints and concerns, and that it could have responsibility for investigating complaints as appropriate, and at no charge to the complainant. This could lead to a significant increase in the number of complaints. The

commission would need power to screen out frivolous or vexatious complaints, and to refer to an Election Court difficult points of election law, or serious cases where it appears the result should be annulled and a fresh election ordered.

Further work needs to be done on the respective roles of returning officers, the electoral commission and the court in investigating petitions and complaints (in particular on whether the commission should have enforcement powers); but the ombudsman-type role of investigating complaints is one performed by electoral commissions overseas, and with suitable adaptation should be capable of introduction in the UK.

Setting up an Electoral Commission

The independence of an electoral commission will be crucial to its successful operation. Its independence must therefore be clearly signalled and protected in its structure and organization. A commission must also be accountable for its performance and ensure that its activities are transparent and open to scrutiny. The general principles informing the governance framework of an electoral commission are considered in the briefing on *Constitutional Watchdogs*. Key factors such as the mechanisms by which it is held to account, the nature of its membership and the means by which it is funded are considered below.

Accountability and Independence

An electoral commission should be independent of any government department and accountable to Parliament to ensure that it is as far as possible protected from political influence. The Boundary Commissions are currently chaired by the Speaker. However, the Speaker plays no part in the proceedings of the Boundary Commissions and the Speaker's nominal role as chair makes it difficult for MPs to criticise the work or methods of the Commissions. It would be better to achieve accountability to Parliament through a select committee. This could be done through a committee created specifically to oversee the electoral commission. This would, however, break with the current departmental structure of committees and could be seen as leading to a proliferation of new committees in the House of Commons.

The development of other 'constitutional commissions' may make it appropriate for a new committee to be created to provide them with a framework for Parliamentary accountability. Given current arrangements, an existing departmental committee may be the most realistic option: if responsibility for electoral law was retained by the Home Office, it would sensible for the electoral commission to report to the Home Affairs Select Committee; if responsibility were to be moved to the Cabinet Office, it should report to the Public Service Committee.

In addition to this formal line of accountability, an electoral commission should give a wider account to other stakeholders and to the public. This would include ensuring transparency in its actions—by, for example, publishing annual reports and accounts—and engaging in consultation both in relation to boundary reviews and on the wider issues covered by its remit.

Membership

The independence of the electoral commission will be judged by a number of factors, including the method of appointment and the background of the members. The requirement that the deputy chairman of the Boundary Commissions should be a High Court judge has meant that their independence has not been brought into question. If membership were to be extended in order to bring a wider range of expertise into an electoral commission, political bias could become an issue. The involvement of Parliament and the opposition parties could provide a safeguard. Members should be appointed through a motion of the Prime Minister in the House of Commons following consultation with the Opposition—as is the case with the Comptroller and Auditor General. Security of tenure could also help to safeguard the commissioners' independence. Commissioners should be appointed on a fixed-term basis with provision for renewal. Provision would also be necessary to cover dismissal on grounds of misconduct, or inability to perform duties; with protection similar to that applying to the judiciary.

Funding and Costs

The Boundary Commissions are currently funded out of the relevant departmental vote, but are not cash limited. Such an arrangement is increasingly anomalous and cannot endure. To underline an electoral commission's independence its budget should come from the Consolidated Fund, as does the budget of the National Audit Office. An electoral commission should as far as possible have to live within a set budget, but the budget will fluctuate depending on the cycle of boundary reviews and the volume of local inquiries. If the latter continue to be unpredictable it may prove impossible to introduce a cash limited budget. The electoral commission should submit annual budget plans and report on previous expenditure to a Parliamentary committee.

Our current electoral arrangements are run relatively cheaply and the establishment of a more effective electoral commission may lead to some increase in cost. Precisely how much is difficult to quantify because it will depend on the commission's range of functions and on the division of expenditure between the commission and local authorities. The greatest area of potentially open-ended expenditure, more intensive voter registration, is a local authority function and likely to remain so.

Other functions will be transferred from the Boundary Commissions and from the Home Office with their existing budgets. The budget of the Boundary Commissions for England and Wales in 1997-98 is around £1.6M, and the five staff in the Elections Section of the Home Office £184,000. The Boundary Commissions have a small permanent staff seconded from the Office for National Statistics, and take on extra staff according to the fluctuating workload involved in boundary reviews. The electoral commission would need a core permanent staff but would need to recruit temporary staff to meet the demands of periodic reviews. The cost and duration of these reviews depends heavily on local inquiries, which have been criticised for providing cumbersome and artificial opportunities for special pleading by the parties, who will already have submitted evidence to the review. Consideration should be given to ending local inquiries, or at least streamlining their procedures (for example by requiring that all evidence be submitted prior to an inquiry); if achievable this could greatly speed up boundary reviews as well as reducing their cost.

Timescale

Establishing an electoral commission would require legislation. A purely advisory body could be established without legislation, but its functions would be limited. For an electoral commission to supervise the administration of elections, to increase voter registration, to conduct boundary reviews or investigate complaints requires legislation. The legislation need not confer all these functions on an electoral commission at once. It may make sense to establish the electoral commission initially as a slimline body and to build up its functions gradually.

Under a Labour Government, referendums may provide the key. It is unlikely that a full electoral commission will be established in time to supervise the proposed referendums in Scotland and Wales. But electoral commissioners could be appointed in Scotland and Wales, initially to supervise the referendum; and then to supervise the first elections to the Scottish parliament and the Welsh assembly. These commissioners could in due course become members of an electoral commission.

When might legislation be needed to establish an electoral commission? The case for an electoral commission is particularly strong in relation to the proposed referendum on electoral reform. This will require a considerable educational role about the effects of the alternative electoral systems, and could result in the need for a fundamental reorganization of Parliamentary constituencies. If any change resulting from a referendum is to be implemented prior to the next general election, the referendum will need to be held, at the latest, in 1999. If an electoral commission is to take the lead in overseeing the referendum and implementing any consequent boundary changes, legislation will need to be introduced at the latest in the 1998-99 Session (see the Constitution Unit's companion briefing, *Changing the Electoral System*).

It would thus be possible to build up the functions of an electoral commission gradually: starting with electoral commissioners responsible for the devolution referendums (appointed in the Scotland and Wales referendums legislation) and then with supervising the elections to the devolved assemblies (authorised in the devolution legislation). If necessary, commissioners could also be appointed to supervise early referendums on a single currency and a strategic authority for London. Legislation establishing a full electoral commission would then be passed in time for the referendum on electoral reform.

If the electoral commission is to be robust and independent it will in any case need a solid statutory basis. Bringing together all of the functions proposed for an electoral commission in a single piece of legislation need not represent as great an upheaval as appears at first glance: for example the transfer of responsibility for boundary reviews to an electoral commission would have little immediate effect. The next full review of Parliamentary constituencies is not due to start for another five to ten years. The degree of change involved in legislating for an electoral commission will also depend on whether it is used as an opportunity for more detailed reform of electoral law, for example the introduction of restrictions on election expenditure, or a rolling register. Some of these changes may benefit by preparatory work being done by an electoral commission as part of its general remit to review and update electoral law. Parliament may feel more confident about such changes if they have been carefully scrutinized by an independent body which has engaged in the necessary consultation and thought through the practical implications.

One solution might be to confer a power on the electoral commission to review electoral law and recommend changes, and empower the Government to make changes through secondary legislation subject to the affirmative resolution procedure. Changes to provisions for absent voting would, for example, be suitable for secondary legislation. Other reforms, such as national restrictions on election expenditure, will clearly need to be in primary legislation. There is a case for including any such major reforms in the legislation for an electoral commission: as our 19th-century arrangements show, the opportunities for primary legislation on electoral law will continue to be relatively rare.

BRIEFING 12

CONSTITUTIONAL WATCHDOGS

The need to establish new, independent, machinery to safeguard the democratic process has been a recurring theme in the Constitution Unit's reports and briefings; and in the proposals for reform put forward by the Labour and Liberal Democrat Parties in the run up to the General Election. With each of these watchdog bodies, it will be necessary to develop the right framework to ensure their independence, accountability and effectiveness.

Introduction

Examples of the 'constitutional watchdogs', which might safeguard the democratic process, include: an electoral or referendum commission; a judicial appointments commission; an appointments commission for the House of Lords; an information commissioner; a territorial finance commission; and a human rights commission.

Details about the functions of each of these bodies are set out in the earlier briefings in this Report. Few of these new bodies are likely to involve significant new public expense. Some might replace existing quangos; for example the merger of the existing Boundary Commissions into a new electoral commission. In other cases new roles might be assigned to existing bodies—the Ombudsman might take on the role of information commissioner (as he has already taken on a supervisory role in relation to the Code of Practice on Open Government). Where an entirely new body is created, its full range of functions may be phased in over time. In each case, it will be necessary to develop an operational framework suited to the watchdog's functions and role. This briefing considers the design of those frameworks.

Governance and Quangos

Constitutional watchdogs are not new to the UK, but they are not a category with any official status or recognition. Whatever generic term we use to describe them, these constitutional watchdogs are essentially quangos, with all the institutional tensions and ambiguities that come with the territory. No quango blueprint exists, nor are there clear guidelines for the particular subset with which we are concerned. The expansion in the number and range of quangos has gone ahead without any apparent overall direction, a largely pragmatic

response to political and policy pressures. Questions of structure, organization and process are resolved on an *ad hoc* basis.

The definition used here, 'independent machinery to safeguard the democratic process', covers a potentially wide range of bodies. It includes the National Audit Office (headed by the C&AG); Audit Commission; Parliamentary Commissioner for Administration (the PCA or Ombudsman); the Commission for Local Administration (Local Government Ombudsmen); the Local Government Commission; and the Boundary Commissions. Lesser known bodies include the Political Honours Scrutiny Committee, the Civil Service Commission, and the Security Commissioner. Many have territorial counterparts; and in Northern Ireland, there is also a Standing Advisory Commission on Human Rights and an independent electoral commissioner. Then there are the more recent bodies associated with Nolan: the Committee on Standards in Public Life itself; the Commissioner for Public Appointments; and the Parliamentary Commissioner for Standards. Equally, we could include the Data Protection Registrar; the Committee on Public Broadcasting, responsible for allocating broadcasting time to political parties; or the advisory committee to the Home Secretary tasked with vetting members of the armed services who wish to stand for election.

Despite the broad definition, these individuals and institutions inhabit a particular place in the political landscape. For example, siting them on the quango map is fairly straightforward. Using a scale developed by the Political Economy Research Centre (PERC) which uses the two axes—'purely private to purely public' (in terms of their own status rather than their sphere of influence) and the 'degree of control by Ministers'—constitutional watchdogs will be firmly in the 'purely public' camp, and subject to a low degree of Ministerial control. But they are not a homogeneous set of institutions. These bodies can be seen as belonging to two distinct categories: regulatory bodies, with varying powers of enforcement, and advisory bodies charged with tasks or inquiries deemed too 'political' to be dealt with by Ministers or even by Parliament. Beyond this, there is little consistency in their operating frameworks.

In type, the new constitutional watchdogs are mainly advisory rather than regulatory bodies, although some combine both functions. They are concerned more with guarding against impropriety than illegality. In developing appropriate governance frameworks, our reference points are not limited to the range of existing constitutional watchdogs. Since the 1960s, the UK has acquired a range of non-constitutional quangos deliberately set up at arm's length from government, to preserve their independence, for example the regulators for the privatized utilities, public sector ombudsmen, and the various anti-discrimination bodies. Across Europe, there has been intense development of administrative regulation over the last two decades; but, by comparison, the UK lacks the sort of public law framework which would ensure that the legal liabilities and obligations of quangos are understood and respected.

In extending the existing network of independent watchdogs, care must be taken not to cause public confusion, or to adversely affect their credibility through proliferation. There is also what Lord Nolan has referred to as 'a danger of the excessive involvement of unelected officials in supervising elected politicians upsetting the balance which is needed in a democratic society'. The operating frameworks for these new constitutional watchdogs need to be founded on clear political and legal principles—both to ensure coherence in their development and to safeguard their legitimacy as guardians of the democratic process. Moreover, any guiding principles must underpin both the formal and informal, the visible and invisible elements of the new watchdogs' operating frameworks. As PERC has pointed out 'The changes to the structure of the public sphere have removed many of the old certainties. The constitutional form of a particular body is no longer an adequate framework for analysis'. For example the nature of the operating frameworks devised for these new bodies is likely to be influenced by whether they have an advisory or executive role. But this is not an easy distinction to draw: some bodies will have a range of functions, some advisory and some executive. Moreover, the specialist role and status of such bodies may mean that their *de facto* powers extend beyond their formal limits, as with the existing Boundary Commissions whose advice is so influential as to determine the normal outcome of boundary reviews.

Formal design elements will include legal status, powers, structures, and funding arrangements. But the operating style of the bodies will be the product of a wider, and less controllable, set of factors—the personalities and integrity of members and staff, the national profile of the organization, and its approach to public relations. In this latter respect, the 'seven principles of public life' devised by the Committee on Standards in Public Life (selflessness, integrity, objectivity, accountability, openness, honesty, leadership) are clearly pertinent, and practical support should come from the Government's proposal to develop a model code for staff of quangos and from its advisory document, Guidance on Codes of Practice for Board Members of Public Bodies.

Independence, Accountability—and Influence

Although recent years have seen an escalation in the use of independent agencies, these developments have yet to produce easy solutions to the central political problem of such institutions: how to reconcile independence with accountability.

The critical importance of independence to the successful operation of these bodies cannot be underestimated. Indeed, their existence is justified by their independence, for the tasks with which they are to be entrusted are certainly not beyond the capacities of central government. Moreover, because the possibility of entrenchment does not exist in any formal sense under the UK's unwritten constitution, the intention of such independence must be clearly signalled and protected in their structure and organization. A range of international bodies, including the United Nations and the International Organization of Supreme Audit Institutions, have produced

guidelines on how to buttress the independence of key public bodies. These guidelines suggest two key criteria for assessing independence: a body's formal legal status and the nature of any powers of direction.

The degree of freedom possessed by any constitutional watchdog will also reflect a wider range of factors: its terms of reference; who defines the body's intended outputs; the political salience of the body's area of work; the centrality of unchallengeable expert opinion; who holds the power of appointment and dismissal; funding requirements and uncertainty in the amount and duration; competition and contestability (i.e. whether the body has a monopoly in its area of work); the permanence of the body and the possibility of dissolution. The criteria published by the British and Irish Association of Ombudsmen governing the recognition of Ombudsman offices also suggest a further aspect of independence: that the watchdog's jurisdiction, powers and method of appointment should be matters of public knowledge. Finally, there must be well-defined statutory and institutional objectives; and the risk of 'regulatory capture' should be minimized.

If all these criteria are satisfactorily met, can independence be a substitute for accountability? The need for accountability arises from the indirect nature of our democracy: 'those who make decisions on our behalf must do so transparently and must convince us that they are the right people to be doing so. In short, we must see them as legitimate' (PERC, *Good in Parts: An Agenda for Reform*, 1996). In the case of elected bodies, this legitimacy is conferred largely as a result of the election process. But is it possible to argue that in the case of constitutional watchdogs, their legitimacy depends 'not upon accountability *to someone*, but upon the absence of such accountability i.e. on its independence in carrying out its statutory mandate' (University of Sheffield, *The Changing Constitutional Role of Public Sector Audit: The Audit Commission*, March 1996)?

In practice, this may well be the case. But as guardians of the democratic process, constitutional watchdogs require institutional safeguards not only to secure accountability, but also to send the right signals to others. So what is the nature of that accountability? The concept as applied to constitutional watchdogs raises a number of questions. First, who is accountable? A critical issue is whether these bodies will be accountable for their own actions, or whether they will also have sponsoring Ministers who will share that accountability. The public administration environment into which these new watchdogs may be born will be one in which, for public bodies, accountability through Ministers to Parliament is no longer the paradigm it once was. Increasingly, there is a perception of over-reliance on the conventions of Ministerial accountability, and a challenge to the assumption that the doctrine of Ministerial accountability is an effective guardian of good government or good administration. Direct accountability of the watchdogs to Parliament, bypassing Ministers, is an important option.

The question 'accountable to whom?' is also asked with greater frequency. Accountability may be to different people or institutions for different things, and need not be reactive—transparency, for example, provides a

means of *de facto* accountability. The Democratic Audit has suggested that a range of 'upwards' and 'downwards' mechanisms of accountability is necessary. They propose that the public should have rights to: inspect a register of members' interests; attend board or committee meetings; inspect minutes of meetings; see policy papers or documents for meetings; and that the bodies themselves should be required to: publish annual accounts and annual reports; and meet in public. A further form of accountability is participation—as with the public consultation exercises conducted as part of the Local Government Commission's recent review of the structure of local government in England. Others have taken this further: the BBC, for example, has established national, regional and local councils; specialist advisory machinery; a series of public meetings; reports by an independent assessor; and governors' seminars.

A final aspect of accountability that requires clarification in this context is 'accountable for what'? Should independent bodies be accountable for their own policies and performance; or is the degree of control implicit in such a requirement likely to constrain their independence? In broad terms, watchdogs should be accountable only for matters of performance, for example efficiency and propriety, rather than for the merits of their recommendations, policies or goals. In most cases, accountability should be after the fact, rather than the sort of pre-accountability that involves seeking consent prior to a course of action, through a business plan or structuring the action by prescribing the rules.

The second half of this briefing explores the key factors involved in securing independence and accountability. This is not to say that resolving these structural issues will determine the effectiveness or success of these new bodies. Independence and accountability alone are insufficient for this purpose; good management and clear lines of responsibility between commissioners and staff will play their part. Most importantly, any new constitutional watchdog should have *influence* within its operational sphere—whether derived from statutory powers or its own expertise and authority. The scope for a government to undermine the credibility of such bodies if it objects to their actions should not be underestimated. As the Nolan Committee and the Scott Inquiry have recently shown, the balancing act involved in operating both independently and influentially will inevitably create tensions; the governance framework must be designed to cope with this.

Legal Status

There are two broad possibilities here. A new watchdog could be established without legislation—a body created by the Government as a non-departmental public body, operationally independent. An alternative model would be to establish a new body through an Order in Council, primary legislation or incorporation by Royal Charter (as with the BBC and Arts Council)—progressively stronger forms of legal protection. A statutory basis may be required for some bodies, if they are to exercise certain powers or impose sanctions. Such a statute might also specify the functions and remit of the relevant body to avoid future disputes or unwarranted political

intervention. This second model would provide a more robust form of independence. Indeed, the Public Service Committee has recently suggested that the status of Next Steps agencies should be considered candidates for having independent statutory status, specifically as a safeguard against Ministerial over-involvement in their activities. However, statutory backing is more important in terms of entrenching a body against dissolution than for conferring legitimacy. It is noticeable, for example, that the Nolan Committee has no statutory footing and yet has achieved considerable influence and status; indeed, it could be argued that the need to prove their worth was a spur to create legitimacy through their recommendations. A further alternative structure that might be considered in some circumstances would be a quasi-judicial model, but this is unlikely to be appropriate for any of the bodies considered here, except possibly for an information commissioner.

External Scrutiny and Monitoring

The Conservative Government accepted the desirability of extending the PCA's jurisdiction, promising a review of the position of every executive quango and giving consideration to bringing advisory bodies into jurisdiction. In principle, the new watchdogs should fall within the jurisdiction of both the C&AG and the PCA; and therefore should be subject to the existing Code of Practice on Access to Government Information (and any subsequent freedom of information legislation). Key appointments to all the watchdogs should be subject to scrutiny by the Commissioner for Public Appointments. This range of monitoring mechanisms would safeguard the ethics and performance of watchdogs rather than considering the merits of their decisions, actions or advice. Additional external scrutiny might be appropriate in relation to particular watchdogs. For example, the Commissioner for Public Appointments might be required to report annually on the procedures and operation of a House of Lords Appointments Commission and a Judicial Appointments Commission. In the case of advisory bodies, the scope for more extensive scrutiny will depend heavily on the extent to which the advice they offer is made public, and on the transparency of the procedures they follow. Of the 674 advisory quangos in 1996, only 25 were required by statute to publish an annual report; 13 were required to publish their advice to the Government. In the case of constitutional watchdogs, the presumption should be in favour of public disclosure.

Relationship with Parliament

Among the constituencies to which these bodies must be accountable, Parliament ranks highly. A key question is whether this accountability is *via* the relevant Minister, as is currently the case for the Boundary Commissions and the Audit Commission, or direct to Parliament (as with the PCA and the NAO) possibly through a Parliamentary Committee. At first sight, the notion of direct accountability to Parliament seems attractive, as a means of bolstering the watchdogs' independence. On the other hand, Parliament lacks the resources that Ministers possess: it has many fewer staff, limited time, comparatively little expertise. The resulting relationship between Parliament and the utility regulators, or the Data Protection Registrar, for example is far from effective.

Moreover, the mechanisms that can be used by Parliament to call Ministers to account for the bodies for which they are responsible—Parliamentary questions, debates, and so on—would be lost if their accountability was direct to Parliament. What this suggests is that if accountability to Parliament is desirable as a means of signalling detachment from the executive, then Parliament must devise new arrangements for securing that accountability.

One means of securing accountability direct to Parliament (and simultaneously strengthening the clout of any watchdog) would be to establish a direct link to a specialist Parliamentary select committee. This might be a relationship of vertical accountability; or a 'partnership' relationship. One example of such a relationship is that between the National Audit Office and the Public Accounts Committee. The Comptroller and Auditor General is appointed on the recommendation of, and reports to, Parliament. But in practice only the Public Accounts Committee follows up reports (although other select committees are now allowed to consider NAO reports in consultation with the Public Accounts Committee). The NAO's workplan is designed in consultation with the Public Accounts Committee, but the NAO has the last word. Unofficially, the NAO also briefs the Committee with questions for its hearings with Government Departments, and contributes to the drafting of its reports. However, the limits of this relationship are implicitly acknowledged by the fact that the NAO is required to present its annual budget to a separate committee (the Public Accounts Commission, which includes the Chairman of the Public Accounts Committee) for approval; the Commission is also responsible for appointing auditors to audit the NAO. A similar model—but without the separation of accountabilities—is provided by the relationship between the PCA and his Select Committee. Each year the Select Committee produces its own report on the Ombudsman's Annual Report, reviewing his work and sometimes proposing changes in his methods of working. The Committee also produces occasional reports on some of the more difficult cases tackled by the Ombudsman; or thematic enquiries. The Committee's function is both to provide a channel of accountability and to add weight to the Ombudsman's judgment.

In most cases, accountability to Parliament will be intended to provide an opportunity for examination based on an annual report, rather than to provide direction. Those new watchdogs with a cross-departmental remit (human rights commission, information commissioner) might most benefit from the sort of 'partnership' arrangement described above. This could require breaking out of the 'departmental committee' mould—both to avoid a proliferation of committees and to provide for more issue-based groupings. One option might be for the Public Service Committee to adopt a general remit in respect of constitutional watchdogs (it already oversees the work of the Commissioner for Public Appointments); or the establishment of a new committee dealing with constitutional affairs—perhaps a joint committee of both Houses. Any significant extension of the select committee system would require wider consideration of the resources available to Parliament; not least whether sufficient enthusiastic Parliamentarians could be found to sustain it. The administrative support available to the committees under present arrangements (with the exception of the PAC) is already stretched. A reformed

House of Lords, with a larger proportion of working peers, might create more scope for establishing new committees especially if the second chamber was itself recognized as having a particular remit in constitutional matters.

Funding

Ring-fencing the funding of any body from across-the-board budget cuts is unrealistic. However, Parliament has passed statutes that authorize the salaries of certain people who hold offices which are constitutionally independent of the Executive to be charged directly to the Consolidated Fund and not be subject to the annual supply procedure. These include the judiciary, the C&AG, the PCA and the Speaker of the House of Commons. The NAO's staff and running costs are also funded directly from the Consolidated Fund, based on estimates prepared by the Public Accounts Commission; and the Audit Commission's income from district audit allows it to be almost entirely self-funding, a factor which is seen by some as an important contributor to its success. On the other hand, the members' salaries and running costs of the Nolan Committee, Local Government Commission and the Boundary Commissions are funded from departmental votes, and do not appear to have suffered as a result.

For bodies whose running costs are not funded from the Consolidated Fund, but instead from departmental grants-in-aid, it could be argued that a statutory funding formula is key to securing independence, although it is not always easy to devise an appropriate formula. Certainly, funding should not be linked to Whitehall assessments of a body's effectiveness, and bodies should be free to point out the consequences of under-funding. It should be possible to adapt the recommendation of the Commission on the Regulation of Privatized Industries that regulators should have a statutory duty to state publicly the level of resourcing they believe they require; and that the relevant Secretary of State and the Treasury should have a statutory obligation to have regard to this stated level when allocating resources to them. This might be extended to requiring the Government to explain any difference in the two amounts to Parliament. Commissions should have broad discretion in deploying their budgets, including choices over recruitment and remuneration and, critically, in programme planning. Where watchdogs are reliant on grants-in-aid, the head of the institution should be an independent accounting officer. Bodies should be entitled to raise income through marketing their expertise, for example via training or publications, so long as there are no conflicts of interest.

Staffing might be drawn from within the civil service, operating independently of government for the duration of their attachment (as, for example with the Nolan Committee, PCA's Office and SACHR). The 'half-in, half-out' arrangements devised in relation to the Secretaries to the Boundary Commission are clearly unsatisfactory. Commissions could alternatively recruit direct, as with the NAO, Audit Commission, and anti-discrimination

agencies. The choice will depend upon the size of the organization; whether it can offer satisfactory career progression and attract good candidates; and the degree of expert knowledge or professional training required.

Relationship with Whitehall

The question of agenda setting and powers of direction is critical here. Norman Warner describes the public perception that 'with the growth in appointed bodies accountable to Ministers and dependent on them for funding, has come greater centralisation of decision-making and priority-setting' (Demos, *Restoring Public Trust*, 1995). In some cases, the power of central direction is not just a matter of procedures or a culture shift; but is embodied in legislation. This is, for example the case in respect of the Audit Commission, whose governing statute confers on the Secretary of State reserve powers.

Where powers of direction are necessary, they should be embodied in legislation to ensure that they are overt and subject to Parliamentary approval. Whatever the formal arrangements, maintaining the right balance between oversight and interference will require constant vigilance: freedom to publish and commission research, for example, is one area where the courtesy of providing advance sight of findings should not blur into a power of approval or veto. Where a watchdog is accountable to a government department rather than to Parliament, the responsibility of the parent department should be to ensure good systems of control and strategic and business planning. But responsibility should not extend to limiting funds in order to squeeze out activities of which the department disapproved.

Membership

New watchdogs might have multi-member boards or a single post of commissioner. There are advantages and disadvantages in each approach: with a multi-member body, there is a risk that it might not be easy to achieve a generally accepted balance in the membership, and that a corporate body might lack the decisive authority and unambiguous personal responsibility of a single commissioner. On the other hand, the Commission on the Regulation of Privatized Industries points out: 'One of the factors which may undermine legitimacy is the personalisation that has characterised discussion of the activity of several of the DGs...the result of legislation investing them, personally, rather than institutionally, with specific powers and obligations' and that multi-member boards might better sustain continuity, if replaced in rotation. The choice would depend on the range of functions designated to the body, and the skills and experience required. For a human rights commission, establishing public credibility will be more easily achieved with a multi-member commission, which enables a range of interests to represented among the membership. For other bodies, multi-member boards may be required to secure cross-party involvement (for example a House of Lords appointments commission) or a diversity of expert views (for example a territorial finance commission). Where technical expertise is a key

factor, the application of objective or professionally validated criteria by expert members provides legitimacy, which can supplement formal accountability.

Appointments to a commission might be the responsibility of the Crown, on advice from the Prime Minister, or the Minister in charge of the sponsoring department. Transparency is important to establish the credibility of the process. In the case of executive quangos, the selection process would be subject to the guidance produced by Nolan and the Commissioner for Public Appointments, and any other arrangements instituted by the Government of the day. An alternative would be for the chair of the most important commissions to be appointed by the Crown on the recommendation of Parliament in the same way as the C&AG. Some key appointments are by convention subject to agreement with the opposition parties. This would clearly be necessary for a House of Lords appointment commission, which might be composed of one nominee from each party in the House of Commons with more than a certain number of seats and one nominated by the cross-benchers. Nominations could be agreed through the 'usual channels'; or through a more public process of public nomination by party leaders. Equally important is the question of dismissal—the strongest form of protection being a requirement that removal from office is dependent on a vote from both Houses of Parliament (as with the Data Protection Registrar, C&AG, PCA and judiciary).

Conclusions

There is no lack of operational models for the new constitutional watchdogs. The trick is to find the right combination of structural and practical safeguards to secure an appropriate balance between institutional and 'goal' independence on the one hand, and public and Parliamentary accountability on the other. Too much reliance cannot be placed on statutory or other formal frameworks; but by the same token the absence of such arrangements need not preclude operational effectiveness. This is borne out by comparing the experience of the NAO and the Audit Commission. The former has far more institutional defences against governmental interference than the latter, but in practice the Audit Commission has shown itself capable of rigorously protecting its own independence, without undermining its relationship with government or its channels of accountability.

In devising proposals for the new watchdogs, several criteria have been applied:

- Institutional arrangements should be as transparent as possible.
- Accountability should be to those who have reason and incentive to exercise their powers.
- Familiar structures should not be dismissed for their own sake; but more flexible forms of control than the traditional methods of political and administrative oversight are needed.

Table 1 suggests how the new watchdogs might map out.

	Advisory or executive	*Reports to?*	*Commissioner(s) funded from?*	*Single or multi-member*	*Appointed by?*	*Ombudsman and audit*
Electoral commission	A/E	Parliament (Public Service Committee or Home Affairs Committee)	Consolidated fund	MM	Queen, following Parliamentary motion moved by PM, on basis of consultation with Opposition	PCA/NAO
Information commissioner	A/E	Parliament (Select Committee on the PCA)	Consolidated fund	S	Queen, on advice from PM, following consultation with Opposition and Select Committee Chairman	PCA/NAO
Human rights commission	A/E	Parliament (Joint Committee on Human Rights)	Consolidated fund	MM	Queen, on advice from PM, following consultation with Opposition and Joint Committee Chairman	PCA/NAO
Judicial appointments commission	A	Lord Chancellor	Departmental vote	MM	Lord Chancellor	PCA/NAO plus Commissioner for Public Appointments
House of Lords appointments commission	A	Prime Minister	Consolidated fund	MM	Queen, on advice from PM, with nominees from Opposition Parties	PCA/NAO plus Commissioner for Public Appointments
Finance commission	A	Parliament (Public Accounts Committee) and Devolved Parliaments	Consolidated fund	MM	PM, following consultation with Devolved Governments	PCA/NAO

Inevitably the exact framework will reflect the specific functions fulfilled by the bodies; and in particular whether they have decision-making powers or are simply advisory (and if so, whether they advise Parliament or the Executive). Some will operate differently in respect of different functions. Aside from the formal governance arrangements, the style and scope of the new bodies will be influenced by the individual or individuals first appointed to lead them. This was certainly the case with the PCA, where the operating style adopted at the outset was heavily influenced by the first post-holder's previous experience as C&AG. Some bodies will have territorial counterparts which, in the context of a devolution settlement, might be separate bodies with separate lines of accountability, for example to a Scottish parliament. These parallel sets of institutions will need to create effective interfaces, perhaps through shared membership. It is possible that a form of collegiality will develop

between different watchdogs as has happened in Northern Ireland, or that certain functions will be amalgamated (perhaps through sharing common services), especially in devolved territories. Collegiality could help to develop a further line of mutual accountability as a form of peer review; and mutual support if any individual watchdog were to be undermined or attacked by the Executive.