Towards a New Constitutional Settlement

An Agenda for Gordon Brown's First 100 Days and Beyond

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Summary of Action Points

Gordon Brown is committed to a further programme of constitutional reform. This Briefing sets out the main options facing the new government. Below are the highlights of the main action points which he might pursue in the first 100 days, the next two years, and the next parliament. A full list of action points appears at the end of each section in the Briefing, and in a summary table at the end by subject area.

Action for the First 100 Days

The Vision

- Decide how bold the government wants to be. Is the objective a new constitutional settlement, or further specific reforms?
- Give a major speech explaining the government's objectives for constitutional reform. Set out a vision based on a new compact between citizens, communities and the state; and active and accountable government.

The Framework

- Put an experienced and committed Minister in charge of constitutional reform.
- PM to take chair of Cabinet Committee on Constitutional Affairs.
- Create small Constitution Secretariat in Cabinet Office.
- Revive Cabinet Sub-Committee on Devolution Policy.
- Revive Joint Ministerial Committee on Devolution and hold early summit with the new First Ministers.

Conduct of the Executive

- Revive Cabinet and its key committees with proper papers and discussion.
- Issue revised and tightened Ministerial Code of Conduct.
- Divest patronage powers over House of Lords, Church of England

Parliamentary Reform

- Announce the immediate end of Prime Ministerial patronage powers to the Lords, giving greater power to the Appointments Commission.
- Announce intent (when legislative time allows) to break the peerage link.
- Appoint a reform-minded Leader of the Commons and Chief Whip.
- Announce a wide review of the relationship between government and Parliament.
- Abolish Modernisation Committee and merge with Procedure Committee.

Electoral Reform and Funding of Political Parties

- Hold early Cabinet discussion to test mood on electoral reform.

British Bill of Rights

- Await the report of the JCHR on the case for a British bill of rights

Freedom of Information

- Decide on changes to FOI fees regime.
- Oppose Maclean bill, unless restricted to exemption of MPs' correspondence.

Action Over the Next Two Years

Framework for Devolution

- Merge Scotland, Wales and Northern Ireland Offices into single department.

Conduct of the Executive

- Review main prerogative powers to subject them all to parliamentary scrutiny.
- Introduce Civil Service Act.
- Review position of constitutional watchdogs, so that they have closer relationship with Parliament.
- Legislate to make prerogative powers subject to parliamentary scrutiny.

Parliamentary Reform

- Support and advance Jack Straw's reforms: getting ministers and civil servants to co-operate with evidence-taking Bill committees.
- Implementation of changes to hand prerogative powers to Parliament.
- Continue cross-party talks on Lords reform.
- Announce wide ranging review of relationship between government and Parliament.

Electoral Reform and Funding of Political Parties

- If Cabinet still hostile to PR, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords. If Cabinet lukewarm, update and publish DCA review of new voting systems. If Cabinet more supportive, announce inquiry into AV for House of Commons.
- Seek cross-party agreement for a balanced solution on party funding, which controls expenditure and donations. If agreement is not possible, legislate for tighter spending limits on campaign expenditure.

British Bill of Rights

- Decide on the machinery for drafting a bill of rights, and the process for adopting it.
- Involve CEHR and JCHR in the decision.

Judiciary and the Courts

- Invite parliamentary committee to inquire into operation of the Concordat between the Lord Chancellor and the Lord Chief Justice.

Freedom of Information

- Support principle of FOI in ministerial speeches.
- Build stronger evidence base to support any further policy changes.

Action for the Next Parliament

Conduct of the Executive

- Legislate to put all constitutional watchdogs on statutory footing as bodies coming under Parliament.

Parliamentary Reform

- Possible move to specialist legislative committees.
- Implementation of key recommendations from Standing Orders review – possible reform of petitions, committee appointments, committees' ability to move bills and get time on the agenda, private member's bills, early day motions.
- If no agreement on major Lords reform, establish a citizens' assembly to discuss this and Commons electoral reform.
- In the meantime legislate to end hereditary byelections, create a statutory Appointments Commission and break the peerage link.

Devolution

- Referendum on primary legislative powers for Welsh Assembly.
- Increase capacity of Welsh Assembly from 60 to 80 members to match increased powers.
- Announce a review into the level and the forms of territorial representation at Westminster, in the Commons and in a reformed upper chamber.
- Funding of devolution to be reviewed by expert Commission.

Electoral Reform and Funding of Political Parties

- If agreement is reached on new voting system, hold referendum on electoral reform.

British Bill of Rights

- Establish a body to draft the bill of rights, with wide public participation.
- Submit bill of rights to referendum, perhaps at time of next election.

Freedom of Information

- Act on evidence built up during past two years, having included proposed changes in Labour party manifesto.

Part One: The Framework

This Briefing sets out the options facing the new Prime Minister if he wants to deliver a new constitutional settlement, in terms of process, machinery and substantive policies. It is divided into two parts. The first part is about the overall framework, in terms of deciding on the objectives, the narrative, the machinery inside and outside government, and the processes to be followed. The second part is about the individual policies. Each section in Part 2 concludes with a short summary of what can be done in the first 100 days, what can be done in the next two years, and what needs to wait for the next Parliament.

1 Introduction

Britain could be poised for a second big wave of constitutional reforms following Tony Blair's departure. The first wave of reforms initiated by the Blair government (devolution, the Human Rights Act, the first stage of Lords reform) have transformed Britain's constitutional landscape, and built up momentum for the second wave.

Gordon Brown is a strong believer in constitutional reform (Brown 1992, 1997). In the opening speech of his leadership campaign on 11 May he committed himself to building a shared national consensus for a programme of constitutional reform, starting with restoring power to Parliament:

> 'Just as my first act as Chancellor was to give power to the Bank of England to restore trust in economic policy, so one of my first acts as Prime Minister would be to restore power to Parliament in order to build the trust of the British people in our democracy.
>
> Government must be more open and accountable to Parliament – for example in decisions about peace and war, in public appointments and in a new ministerial code of conduct..
>
> But this is just a beginning. Over the coming months, I want to build a shared national consensus for a programme of constitutional reform that strengthens the accountability of all who hold power; that is clear about the rights and responsibilities of being a citizen in Britain today; that defends the union and is vigilant about ensuring the hard won liberties of the individual …'

In the same week his campaign manager Jack Straw came out in favour of a written constitution. So there seems a determination to be bold. At the outset the government needs to make some big decisions about its overall objectives. Is the objective:

- To introduce a written constitution?
- To improve public understanding of the constitution?
- To provide an overarching narrative for the reform programme?
- To introduce further specific reforms?
- To rebuild trust in government?
- To maximise public participation in government?

As the Briefing will show, not all these objectives are readily achievable, and there is a tension between some of these objectives and others. Rebuilding trust is particularly difficult. And there is a general tension between the degree of public participation the government wants to engender, and the degree of control it might want to retain over the process and the outcomes. Part 1 of the Briefing explains some of the difficulties and tensions between the different objectives, starting with the need for an overarching narrative.

2 Principles Underlying a New Constitutional Settlement

2.1 Need for a New Narrative

It is a commonplace amongst critics to say that the first wave of reforms were introduced in a disconnected, piecemeal fashion, with no overarching explanation or vision. It is not too late to supply that, and it is vital to sustain a relaunch of the reform programme. A big strategic decision at the outset is how high flown the new government wants the vision to be. Does it want to aim as high as a written constitution (discussed in the next section), or a new constitutional settlement, or just a continuing programme of reform? Does it want to promise to restore trust, and increase participation and turnout, or merely to strengthen the machinery which might help to increase these things?

People under-estimate how difficult it is to frame a convincing narrative. The first difficulty is the perennial one that the vision must be high enough to be inspiring, but not so high flown that the government promises more than it can deliver. The media and the public ultimately judge politicians by what they do, not what they say. And they are very quick to pick up on any gap between promises and reality. So a strong reality check needs to be made between the policies which the new government decides upon, and the overarching narrative to justify those policies. This briefing starts with the overall narrative and framework in Part 1, but these need constantly to be adjusted against the policy options set out in Part 2.

The second difficulty is specific to trust. Despite the huge wave of constitutional reforms introduced so far, there is little evidence that they have served to increase trust in the political system (Bromley, Curtice and Seyd, 2001). Trust has been going steadily downwards, with occasional fluctuations linked to the electoral cycle (Seyd, 2007). And there is some evidence that reforms such as FOI can decrease trust, because of selective media reporting: press reports of MPs' expenses, or of the Treasury advice over tax changes for pension funds being classic examples (Hazell 2007). This is not to say that reforms can never increase trust: the strongest counter example being the effects of trust in economic policy of devolving interest rate policy to the Bank of England. But governments need to be extremely careful in framing promises that specific reforms will restore trust.

The third difficulty is identifying a set of principles that will command public consent and understanding. Experts themselves disagree about the fundamental principles underlying the British constitution. And such principles are inevitably framed in vague and general terms, which mean little to the public until they are illustrated with specific examples. But any new narrative needs to start with a strong statement that far too much power has been concentrated in the centre. New checks and balances have been introduced into the system, with devolution, the Human Rights Act, FOI and the new Supreme Court. It then needs to acknowledge that more remains to be done, and explain (with examples) how the government is planning to introduce further checks and balances on the executive, more openness, more effective accountability to Parliament, stronger rule of law and more devolution and decentralisation of power. Each of these principles needs to be illustrated with examples of measures the government is planning to introduce.

To be convincing, the narrative needs to be couched in language which Gordon Brown himself has crafted. There are three long standing themes in Brown's speeches on the constitution which could provide the basis for an overarching framework:

- The individual, community and the state (Brown 1992, 1997).
- Liberty, responsibility and fairness (Brown 2005, 2006a).

- Britishness (Brown 2004, 2006b, 2006c).

Brown's recent speeches on Britishness are well known, so the section which follows presents extracts from his speeches on the first two themes, including the need for constitutional reform.

2.2 Brown's Own Narrative on the Constitution

2.2.1 The Individual, Community and the State

Although delivered in the 1990s, these speeches linking constitutional change to the individual, community and the state are still relevant today:

> 'My main purpose is to set a course for constitutional change. To make it more than just a shopping list of attractive ideas. To place it within a framework of belief about Britain as a community that can reach and touch all our people. To make constitutional change central, to make it popular and thus to make it attainable.
>
> I believe that in Britain constitutional change is essential for two quite fundamental reasons. It is vital because it is our responsibility to ensure the individual is protected against what can be called the vested interests of the state. And it is vital too because constitutional change is also a necessary means of advancing the potential of the individual in our community… I want to argue that what in truth we require is an entirely new settlement between the individual, community and government… I believe that in a modern interdependent society individual well-being is best advanced by a strong community backed up by active and accountable government.
>
> Neither nineteenth-century paternalism nor eighteenth-century free market liberalism can answer questions of the relationship between individual community and government that now require a modern twentieth-century democratic settlement. A settlement that recognises first that the state may become a vested interest and that the individual needs the proper and guaranteed protection of a modern constitution so that government is accountable. And second, a settlement that recognises that individual potential is best developed in a community and that the community need not be a threat to individual liberty but can assist the fulfilment of it.
>
> There must also be proper accountability for all those who exercise power in the public's name. I favour certain public appointments made subject to the scrutiny of a House of Commons committee, so reducing the prime ministerial power of patronage.
>
> In conclusion, the current movement for constitutional reform is of historic importance. It signals the demand for a decisive shift in the balance of power in Britain, a long overdue transfer of sovereignty from those who govern to those who are governed, from an ancient and indefensible Crown sovereignty to a modern popular sovereignty, not just tidying up our constitution but transforming it' (Brown, 1992).

> 'The new settlement recognises, first, that the individual needs proper and guaranteed protection, within a modern constitution, to make government accountable … This requires a commitment to ensure that people can participate as much as possible in decisions that affect their own lives, that power is devolved as far as possible and that decision making which does take place at the centre is open and accountable.
>
> Britain needs a modern constitution and a modern view of the role of government. In this way, I believe we can break out of the discredited alternatives of old style state power and new style individualism. The challenge … is to create a new settlement that recognises both our rights and aspirations as individuals and our needs and shared values as a community' (Brown, 1997).

2.2.2 Liberty, Responsibility and Fairness

Gordon Brown has a strong sense of liberty, responsibility and fairness:

> 'The first value I want to highlight is liberty - liberty as both the rights of the individual protected against an arbitrary state and, more recently, as empowerment.
>
> In this century a consensus has evolved that liberty is not just passive, about restricting someone else's powers, but active, people empowered to participate … our liberties, equal and compatible with the liberties of all, should be tested against the extent to which they enable each individual not just to have protection against arbitrary power or the right to political participation, but to realise their potential.
>
> … alongside the idea of liberty are the equally powerful ideas of responsibility and duty. So that people are not just individual islands entire of themselves, but citizens where identity, loyalty and indeed a moral sense determine the sense of responsibility we all feel to each other.
>
> And because this comes alive not only in families, but through voluntary associations, churches and faith groups and then on into public service we, the British people, have consistently regarded a strong civic society as fundamental to our sense of ourselves
>
> The twentieth century innovation has been to give new expression to fairness as the pursuit of equality of opportunity for all, unfair privileges for no one. And in this century there is an even richer vision of equality of opportunity challenging people to make the most of their potential through education, employment and in our economy, society and culture
>
> Charities can and do achieve great transformative changes, but no matter how benevolent, they cannot, ultimately, guarantee fairness to all. Markets can and do generate great wealth, but no matter how dynamic, they cannot guarantee fairness to all. Individuals can be and are very generous but by its nature personal giving is sporadic and often conditional … So fairness can be … guaranteed only by enabling government' (Brown, 2005).

2.2.3 Britishness

Brown links Britishness to being more explicit about our shared values:

> 'Take our constitution and all the great and continuing debates about the nature of the second chamber, the relationship of the legislature to the executive, the future of central and local government. Our approach to resolving each of these questions is governed by what sort of country we think we are and what sort of country we think we should become' (Brown, 2004).
>
> 'We the British people must be far more explicit about the common ground on which we stand, the shared values which bring us together, the habits of citizenship around which we can and must unite. Expect all who are in our country to play by our rules. And while we do not today have a written constitution it comes back to being sure about and secure in the values that matter: freedom, democracy and fairness … And let us reaffirm the truth, that as individual citizens of Britain we must act upon the responsibilities we owe to each other as well as our rights' (Brown, 2006c).

This interest in Britishness can be linked to several constitutional reform themes:

- British Bill of Rights: British values will be expressed and protected through a new British bill of rights and responsibilities. A widespread process of consultation could ensure that the new bill of rights captures core British values.

- Defending the Union: Even after devolution, our most basic interests of prosperity and security are still primarily protected at nation state level. The UK state provides the institutions for defence, national security, foreign policy, macro-economic management,

pensions and social security, and provides the basic framework and all the funding and redistributive mechanisms for the welfare state.

- Modernising our Institutions: Institutions which symbolise Britain and Britishness include the key political institutions and major public services. Some of these institutions like Parliament have lost the automatic authority and respect they once enjoyed. Reforming and strengthening institutions will help to ensure they reflect and represent the main interests and values of contemporary Britain.

2.3 Drawing the Narrative Together

These themes can be drawn together in several different ways. The following is one illustration, which informs the main themes with policy examples from Part 2 of the Briefing. Examples in brackets may be steps too far until the government feels confident about them, having worked through the implications:

New Compact Between the Individual, Community and the State: The individual needs proper and guaranteed protection within a modern constitution. This will be delivered by:

- Developing a new British bill of rights and responsibilities, based on the fundamental principles of liberty, responsibility and fairness.
- Supporting communities by strengthening institutions of civil society.
- Widening the opportunities for public participation, of individuals and communities.
- [Plans for Constitutional Convention or Citizens' Assembly]
- [Plans to put major constitutional changes – British bill of rights, Lords reform, electoral reform – to referendum.]

Active and Accountable Government: Equality of opportunity and fairness for all can be delivered only by an active and enabling government. But an active government needs to be open and accountable. The government will strengthen accountability by:

- Restoring proper Cabinet government.
- Making senior appointments subject to parliamentary scrutiny.
- Making the main prerogative powers subject to proper parliamentary control.
- Divesting powers of patronage over appointments to the Lords and the Church of England.
- Issuing a revised Ministerial Code of Conduct.

Strengthen and Modernise our Institutions: The first wave of constitutional reform has left a lot of unfinished business. Lords reform must be completed, and Whitehall and Westminster need to adapt to the realities of devolution. The government will strengthen our institutions by:

- Seeking a cross-party consensus on Lords reform.
- [Establishing a Constitutional Convention or Citizens' Assembly to advise on Lords reform.]
- Reviewing the whole relationship between government and Parliament.
- [Establishing a Constitutional Convention or Citizens' Assembly to advise on electoral reform for the Commons.]
- Establishing a Department of the Nations [and the Constitution.]
- Establishing summit talks on a regular basis with the devolved First Ministers.
- Introducing a tighter regime to regulate party funding.

Other policy examples can be added or subtracted. What the exercise brings home is how the narrative needs to be adjusted to the specifics of what the government plans to do.

2.4 Need for Coherence

Along with the need for an overarching narrative is the need for coherence. This can be achieved in two ways: procedural, and substantive. **Procedural coherence** can be achieved through a strategic Cabinet committee, chaired by the Prime Minister, and through strengthening the Whitehall machinery responsible for the constitution. As part of this there needs to be a central coordinating unit to plan the programme, its phasing and sequencing, like the Constitution Secretariat set up in the Cabinet Office in 1997. For more on the Whitehall machinery see section 5 below.

Substantive coherence is about understanding the interrelations between the different items. It can best be illustrated by a series of examples:

- Lords reform and electoral reform. The electoral system for an elected House of Lords cannot be planned in isolation from the electoral system for the House of Commons.

- Lords reform and devolution. If the elected members of the House of Lords are to represent the nations and regions of the UK, can they also help to underpin devolution by representing the devolved institutions?

- The English Question and parliamentary reform. 'English votes on English laws' would require a big change in parliamentary procedure, effectively creating a parliament within a parliament. An alternative solution could be delivered by electoral reform (Hazell, 2006).

- Devolution and the new Supreme Court. Post devolution, is it adequate to continue with the convention that two of the judges will be Scottish and one from Northern Ireland: what about the emerging new legal system in Wales? Another set of issues relates to the anomalous jurisdiction of the court in Scottish cases. It has no jurisdiction to hear criminal appeals from Scotland, while Scottish civil appeals can jump the queue and be heard as of right, requiring no leave to appeal (Hale, 2004).

- Parliamentary reform and constitutional watchdogs. Parliamentary reports have begun to recommend that constitutional watchdogs should come under Parliament, not the executive (CASC, 2006; PASC, 2007). What changes would be required to enable Parliament to develop the capacity and expertise to sponsor external bodies?

3 A Written Constitution, or a New Constitutional Settlement?

A major early decision is required on whether to aim for a written constitution, a new constitutional settlement, a statement of principles, or just a continuing programme of reform. This section focuses on the arguments for and against a written constitution, and then considers options short of that.

3.1 The Argument for a Written Constitution

The main argument for a written constitution is one of political literacy: to make it clear what the constitution is, and to educate the public by setting out the constitution in a relatively short and simple document. It would provide an organisation chart of the main institutions of the British state, the relationships between them, and the rights of its citizens. It would lay to rest the

common error that the UK does not have a constitution, just because it is not brought together in a single codified document.

If the main purpose is political literacy, there are short written guides to the UK constitution already available. The DCA supported a project which led to the Citizenship Foundation publication *Inside Britain: A Guide to the UK Constitution* (Citizenship Foundation, 2006), but it is as much a young person's guide to the political system. Vernon Bogdanor's students have produced a concise 20 page summary of the UK constitution (Smith Institute, 2007). The IPPR produced a longer draft UK constitution with accompanying commentary in *A Written Constitution for the UK* (IPPR, 1993), but theirs was a prescriptive project.. The difficulty is that none of these summaries have official status. To gain official status, and political agreement that these were accurate summaries, would require resolving the drafting difficulties addressed in section 3.3. But first we mention the political difficulties.

3.2 The Politics of a Written Constitution

The potential political difficulties of embarking on a written constitution include the following.

3.2.1 No Strong Public Demand

When asked if they want a written constitution, the public say that they do by majorities of around 80 per cent (State of the Nation poll 2004 Q2). But the question is a typical 'cost-free' polling question, all upside and no downside. Nor does the question provide any guide to the salience of the issue. Philip Gould's polls for the Labour party which asked voters to rank issues in order of importance regularly found that the constitution came bottom in voters' order of priorities.

3.2.2 Stronger Judiciary and Weaker Parliament

If it is entrenched (see below), a written constitution inevitably goes with a stronger judiciary to interpret that constitution. In essence, power is taken away from Parliament. Constitutions circumscribe majoritarian democracy because they create rules to constrain political majorities. MPs who are asked to vote for a written constitution will be aware that they are reducing their own power.

3.2.3 Approval by Referendum

New constitutions are generally submitted to the public for approval in a referendum. Approval cannot be taken for granted. If turnout is low this can threaten the legitimacy of the new constitution. Rejection would be devastating for the project and for the government which initiated it. So the reservations of critics and opponents must be taken seriously from the start: if they are ignored they can come back with a vengeance later in the process.

3.2.4 Reaching Consensus

Reaching agreement on defining the present constitution would not be easy, even amongst a group of experts. There are intrinsically subjective and difficult decisions to be made in deciding what belongs in the constitution and what does not. The difficulties in agreeing a constitution are spelt out below.

3.3 Difficulties in Agreeing a Written Constitution

Drafting a written constitution would require agreement on the following:

3.3.1 Scope and Length

What is to be included and excluded? In the absence of a written constitution, there is no agreed boundary of what is 'constitutional' and what is not. Should the electoral system be defined in the constitution? Should the national flag? Most written constitutions define the flag, but not the electoral system. But the electoral system is vastly more important in determining the nature of the political system (King, 2001).

A related issue is the tension between brevity and detail. For political literacy, a short and simple constitution is much better. But the shorter the document, the greater the scope for interpretation by the courts.

3.3.2 Descriptive or Prescriptive

Is this to be a purely descriptive exercise, defining the constitution as it is; or prescriptive, defining the constitution as people would wish it to be? Most drafters will not be able to resist glosses or small improvements to the constitution as they write it down. Once you allow some improvements it is hard to draw the line. While defining the monarchy would it not be sensible to remove the discrimination against Roman Catholics in the line of succession, or the discrimination against women in the rule of (male) primogeniture? And once you allow small improvements it is harder to resist the lobbying for bigger changes: should we continue with the monarchy or not? A purely descriptive exercise could be left to a committee of experts; a reforming one would need political and public involvement, through a constitutional convention or constituent assembly (see section 4).

3.3.3 Entrenchment and Amendment

Entrenchment would involve giving the constitution superior legal status and priority over ordinary legislation. A fully entrenched constitution would become the fundamental source of legal authority in the state, superseding the traditional doctrine of the sovereignty of Parliament. If that was too radical a step, qualified entrenchment could create an elevated status in law for the constitution, while allowing Parliament to legislate in contradiction to the constitution if it expressly chose to do so. The constitution would contain a declaration of primacy over other law, as in the European Communities Act 1972 or the Human Rights Act 1998; but much would depend on how the courts chose to interpret the status of the new constitution in relation to other Acts of Parliament. (For more detail on different forms of entrenchment and their likely effect, see JUSTICE 2007 ch 3. See also Oliver 2007 at 148-9).

A related question is whether the constitution should lay down some special legislative process to govern future amendments. This could take the form of special majorities (such as two thirds) in both Houses of Parliament, and/or a requirement for a referendum, which could apply to all of the constitution, or just certain key provisions.

3.4 Options Short of a Written Constitution

3.4.1 A Statement of Principles

This could help to fill the gap, by explaining the fundamental principles on which the British constitution is based. But it would encounter some of the same difficulties as a written constitution. Experts disagree on the balance between the competing principles of parliamentary sovereignty, popular sovereignty and the rule of law. An expert body charged with defining the

principles of the British constitution would find it difficult to avoid being prescriptive (principles like the rule of law being normative as well as descriptive). And they would face the same difficulties about scope and length. A brief statement of principles at a high level of generality would be of little educational or practical value. But the more detail that was applied to give the principles some context and meaning (eg in providing a statement of rights and responsibilities), the closer the exercise would come to drafting a written constitution.

3.4.2 Towards a New Constitutional Settlement

The safer course might be to draft some principles to guide the constitutional reform programme, rather as the Consultative Steering Group set out some general principles to guide them as they devised the working methods for the Scottish Parliament.[1] As Gordon Brown has said, his purpose is to set a course for constitutional change, to make it more than just a short list of attractive ideas, and to place it within a framework. Early in his premiership he could deliver a major speech explaining the principles which guide the constitutional reform programme, and the course being set. He may want to avoid being too high flown, because the press would judge subsequent actions against the principles. And he need not be too specific about the eventual destination: aiming towards a new constitutional settlement is good enough.

4 Processes for Delivering Constitutional Reform Outside Government

The previous two sections have identified a range of broad objectives for the next phase of reform, ranging from drafting a written constitution, to formulating an agreed statement of principles, to planning specific reforms. Depending on the task, there is a corresponding range of mechanisms available to ensure that constitutional reform is based on broad public and cross-party consultation. The Constitution Unit's first report *Delivering Constitutional Reform* (1996) analysed the strengths and weaknesses of the various mechanisms which have been used in the UK and overseas. They can be divided into three broad categories: building political consensus, calling in the experts and engaging public participation.

4.1 Building Political Consensus

4.1.1 Cross-party Talks

The past century has seen several attempts to secure consensus on constitutional measures through cross-party talks, both private talks on Privy Councillor terms and more formal inter-party talks. Cross-party talks have repeatedly been used to try to progress reform of the House of Lords from 1910 onwards (mostly without much success). Recent examples of cross-party talks include:

- Joint Labour/Liberal Democrat Committee on Constitutional Reform: These talks chaired by Robin Cook and Robert Maclennan (and serviced by the Constitution Unit) ran for six months in the run up to the 1997 election, and resulted in publication in March 1997 of an agreed programme for constitutional reform. The new Labour

[1] http://www.scotland.gov.uk/library/documents-w5/rcsg-03.htm. The principles were:

- The Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive.
- The Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland.
- The Scottish Parliament should be accessible, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation.
- The Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all.

government received strong Lib Dem support for its constitutional reforms, and set up a joint Cabinet committee to seek continued cooperation from the Lib Dems.

- House of Lords reform: Jack Straw initiated cross-party talks in June 2006. The cross-party group met eight times, and agreed that a reformed House should be part appointed, part elected, that the remaining hereditary peers should come to an end, and that reform should be introduced over a long transition period. The group could not agree on the proportion of elected and appointed members, nor on the precise method and timing of any elections. The February 2007 White Paper was a compromise which attempted to build on the limited amount of cross-party agreement. But its proposals were immediately denounced by the Conservatives.

- Review of party funding: These cross-party talks are unusual in being chaired by a neutral third party, Sir Hayden Phillips. In March 2006 he was asked to consider the case for increased state funding of political parties alongside tighter caps on donations and campaign expenditure. Alongside a process of public consultation he has held intensive talks with the political parties, with a deadline of trying to reach agreement of July 2007. (see http://www.partyfundingreview.gov.uk)

4.1.2 Parliamentary Committees

In the twentieth century Speaker's Conferences were convened to recommend changes in electoral law (the last was in 1977-78). In recent years a joint parliamentary committee of both Houses has been convened as a cross-party forum to consider Lords reform. In 2002 a joint committee was asked to produce options in terms of the balance between appointed and elected members. In 2006 a joint committee was asked to codify the key conventions governing the relationship between the two Houses.

The joint parliamentary committee on Lords reform received few submissions and very little publicity. But this need not necessarily be so. The joint parliamentary committee in Canada which considered the draft Canadian Charter of Rights and Freedoms held nationally televised hearings in which it heard evidence from 300 groups and 1000 individuals.

4.1.3 Constituent Assembly

In the past the Liberal Democrats have proposed a constituent assembly to bring a disconnected set of reforms together into a written constitution (Liberal Democrats, 1993). Historically constituent assemblies have typically been used at the birth of a new state, or to create a new constitutional order (India, post-war Germany, Israel, South Africa after apartheid). They are directly elected, representative bodies, which may be separate or may just be the parliament sitting as a constituent assembly, and their task is to draft a new constitution. They are generally convened following a seismic event, such as defeat in war, the grant of independence, or the complete collapse of the previous system of government.

4.2 Calling in the Experts

4.2.1 Royal or Expert Commission

Royal Commissions have gone out of favour in recent years. They can be an excuse for procrastination; their findings can be delivered into a completely different political environment; and collecting the views of external experts neglects the importance of engaging parliamentarians in negotiating the settlement of constitutional issues. But there are two recent precedents for establishing a Royal Commission into a constitutional issue: the Kilbrandon Commission on the

Constitution (1969-1973) which inquired into devolution, and the Wakeham Commission on Reform of the House of Lords (2000-2001). The latter reported in 12 months, and defined the key issues which have formed the basis for subsequent discussion, even though some have still not been implemented.

A constitutional commission is an independent, expert body similar to a Royal Commission, or a body of experts such as the Law Commission. Rodney Brazier has argued for a standing constitutional commission, to provide an external and independent motor of reform, and to ensure the reform programme is coherent and the interactions fully thought through (Brazier, 1998).

4.2.2 Constitutional Convention

A constitutional convention typically has a wider membership involving politicians and the wider community. It is exemplified in the Scottish Constitutional Convention (1989-1995) which laid the plans for the Scottish Parliament, with representatives from the Scottish Labour party, Scottish Liberal Democrats, local authorities, trade unions, churches, women's movement etc (Scottish Constitutional Convention, 1995).

The choice of an expert commission or wider convention depends on the nature, size and scale of the task. A convention is more suitable as a forum to negotiate between the political parties and other interests, but could lose credibility if major parties decide not to be involved (the SNP and Conservative party did not join the Scottish Constitutional Convention). A convention can more easily get bogged down: in Australia in 1985 the Hawke government lost patience with the slow progress of the Constitutional Convention (1973-1985) and set up a Constitutional Commission in its place. A commission can be equally good at engaging in systematic and widespread consultation, as shown by the Australian state of Victoria in their consultation exercise on a bill of rights, led by a four person panel in six months in 2005.

4.3 Public Participation

4.3.1 Citizens' Assembly

A citizens' assembly is a radical new model developed in Canada, using citizens drawn randomly from the electorate. It was pioneered in British Columbia, when 160 citizens were recruited (one man and one woman from each of BC's 80 constituencies) to consider whether BC should change from first-past-the-post to a new voting system. As their report put it, "Elsewhere, such a task has been given to politicians or to electoral experts. Instead, British Columbia chose to make history and to give this task to the voters". Working at weekends over 11 months, the Assembly held 50 public hearings and received 1600 submissions, and recommended STV as an alternative voting system (BC Citizens' Assembly, 2004).

Ontario has since followed suit, with a Citizens' Assembly of 103 randomly selected voters, who followed a similar procedure and have just recommended a mixed member proportional system (similar to that used in the Scottish Parliament and Welsh Assembly): Ontario Citizens' Assembly, May 2007. The nearest the UK has come to Citizens' Assemblies has been the use of citizens' juries, which sit for a much shorter period (typically 3-5 days) to debate a public policy issue and report back.

4.3.2 Referendums

Citizens' Assemblies help the government to define a constitutional reform proposal. Referendums invite citizens to endorse a proposal defined by government, though the two can also be used together. Having had no place in British constitutional tradition, since the 1970s referendums have become an increasingly frequent way of ensuring there is public consent for constitutional reforms. They have several advantages:

- Helping to educate the electorate, by forcing supporters and opponents to campaign on the issue, and forcing the voting public to make up their minds.
- Easing the passage of subsequent legislation, as happened with the Scotland and Wales bills in 1997-98.
- Serving as a form of political entrenchment to protect institutions established following a referendum.
- Helping to overcome party splits (the genesis of Harold Wilson's referendum on the EC in 1975, and of John Smith's commitment to hold a referendum on electoral reform).

But they also have disadvantages:

- They reduce complex issues to a Yes/No decision, with less space for options in between.
- They can become a plebiscite on the popularity of the government (as happened in the French referendum on the draft EU constitution).

There is no agreed doctrine on when a referendum needs to be held on a constitutional issue. Sufficient referendums have been held on devolution (in Scotland, Wales, Northern Ireland, Greater London, and the North East) that it would be difficult to introduce more devolution (eg an English Parliament, or regional assemblies in England) without testing public demand through a referendum. But equally big constitutional changes, such as the Human Rights Act 1998 and the House of Lords Act 1999 were introduced without referendums. If there is a wish to engage in widespread public education before introducing a British bill of rights, a referendum could be one means of helping to ensure that.

5 Strengthening Whitehall to Plan and Deliver Constitutional Reform

Tony Blair's minimalist approach to constitutional reform included a minimalist approach to refashioning Westminster and Whitehall in response to the challenges presented by the new constitutional arrangements. The old pre-devolution structures have been left more or less intact. The new Prime Minister will want to review and strengthen the Whitehall machinery, and possibly bring it more under his control, starting with the relevant Cabinet committees.

5.1 Cabinet Committees on the Constitution

Currently the main Cabinet committee on constitutional reform is CA on Constitutional Affairs (chaired by Jack Straw), with three sub-committees: CA(EP) on Electoral Policy, CA(FOI) on freedom of information, and CA(PM) on parliamentary modernisation. Brown will want to chair the main committee himself, to have overall supervision of the constitutional reform programme. Depending on his initial priorities, he might also want to reinstate one or more of three sub-committees which have lapsed, on devolution policy, human rights and Lords reform (these topics are currently dealt with by the main committee). Devolution policy is probably the most urgent, with the emergence of potentially difficult administrations in Scotland and Northern Ireland, and an unstable situation in Wales.

5.2 Constitution Directorate to the Centre?

There needs to be a central coordinating unit to plan the constitutional reform programme, its phasing and sequencing, like the Constitution Secretariat set up in the Cabinet Office in 1997. The policy lead currently lies with the Constitution Directorate in the Ministry of Justice. The Directorate covers a wide range of constitutional issues: Lords reform, democratic engagement, party funding, electoral policy and administration, devolution and the Crown dependencies, Royal matters, human rights, freedom of information and data protection. Bringing all these functions together was one of the achievements of the new Department for Constitutional Affairs in 2003, and it would be a great pity to divide them up. But apart from the link with the judges, there is no compelling argument that these functions belong with Justice. If the new Prime Minister wants to make the constitution a major priority he may want to bring it directly under his control in the Cabinet Office (although that would go against the current trend to make the centre smaller and more strategic). Much will depend on the senior Minister he puts in charge of constitutional reform. Will this be the Secretary for Justice; a Cabinet Office minister; or the head of a new Department for the Constitution and the Nations (see below)?

5.3 Merging the Separate Territorial Secretaries of State

With three separate territorial Secretaries of State, plus the Department of Communities and Local Government (DCLG), Whitehall has not one but four 'centres' to handle policy on devolution: one dealing with Scotland, one with Wales, one with Northern Ireland, and one with the English regions. The Ministry of Justice nominally provides a fifth centre responsible for devolution strategy, but it has been difficult for it to carve out a meaningful role, alongside the territorial departments with their operational responsibilities.

The Constitution Unit has long recommended merging the territorial Offices (Constitution Unit, 2001). The Cabinet Secretary made the same recommendation to Blair after the 2001 election. Now that devolution is hotting up Whitehall needs a much stronger centre to handle devolution issues. Merger of the three territorial departments would create stronger capacity to look ahead, to understand the dynamics of devolution, the read-across from one devolution settlement to the rest, and the implications of devolution for the rest of the constitutional reform programme. If the Constitution Directorate were moved from Justice it could form part of the merged department. The merger could be announced early on, but take effect after a period of proper consultation and planning, to avoid criticisms similar to those made about the new Ministry of Justice.

5.4 Intergovernmental Relations

As devolution heads into choppier waters, the new Prime Minister needs to revive the Joint Ministerial Committee (JMC) on devolution, the forum in which he meets the First and Deputy First Ministers from Scotland, Wales and Northern Ireland. Its main functions are to maintain the arrangements for liaison between the different governments, and to resolve devolution disputes. Under the UK government's Memorandum of Understanding with the devolved administrations, the JMC is meant to meet at least once a year, but it has not met in plenary format since 2003. There will also need to be a stronger network of functional JMCs, of Education Ministers, Health Ministers etc, where the real business gets done. At present the only functioning JMC sub-committee is the JMC (EU).

5.5 Parliamentary Committees

At Westminster the structures of the House of Commons are as fragmented as those of Whitehall. Reflecting the three territorial departments, the Commons still have three separate Select Committees for Scottish Affairs, Welsh Affairs and Northern Ireland respectively. They

continue to operate in separate compartments. If the three territorial departments are merged, the three committees could also be merged into a single Select Committee, which would enable it to take a much more synoptic view of devolution. There might need to be three separate sub-committees for the three devolved nations, so long as the asymmetry of the devolution settlements required a different role for each.

Action

First 100 Days

- Put experienced and committed Minister in charge of constitutional reform.
- PM to take chair of Cabinet Committee on Constitutional Affairs.
- Revive Joint Ministerial Committee on Devolution.
- Revive Cabinet Sub-Committee on Devolution Policy.
- Create small Constitution Secretariat in Cabinet Office.

Next Two Years

- Merge Scotland, Wales and Northern Ireland Offices into single department.

Part 2: The Policies

Part 2 of the Briefing goes through the outstanding policy issues in constitutional reform, summarising briefly the current position and explaining the options for change. It starts with the conduct of the Executive, because that links back to the end of Part 1, and then goes on to parliamentary reform, devolution, electoral reform, a bill of rights, the judiciary and freedom of information. Each section concludes with a summary of possible Action points.

6 Conduct of the Executive

6.1 Cabinet and the Ministerial Code

The new Prime Minister may wish to make some quick symbolic changes which lie directly within his power. First, to announce the revival of Cabinet and Cabinet committees in place of bilateral meetings and sofa government. It may not come easily, given Blair's example, but the most important check on centralised power within government is the collective wisdom of the Cabinet. Cabinet colleagues need to be informed by proper papers and discussion to underpin their collective responsibility (Butler report, 2004; Foster, 2005).

Gordon Brown has also signalled his intent to issue a new version of the Ministerial Code. This needs a radical overhaul, similar to the overhaul which Sir Gus O'Donnell gave in 2006 to the Civil Service Code, now a concise five pages. The Ministerial Code is meant to be divided into a Code of Ethics and a Code of Procedural Guidance, but too much detailed procedural guidance (eg over public appointments) is still contained in the Code of Ethics, which is 18 pages long. It also needs updating, eg to include the new statutory duty on all Ministers not to seek to influence particular judicial decisions, and to uphold the independence of the judiciary (Constitutional Reform Act 2005, s3). The Comptroller and Auditor General, appointed in 2006 as independent adviser and investigator of ministerial conflicts of interest under the Code, could be replaced by the Parliamentary Commissioner for Standards, who specialises in investigating conflicts of interest, and already advises ministers over such conflicts in their capacity as MPs.

6.2 War-making Power

The declaration of war and deployment of the armed forces are amongst the prerogative powers. The new Prime Minister has indicated his support for making the war power subject to parliamentary approval. On 15 May 2007 the House of Commons approved an amended resolution accepting that "The time has come for Parliament's role to be made more explicit in approving (or otherwise) decisions of Her Majesty's Government relating to the major or substantial deployment of British forces overseas into actual or potential armed conflict". The basis for implementing the resolution can be found in the 2006 report of the Lords Constitution Committee, which recommended a new convention that the government should seek parliamentary approval before overseas deployment of the armed forces, with a statement of the deployment's objectives, legal basis, likely duration and size (Lords Constitution Committee, 2006).

6.3 Other Prerogative Powers

The other prerogative powers exercised by Ministers include the making of treaties, recommendations for honours, patronage appointments (eg Church of England), organisation of the civil service, issue and revocation of passports, and the grant of pardons. In their 2004 report *Taming the Prerogative* the Public Administration Select Committee recommended that the

government should consider making most of the prerogative powers subject to parliamentary scrutiny: the most urgent being decisions on armed conflict, treaties and passports (PASC 2004).

Tony Blair was dismissive in the government's response to the PASC report in 2004. The new Prime Minister could announce that he is immediately divesting himself of patronage appointments to the Church of England, and to the House of Lords (see section 7), and introducing a Civil Service Act. If he wanted to go further he could announce a wider review of the prerogative powers, with an intent to put the ratification of treaties and the issue of passports onto a statutory basis.

6.4 Civil Service Act

A Civil Service Act has been repeatedly recommended by the Civil Service Commissioners, the Committee on Standards in Public Life and the Public Administration Select Committee. The government published a draft Civil Service Bill and consultation document in November 2004, but has done nothing since (Cabinet Office, 2004). The new administration could score a quick win by introducing the bill, which does little more than put regulation of the civil service on a statutory footing. The main issues are the degree of parliamentary oversight, and the powers of the Civil Service Commissioners: see http://www.civilservant.org.uk/csact.shtml.[2] The bill might also provide for parliamentary debate and approval before major reorganisations of government.

6.5 Constitutional Watchdogs

Partly as a by-product of the first wave of constitutional reforms, there are now a dozen constitutional watchdogs, ranging from the Information Commissioner to the House of Lords Appointments Commission. Half are based in statute, but half have an insecure, non-statutory basis, with five coming directly under the Cabinet Office. The Public Administration Select Committee has recommended that the time has come to recognise these bodies as an integral and permanent part of the constitutional landscape. There needs to be a new relationship with both Parliament and government for the key regulators, including the Cabinet Office bodies (the Civil Service Commissioners, Commissioner for Public Appointments, Committee on Standards in Public Life, House of Lords Appointments Commission and Advisory Committee on Business Appointments). The PASC report recommends a new Public Standards Commission, established by statute, to take on this sponsoring role (PASC, 2007).

The Cabinet Office is keen to offload the bodies it currently sponsors. The new Prime Minister should accept the key principle in the PASC report, that these bodies need a closer relationship with Parliament. But the detail has to be worked through, in consultation with the regulators and with Parliament. This could be done by inviting PASC to do a stage two report; or by setting up a working party, with the key regulators, Cabinet Office and parliamentary officials represented on it.

[2] Stronger powers for the Commissioners were advocated in the 2003 PASC bill http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/128/12805.htm#a4, and in Lord Lester's 2003 and 2006 bills: see http://www.odysseustrust.org/civil_service/index.html.

Action

First 100 Days

- Revive Cabinet and its key committees with proper papers and discussion.
- Issue revised and tightened Ministerial Code of Conduct.
- Divest patronage powers, eg over Church of England, House of Lords.

Next Two Years

- Review main prerogative powers to subject them all to parliamentary scrutiny.
- Introduce Civil Service Act.
- Review position of constitutional watchdogs, so that they have closer relationship with Parliament.
- Legislate to make prerogative powers subject to parliamentary scrutiny.

Next Parliament

- Legislate to put all constitutional watchdogs on statutory footing as bodies coming under Parliament.

7 Parliamentary Reform

Gordon Brown emphasised in the speech announcing his candidacy as Labour leader that he wanted to give more power to Parliament (see Section 1). In part this relates to prerogative powers, discussed in section 6. But there are many other issues with respect to rebalancing the powers of Parliament and the executive, involving both the House of Commons and the House of Lords. In both cases progress won't be easy, but there are some quick and symbolic changes the new Prime Minister could pursue, to demonstrate a change of direction.

7.1 House of Commons

One of the biggest and most intractable issues relating to the House of Commons is the debate about the voting system, discussed in section 9. But progress on other fronts is also difficult. Most of the rules governing the Commons are set out in Standing Orders, which are the preserve of the House itself, not the government. Conventionally decisions on Standing Order changes are taken by a free vote, and without a whip applied it can be difficult to build a majority for change. Since 1997 Labour has tried to take more of a lead, through establishing the Modernisation Committee chaired by the Leader of the House of Commons. But this arrangement has proved controversial, and even reforming Leaders like Robin Cook have found their proposals treated with some suspicion. There has also been a real tension between the desire of reformers to see power dispersed, and the reluctance of the whips, Number 10 and some other ministers to let go.

As Jack Straw and Robin Cook have both made clear, however, there need not be a conflict between better parliamentary scrutiny and strong, stable government. Proper scrutiny can ensure that problems with policy are ironed out before it comes into effect, avoiding embarassment later. It also gets arguments out into the open, and requires any opponents to submit their case to scrutiny too. For these reasons many reforms to date must be welcomed: in particular the greater resources for Select Committees negotiated by Robin Cook, and the new Public Bill Committees introduced by Jack Straw. The second of these in particular, which for the first time will make evidence-taking on bills the norm, is only in its early stages. It needs firm support from the new Prime Minister and Cabinet to ensure it works. Over time the more radical move – which would bring Britain into line with most other modern parliaments – would be establishment of

permanent, specialist legislation committees to parallel the Select Committees. This would allow greater subject expertise to be developed, so would improve MPs' job satisfaction, as well as improving policy.

There are many other things that could be done to rebalance the relationship between Parliament and Government. The Government remains very much in control of the parliamentary agenda. In contrast to Westminster, for example, the Scottish Parliament votes on its timetable for each week, procedural changes must be moved by the Procedures Committee rather than by a minister, while committes are guaranteed debating time and can introduce their own bills. There is also a far more open petitions process. At Westminster the procedure for Private Members' Bills remains deeply unsatisfactory for all concerned, and Early Day Motions provide only a partial safety valve. There is residual frustration about the process for appointing members of Select Committees, while appointments to Public Bill Committees are even more controlled by the whips.

A bold gesture by the new Prime Minister would be to announce a wide-ranging review of the relationship between government and Parliament. In practice this would require a comprehensive review of Commons Standing Orders and how they enshrine government versus parliamentary control. The extent of government control can be traced, in part, to the difficulties governments faced in the 19th century with the blocking tactics of the Irish Party. A lot has changed since then – both in terms of parliamentary practice and public expectations.

An inquiry of this kind would naturally be referred to the Modernisation Committee. However, if Brown really wanted to signal a change and a more pluralistic approach, he might announce that the Modernisation committee has now run its course, and that the matters it discusses will be brought under a committee wholly made up of backbenchers. In practice this would require a reconstituted Procedure Committee, with a merger of remit and resources and under a senior (probably Labour) backbench chair. This could be a first real sign of handing power to Parliament over its own affairs.

7.2 House of Lords

Reform of the Lords, which depends on government legislation, is procedurally more straightforward than reform of the Commons. However, it has been stalled for the past eight years due to major differences of opinion within the Cabinet and the Parliamentary Labour Party (PLP), which are mirrored by similar splits in the Conservative Party. The new Prime Minister takes over less than three months after the House of Commons voted for an all-elected second chamber, but it does not follow that such a reform will easily pass. At the same time he inherits a position where there is huge controversy about the appointments process, following the (still ongoing) 'cash for peerages' affair.

There is wide agreement in the Labour Party that the House of Lords needs to be reformed. But this means different things to different people. Some believe the chamber should be strengthened so that it can stand up more effectively to the executive, and that the only legitimate route into the chamber is election. Others believe that strengthening the Lords would weaken the Commons, and make it more difficult for governments to govern effectively. And the evidence is mounting that the chamber has already been significantly strengthened by the 1999 reform (Constitution Unit 2006, 2007). The division of opinion currently seen in Labour has always existed, and was largely responsible for the failure of Harold Wilson's reforms in 1968 (Dorey 2006). Gung ho reformers would be well advised to read the history of this episode before pressing blindly ahead. The PLP were persuaded to support a bill in principle, but when it came to the detail this agreement fell apart. Jack Straw has had a similar experience with the recent cross-party talks, whose outcome was denounced immediately by Conservative members who

had been party to the talks – demonstrating again how fragile agreement can be. The votes in March showed that the PLP is still very split, and the all-elected option only passed because it received significant backing from many members known to be opposed to election. Their wrecking tactic was designed to leave Mr Brown with an impossible dilemma, which is unlikely to be resolved very quickly.

Clearly discussions about Lords reform must continue. A cooling-off period is needed, but after that the most likely compromise is an 80% elected chamber (which passed the Commons votes more narrowly in March). This allows the Crossbenchers to remain, and ensures that the chamber never achieves equivalent democratic legitimacy to the Commons. Nonetheless it will be difficult to agree – there are many details such as the electoral system, boundaries and terms, and how these impact on the role of MPs. This needs to be considered alongside the question of PR for the Commons, as having two identical chambers makes little sense. But if elected members are to be introduced that shifts attention to the chamber's power, and raises the fundamental question of how powerful and legitimate we want the second chamber to be. Given the essential failure of the recent cross-party talks, Brown may want to consider throwing this debate wider. Options include creating a Constitutional Convention or Citizens' Assembly on this issue (see section 4), which considers it alongside PR for the Commons.

The key is to develop a long term strategy for Lords reform, of which Labour's next manifesto commitment is a key element, to help break the deadlock. In the short and medium term there are other things that can be done, some of them immediately. One symbolic way in which the new Prime Minister could mark a change from the old regime would be to give up powers of patronage over appointments to the Lords. Tony Blair gave up patronage over (most) independent members, handing this to the new Appointments Commission. Gordon Brown could just as easily do the same for political appointments, thus avoiding the danger of a future 'cash for peerages' scandal. The Commisson could be required to choose party members from shortlists provided by the parties, in proportion to general election votes. The Prime Minister might retain powers to appoint a small number of ministers straight to the Lords. All of this could be done without legislation, though a future bill could place the Appointments Commission on a Statutory Basis. Gordon Brown could also announce that he plans to break the link between the peerage and membership of the House, so that its members simply become 'MLs', which would emphasise that membership is a job, not an honour. Other small changes that could be introduced, if major reform proves impossible, include allowing members to retire, and ending the hereditary by-elections, so that these members gradually fade away.

Action

First 100 Days

- Announce the immediate end of Prime Ministerial patronage powers to the Lords, giving greater power to the Appointments Commission.
- Announce intent (when legislative time allows) to break the peerage link.
- Appoint a reform-minded Leader of the Commons and Chief Whip.
- Announce a major Standing Orders review for the Commons.
- Abolish Modernisation Committee and merge with Procedure Committee.

Next Two Years

- Support and advance Jack Straw's reforms: getting ministers and civil servants to co-operate with evidence-taking Bill committees.
- Implementation of changes to hand prerogative powers to Parliament.
- Continue cross-party talks on Lords reform.

Next Parliament

- Possible move to specialist legislative committees.
- Implementation of key recommendations from Standing Orders review – possible reform of PMBs, EDMs, petitions, committee appointments, committee time on the agenda and ability to move bills.
- If no agreement on major Lords reform, establish a citizens' assembly to discuss this and Commons electoral reform.
- In the meantime legislate to end hereditary byelections, create a statutory Appointments Commission and break the peerage link.

8 Devolution

Devolution always had the potential to release centrifugal forces which might threaten the unity of the United Kingdom. The new Prime Minister might want to encourage a renewed debate on the purpose, principles and structures of the devolution arrangements and move the government away from its tendency to discuss the governance of each part of the UK in isolation from one another.

8.1 Distribution of Powers

Devolution is about finding a balance of powers between central and sub-national government that is stable in political terms, and efficient in policy delivery terms. The position of Labour vis-à-vis Scottish devolution is that there is no case for "reopening the Scotland Act". If the SNP government in Edinburgh manages to build a cross-party consensus on further devolution of legislative and/or fiscal powers then Labour may have no choice but to address the issue. In the short term the new Prime Minister doesn't need to do much. But if he doesn't want to let others set the terms of the debate, he may need to make a positive case for the current division of powers, setting out the unionist reasons for why the major reserved policy matters (eg broadcasting, energy) should not be devolved.

In Wales, Labour is committed to gradual expansion of the legislative competence of the Welsh Assembly, but is opposed to transferring further policy areas such as policing. The UK government should be ready to defend asymmetry where this reflects long-standing historical differences such as the separate Scottish legal system, but where positive reasons for retaining

power at the UK level are not forthcoming, the Prime Minister should be open to negotiations on a new devolution settlement. The government should also take a line on when it will support a referendum on full primary legislative powers for Wales: for instance, would it ever seek to block a referendum if two-thirds of Assembly Members voted in favour?[3]

8.2 Finance and Taxation

One looming issue that the government may have to tackle at some point is the financial settlement for devolution, based on the Barnett formula. As Chancellor, Gordon Brown has kept the Pandora's Box of finance firmly closed, but a number of factors may force the government to reconsider. The public sector financial squeeze will constrain the policy autonomy of the devolved administrations, while resentment may rise in England about different spending levels. The government will be loath to help this issue onto the political agenda. If forced to do so, Gordon Brown may want to establish a non-partisan commission to consider alternatives including a new needs assessment, and greater fiscal autonomy for the three devolved nations. The alternative is that nationalist forces may set the terms of the debate, undermining Brown's desire for Britain-wide solutions.

8.3 Domestic Constitutions

Other structural characteristics of the different devolution settlements might also have to be reconsidered. The most urgent is that the size of the Welsh Assembly will need to be increased once there is a move to full legislative powers. This is something which the 2004 Richard Commission recommended but Labour rejected, mainly because of the hostility of Welsh Labour MPs. If the new Prime Minister is willing to adopt a more principled and coherent approach to devolution he may have to face down the opposition of the Welsh MPs, or leave the Welsh Assembly permanently weakened. More radically, he may wish to consider granting the devolved bodies greater control of their own structures and electoral systems.

8.4 Inter-governmental Relations

The government's approach to inter-governmental relations has been to resolve disputes between administrations in an *ad hoc* way. Policy and legislative coordination has similarly been approached through fragmented and informal mechanisms. This has worked reasonably well in a period of Labour dominance across Great Britain, but may be found wanting with the SNP in power in Edinburgh, Labour weakened in Wales, and Northern Ireland making fresh demands.

The challenge for the new Prime Minister is to adopt a more structured approach to inter-governmental communication, in order to defuse disagreements before they deteriorate into open political conflict; to coordinate legislative, executive and other action where necessary; and to demonstrate a commitment to building a constructive relationship with all administrations in the UK no matter what parties they comprise. Some regular meetings do take place – for instance through the Joint Ministerial Committee on Europe – but there is a pressing need to revive the full JMC machinery (summit meetings, and functional meetings of specialist Ministers), and for it to become more transparent and accountable.

8.5 Devolution at the Centre

As recommended in section 5, the Prime Minister should consider bringing together responsibility for devolution in a single department, as part of a more joined-up and strategic approach. The Cabinet Committee on Devolution Policy should also be revived.

[3] The requirement of the Government of Wales Act 2006 is that a super-majority of two-thirds of Assembly Members support a motion for a referendum, and that the UK Government and Parliament then decide whether this will go ahead.

In Westminster as well as Whitehall, the handling of devolution business needs to be strengthened. The UK Parliament will continue to make use of the legislative consent (Sewel) convention to make law for Scotland in devolved policy spheres, but the procedures need clarifying and tightening up (Scottish Affairs Select Committee, 2006). Particularly given the formation of an SNP executive in Edinburgh, there is a need for a clear set of principles setting out when and why the British government will invoke the convention. The government should similarly set out a clear approach to legislating for Wales, with a committment to accepting Assembly requests for legislative competence in all but exceptional cases. The scrutiny arrangements at Westminster for Scottish or Welsh elements of bills could also be strengthened. If Lords reform progresses (see section 7), the question of how a reformed upper chamber will represent the nations and regions will also have to be addressed.

8.6 The English Question

On the issue of the voting rights of non-English MPs on 'English' laws[4] (the West Lothian Question) there is unlikely to be any change from Labour's position that proposals such as an English Parliament or barring Scots MPs from voting on certain divisions are dangerous and unworkable. If pressures for English fora develop, the government may wish to revive the Standing Committee on (English) Regional Affairs, which was able to debate – but not to decide upon – certain English matters. One partial solution Gordon Brown could consider is to harmonise the electoral quotas of the four UK territories, ending English under-representation, or even to reduce the representation of Scotland, Wales and Northern Ireland to two-thirds that of England.[5] At the least, Welsh over-representation should come to an end in the next parliamentary boundary review after the Welsh Assembly has been granted full legislative powers, just as Scottish over-representation was ended in 2005.

There is also a distributional aspect of the English Question relating to the lower levels of per capita public spending in England than elsewhere in the UK. As noted in section 8.2 above, Brown may have to address this issue sooner rather than later, and as part of a Britain-wide redistributive agenda he may have to make the case for differential spending for the nations and regions of the UK where needs differ. At the same time he should concede the principle that Scotland, Wales and Northern Ireland have no automatic right to higher public spending, while underlining the oft-missed point that a central objective of the Barnett Formula is to facilitate convergence in public spending across the UK.

At the level of broader political discourse, the challenge for Gordon Brown will be to face up to English nationalist critics of the status quo and to make the case for why England – like the rest of the UK – benefits from remaining within the Union.

[4] Formally no acts of parliament apply solely in England, because England and Wales form a single jurisdiction. In practice the direct effects of much legislation passed at Westminster in fields such as health and education apply only in England.

[5] This solution has historic precedent in that during the operation of the Northern Ireland Parliament (1922-72) Northern Ireland had 12 MPs, rather than the 18 its population demanded.

Action

First 100 Days

- Merge Scotland, Wales and Northern Ireland Offices.
- Revive Cabinet Sub-Committee on Devolution.
- Announce revival of Joint Ministerial Committee on devolution.

Next Two Years

- Announce review of division of powers between UK and devolved governments?
- Strengthen Westminster scrutiny of Scottish and Welsh legislation.

Next Parliament

- Referendum on primary legislative powers for Welsh Assembly
- Increase capacity of Welsh Assembly from 60 to 80 members, to match its increased powers.
- Announce a review into the level and the forms of territorial representation at Westminster, in the Commons and in a reformed upper chamber.
- Funding of devolution to be reviewed by expert Commission.

9 Electoral Reform and Funding of Political Parties

9.1 Electoral Reform

Labour's 1997 manifesto boldly stated "We are committed to a referendum on the voting system for the House of Commons. An independent commission on voting systems will be appointed early to recommend a proportional alternative to first-past-the-post". The independent commission was duly appointed, chaired by Roy Jenkins, and recommended a semi-proportional voting system, dubbed AV Plus. Constituency MPs would be elected by the Alternative Vote (AV: to ensure they were elected by a majority of voters in the constituency); and there would be a relatively small number of top up seats - around 15 per cent of the whole - to ensure a limited degree of proportionality (Jenkins Commission, 1998).

In 2001 the manifesto commitment was modified by inserting a prior condition: that before holding any referendum, there should first be a review of Britain's new voting systems introduced for the devolved assemblies and the European Parliament, and the Jenkins report. The Constitution Unit established an independent commission to conduct a review of the new voting systems, which reported in 2003 (Independent Commission on PR, 2003). The DCA initiated an internal government review in spring 2005, which was completed in summer 2006. The DCA's report remains unpublished, although the evidence it sets out is thorough and balanced and not particularly pro-PR.

The government has shown no interest in electoral reform, which had few supporters in Blair's cabinet. How Brown plays it will depend upon his own attitude, any change in views in his cabinet, and on the likelihood of the need for a deal with the Liberal Democrats after the next election. If he wants to continue to play it long, the government could justifiably say that it first wishes to resolve the issue of an elected House of Lords, before embarking on any change to the electoral system for the Commons. Now that the Lords may be wholly or largely elected, it makes a huge difference to the debate. Supporters of PR for the Commons might adjust their view if the Lords was elected by PR. At the very least, the two Houses need to be elected by significantly different voting systems, to complement their different functions.

If Brown wants to test the mood for change, the government could publish the DCA report, updated to include coverage of the May 2007 devolved elections. Those elections have tarnished the image of PR, because of the high number of spoilt ballot papers in Scotland, and because of the back room deals and confusion before the emergence of the new governments in Scotland and Wales.[6] If the government wanted to go further, it could express an interest in moving towards AV for the House of Commons. AV is not a proportional voting system, and a House of Commons elected by AV could still complement a second chamber elected by PR. If the government wanted to maintain support from the Liberal Democrats, it could signal that AV could be the first stage towards introducing AV Plus, as recommended by Jenkins.

These moves could be made using any of the consultation machinery set out in section 4. Cross-party talks would be unlikely to achieve much, because of the Conservatives' staunch support for first-past-the-post, and the same difficulties would apply to a parliamentary committee. Cross-party talks could be initiated just with the Liberal Democrats. But the best vehicles would be an expert committee (as Jenkins was), or a constitutional convention or Citizens' Assembly. The choice depends on the degree of control the government wants to retain versus the degree of public participation it wants to engender. The terms of reference might also include deciding on the electoral system for the House of Lords (see section 7).

9.2 Review of Party Funding

Sir Hayden Phillips published the report of his review in March. On 15 May he announced that he had re-started talks between the three major parties, in the hope of resolving the outstanding areas of disagreement by the end of June. The main points of difficulty are a cap on donations (and how it bites on trade union contributions), and spending limits. For Labour the prime concern is tighter overall spending limits, so that if the Conservatives build up a bigger war chest they cannot spend it. But the price for that is accepting a limit on donations, probably of £50k. That would put to an end the occasional one-off big donations by the trade unions, and require the individualisation of trade union affiliation fees to the Labour Party, making the whole process more transparent.

For Labour this will be very hard to swallow. But it is a historic opportunity to ensure a more level playing field, and to avoid the regulation of party funding descending into a periodic series of tit-for-tat retaliations by the party in power. For Gordon Brown it could be presented as an opportunity to put cash for honours firmly in the past, and a 'Clause 4' moment in which Labour further reduces its dependence on the trade unions. But if Labour cannot swallow the necessary compromises, and the talks break down, the government may still want to legislate to introduce tighter spending limits. So as not to appear too partisan, they will want to try to do a deal with the Liberal Democrats, and offer increased state funding to get their support.

[6] Ironically the highest number of spoilt ballot papers in Scotland were in the first past the post elections for constituency MSPs (4% rejected). For the regional list candidates 3% of ballot papers were rejected, and for the STV elections to local government 2% were rejected.

Action

First 100 Days

- Hold early Cabinet discussion to test mood on electoral reform.

Next Two Years

- If Cabinet still hostile to PR, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords. If Cabinet lukewarm, update and publish DCA review of new voting systems. If Cabinet more supportive, announce inquiry into AV for House of Commons.
- Seek cross-party agreement for a balanced solution on party funding, which controls expenditure and donations. If agreement is not possible, legislate for tighter spending limits on campaign expenditure.

Next Parliament

- If agreement is reached on new voting system, hold referendum on electoral reform.

10 British Bill of Rights

10.1 Labour's Original Commitment

It was Labour Party policy in 1997 first to incorporate the European Convention on Human Rights (ECHR) into domestic law, and then to move to a British bill of rights as a second stage. The second stage was dropped once the ECHR had been incorporated in the Human Rights Act 1998, and the human rights legislation became the subject of a sustained onslaught from the tabloid press. This reached a crescendo in summer 2006, when the Labour and Conservative leaders sought to outdo each other in attacking the Human Rights Act, echoing tabloid outrage at a court decision about deportation. Tony Blair ordered a review of the operation of the Act, and David Cameron went one stage further and promised to scrap the Act and replace it with a British bill of rights. The new Prime Minister must decide at the outset whether he is willing to defend the Human Rights Act, and to instruct his ministers likewise.

Although Cameron attracted little support from his own Democracy Task Force, support for a British bill of rights is growing. The all-party lawyers' group JUSTICE has nearly completed a very thorough study of a British bill of rights (JUSTICE, 2007). In May the parliamentary Joint Committee on Human Rights announced a major inquiry into whether a British bill of rights was needed; what rights it should contain; and what its impact would be. No timetable has yet been set, but the inquiry should report towards the end of the year.

Contrary to the hopes of some, the main impact of a British bill of rights would be to strengthen human rights in the UK. Its content would be stronger than the ECHR, and it could be more strongly entrenched, giving the judges more power over Parliament and the executive. Depending upon how it was introduced, it could also enjoy greater public ownership and legitimacy.

10.2 Content of a British Bill of Rights

All serious commentators recognise the UK's commitment to remain within the ECHR and the Council of Europe, so any British bill of rights would have to be the ECHR plus. Unless there are further derogations, it cannot be ECHR minus. The difficulty in adding to the ECHR

catalogue is that it includes a pretty comprehensive list of minimum standard rights. Possible topics proposed by experts for addition to the basic ECHR catalogue include Protocol 4 on the right of abode, and the stronger equality clause in Protocol 12 (neither of which the UK has ratified);[7] trial by jury; access to justice, including administrative tribunals; strengthening the right to privacy; gay rights; and most controversially, economic, social and cultural rights of the kind protected in South Africa (JUSTICE 2007). To this list Klug has suggested a more extensive right to education; a right to healthcare free at the point of need; provisions from the Children's Convention; and carers' and independent living rights from the new UN Convention on the Rights of Persons with Disabilities (Klug 2007, 143).

Comparative experience is not encouraging about being too expansive in terms of the content of bills of rights. The Northern Ireland bill of rights consultation process attempted to secure support for women's and children's rights as well as cultural (language) rights, but repeatedly failed to gain consensus. The European Charter of Fundamental Rights and Freedoms also illustrates that a long list of rights may come at the expense of a weak and unenforceable document. The States Parties (led by the UK) insisted that its provisions would not be justiciable, because of their social and economic (and thus extensive financial) implications.

10.3 Entrenchment

There are four broad models for the constitutional status of a British bill of rights:

- **Constitutional entrenchment:** This model breaks most obviously from British constitutional traditions, establishing the bill of rights as part of a body of higher law or a written constitution.
- **Qualified entrenchment:** Those who have presented blueprints for a British bill of rights favour models in which it has the status of higher law, but the judges cannot use it to strike down ordinary legislation.
- **Ordinary Act of Parliament:** This option maintains the essence of the model of the Human Rights Act in an ordinary Act of Parliament. Such a bill of rights would not be legally entrenched, though it might acquire political and cultural entrenchment through custom and practice.
- **Declaratory statement:** The fourth option would be a statement of values and code of practice to guide the executive, judicial and parliamentary branches of government. Its value is more than symbolic, though its provisions would be unenforceable.

Most supporters of a bill of rights that builds on the foundations of the Human Rights Act favour some form of entrenchment. As with a written constitution (see Section 3.3), the question of entrenchment must be separated into two distinct yet related issues - the legal status and the procedure for amendment. Thus, entrenchment can involve giving the bill of rights some superior legal status and priority over ordinary legislation. It can also involve some special legislative process being laid down to govern future amendments or measures to suspend the operation of the bill of rights.

[7] Protocol 4 serves to:

- protect the right of everyone in the state to liberty of movement and freedom to choose their residence (Article 2);
- protect the right not to be expelled from, or to be refused entry to, the country of one's nationality (Article 3);
- prohibit the collective expulsion of aliens (Article 4).

Protocol 12 is designed to advance the ECHR's protection of equality beyond the relatively limited guarantee in Article 14 ECHR, by providing "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

10.4 Process

The most important question is how a British bill of rights is developed. Incorporation of the ECHR through the Human Rights Act 1998 was a top-down elite project. The lack of public involvement has enabled the Sun, the Mail and the Telegraph to depict the ECHR as a rogues' charter, and part of a European plot. By launching a widespread public consultation on a British bill of rights, the government could develop greater understanding and support for the ECHR, and foster public debate about what additional rights and responsibilities might be required. The overall change in content might not prove to be very great. But the change in public support could be dramatic, especially if the bill of rights was endorsed in a referendum. The equivalent Canadian charter of fundamental rights and freedoms commands huge public support, and has become an important symbol of Canadian national identity.

The full range of options in section 4 is available for consultative machinery on a British bill of rights. The consultation could be led by the Ministry of Justice; the new Commission for Equality and Human Rights (CEHR); the parliamentary Joint Committee on Human Rights (JCHR); an expert Commission, a constitutional convention or a Citizens' Assembly. In Northern Ireland the task was given to the Human Rights Commission, which tried to gain support for an ambitious catalogue of rights and failed. In the Australian state of Victoria it was given to an expert four person commission, which conducted a six month consultation and succeeded. In Canada a joint parliamentary committee was used for the second stage, to consider the government draft of the Charter of Rights and Freedoms, and it held nationally televised hearings around the country.

Which model is chosen will depend upon which groups the government wants to engage with. Is the main purpose of consultation to engage with the other political parties; civil society, NGOs, human rights organisations and professional bodies; or the public at large? It will also depend on the balance between the government's desire to retain control of the process and to encourage public participation. Opinion polls suggest there is limited public understanding of the notions of 'civil and political rights' (perhaps because they are taken for granted); and more enthusiasm for social and economic rights, such as the right to hospital treatment within a reasonable time (State of the Nation Poll 2004, Q6). Politically, therefore, there is a danger of creating public expectations which cannot be met (Constitution Unit, 1996 ch 8). If the government wants the process to be grounded in political realities, it could put the new Commission for Equality and Human Rights in charge of the public consultation exercise; but then require it to report back to the Joint Committee on Human Rights, to ensure there is parliamentary support for its proposals.

10.5 Referendum

The final point to make about process is the case for a referendum. A British bill of rights could remain as much an elite project as the Human Rights Act if it is not accompanied by imaginative efforts to encourage the British people to understand it and adopt it. The most effective single way to accomplish this would be by submitting it to a referendum. There are of course risks: interest groups, some of the media and some political parties will campaign against. But the clash of argument around the case for and against the bill of rights will be more effective than any government educational campaign (see section 4.3).

Action

First 100 Days

- Await the report of the JCHR on the case for a British bill of rights.

Next Two Years

- Decide on the machinery for drafting a bill of rights, and the process for adopting it.
- Involve CEHR and JCHR in the decision.

Next Parliament

- Establish a body to draft the bill of rights, with wide public participation.
- Submit bill of rights to referendum, perhaps at time of next election.

11 Judiciary and the Courts

11.1 Resolving Tensions Between Executive and Judiciary

The separation between the judiciary and the executive following the Constitutional Reform Act 2005 was always going to be a gradual process, not a single event. It was bound in time to lead to demands from the judiciary for further separation. Those demands are now beginning to emerge. The Ministry of Justice has provided the occasion for that, but is not in itself the cause. There is a trend throughout Europe to introduce greater separation of powers between the executive and the judiciary, and as part of that to give the judges greater responsibility and control for managing the court service.

When the Lord Chancellor ceased to be head of the judiciary he negotiated a Concordat with the Lord Chief Justice which sets out their respective functions. As the new arrangements settle in it will need revisiting. Issues which the judiciary now want to reopen include the administration and budget of the courts, run by the Executive through Her Majesty's Court Service (HMCS). A working party between the judiciary and the Ministry of Justice has failed to resolve these issues, because the judges want a ring fenced budget for the courts, which the government is unable to concede.

Too many of the tensions between government and judges are perceived as tensions purely with the executive branch, when Parliament is also involved. One way to resolve this could be to engage Parliament, by inviting the Commons Constitutional Affairs Committee or the Lords Constitution Committee to inquire into the operation of the Concordat.

Action

Next Two Years

- Invite parliamentary committee to inquire into operation of the Concordat between the Lord Chancellor and the Lord Chief Justice

12 Freedom of Information

Freedom of information (FOI) exemplifies the difficulty of the government having created a narrative which is too high flown to be readily delivered (see section 2.1). The government is now caught between the rhetoric of its lofty objectives, and the reality that most Ministers dislike FOI, and official concern that it imposes serious administrative burdens. The choice now facing the government is whether to stay with the rhetoric; or to begin to adjust the policy in the light of the reality. Two immediate issues throw this into sharp relief: the fees regime and the Maclean bill. The first is central, the second a bit of a sideshow.

If the government wishes to tighten up on FOI, the fees regime is the way to do so. A report which the government commissioned (Frontier Economics, 2006) found that a small proportion of requests (and requesters) accounted for a high proportion of the costs, especially in officials' time. The government accordingly proposed amending the FOI Fees Regulations so that officials' reading, consideration and consultation time could be charged for, and multiple requests from serial requesters could be disallowed. The proposed changes evoked a chorus of protest, and a second consultation period was offered, ending on 21 June. The extension was interpreted as a sign that the government was backing down; but if the government wishes to contain the costs of FOI, the fees regime must be made more effective. At present no government departments charge fees. One way forward might be to drop the proposal for the aggregation of requests (which would have been difficult to enforce), but retain the proposal to charge for officials' reading, consideration and consultation time. Another might be to introduce an application fee, with further fees for internal review, appeals to the Commissioner and to the Information Tribunal. When this was done in Ireland the number of requests and of appeals to the Commissioner dramatically declined.

It will not be at all easy to get new Fees Regulations through Parliament. If the government concludes that Parliament will not accept substantial changes, it will have to accept the consequences of FOI and tighten up where it can at the margins. Central to a policy of marginal improvements is the Information Commissioner, who has been supportive about the need to curb frivolous and vexatious requests. To maintain his support Ministers may need to stop sniping at his decisions. And the government could review its position of neutrality towards David Maclean's private member's bill. This would do nothing to reduce the burdens of FOI on government, because it applies only to Parliament. The bill has passed the Commons but may not pass the Lords, where it has not so far found a sponsor. If the bill does find a sponsor, one possible compromise could be to exempt MPs' correspondence from disclosure (Maclean's stated objective), while retaining both Houses of Parliament within the Act. If the government supports such a compromise it will have upheld the principle of FOI, while showing it has listened to the large group of MPs who were concerned (however mistakenly) about the confidentiality of their correspondence.

The pressures of FOI will not go away, and the challenge remains to bring rhetoric and reality more closely into line. Gordon Brown's broader narrative is based around objectives of openness and accountability which closely coincide with FOI, so it would be very difficult to go back on the principle of FOI. Ministers (including the Prime Minister) may conclude they need to support the principle of FOI, but if they want to make it more manageable they could begin to be more open about the difficulties of FOI in practice. This could include being tougher on vexatious requesters, and more robust in exposing the cost burdens caused by multiple requesters. But it will be difficult to change the terms of debate without stronger evidence. The Frontier Economics report was based on some contested assumptions, and too much of the fees debate is based on anecdotal evidence. In particular, the government needs much better information about FOI requesters (who they are, what they want, and what they can pay).

Action

First 100 Days

- Decide on changes to FOI fees regime.
- Oppose Maclean bill, unless restricted to exemption of MPs' correspondence.

Next Two Years

- Support principle of FOI in ministerial speeches.
- Build stronger evidence base to support any further policy changes.

Next Parliament

- Act on evidence built up during past two years, having included proposed changes in Labour party manifesto.

Summary of Action Points by Subject Area

Area	First 100 Days	Next Two Years	Next Parliament
Strengthening Whitehall and Devolution	• Put experienced and committed Minister in charge of constitutional reform • PM to take chair of Cabinet Committee on Constitutional Affairs. • Revive Cabinet Sub-Committee on Devolution Policy • Revive Joint Ministerial Committee on Devolution • Create small Constitution Secretariat in Cabinet Office	• Merge Scotland, Wales and Northern Ireland Offices into single department • Announce review of division of powers between UK and devolved governments?	• Referendum on primary legislative powers for Welsh Assembly • Increase capacity of Welsh Assembly from 60 to 80 members to match its increased powers • Announce a review of territorial representation at Westminster, in Commons and Lords
Conduct of the Executive	• Revive Cabinet and its key committees with proper papers and discussion • Issue revised and tightened Ministerial Code of Conduct • Divest patronage powers, eg over House of Lords, Church of England	• Review main prerogative powers to subject them all to parliamentary scrutiny • Introduce Civil Service Act • Review position of constitutional watchdogs, so that they have closer relationship with Parliament • Legislate to make prerogative powers subject to parliamentary scrutiny	• Legislate to put all constitutional watchdogs on statutory footing as bodies coming under Parliament
Parliamentary Reform	• Announce immediate end of PM's patronage powers to the Lords, giving greater power to the Appointments Commission • Announce intent to break the peerage link • Appoint reform-minded Leader of the House and Chief Whip • Announce a major Standing Orders review for the Commons • Merge Modernisation Committee with Procedure Committee	• Support and advance Jack Straw's reforms: getting ministers and civil servants to co-operate with evidence-taking committees • Implement changes to make prerogative powers subject to parliamentary scrutiny • Continue cross-party talks on Lords reform • OR plan to establish Citizens' Assembly?	• Possible move to specialist legislative committees • Implementation of key recommendations from Standing Orders review – possible reform of PMBs, EDMs, petitions, committee appointments, committee time on the agenda and ability to move bills • If no agreement on major Lords reform, legislate to end hereditary by-elections, create a statutory Appointments Commission and break the peerage link

Area	First 100 Days	Next Two Years	Next Parliament
Electoral Reform and Funding of Political Parties	• Hold early Cabinet discussion to test mood on electoral reform • Seek cross-party agreement for a balanced solution on party funding, which controls expenditure and donations.	• If Cabinet still hostile, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords • If Cabinet lukewarm, update and publish DCA review of new voting systems • If Cabinet more supportive, announce inquiry into AV for House of Commons • If agreement on party funding is not possible, legislate for tighter spending limits on campaign expenditure	• If agreement is reached on new voting system, hold referendum on electoral reform
British Bill of Rights	• Await the report of the JCHR on the case for a British bill of rights	• Decide on the machinery for drafting a bill of rights, and the process for adopting it. • Involve CEHR and JCHR in the decision	• Establish a body to draft the bill of rights, with wide public participation. • Submit bill of rights to referendum, perhaps at time of next election
Judiciary and the Courts		• Invite parliamentary committee to inquire into operation of the Concordat between the Lord Chancellor and the Lord Chief Justice	
Freedom of Information	• Decide on changes to FOI fees regime • Oppose Maclean bill, unless restricted to exemption of MPs' correspondence	• Support principle of FOI in ministerial speeches • Build stronger evidence base to support any further policy changes	• Act on evidence built up during past two years, having included commitment in Labour party manifesto

Bibliography

Brazier, R 1998. *Constitutional Reform.* Oxford Univ Press, 2nd edn 1998.

Bromley C, Curtice J and Seyd B 2001. 'Political Engagement, Trust and Constitutional Reform' in *British Social Attitudes 18th Report*, Sage Publications

Brown, G 2006a. Donald Dewar memorial lecture, 12 October 2006.

Brown, G 2006b. Keynote speech to Fabian Society Future of Britishness conference, 14 January 2006.

Brown, G 2006c. Speech to Labour party conference, 25 September 2006.

Brown, G 2004. 'Britishness', British Council annual lecture 7 July 2004.

Brown, G 2005. 'Liberty and the Role of the State', Hugo Young memorial lecture 13 December 2005.

Brown, G 1997. Speech to Charter 88 12 July 1997.

Brown, G 1992. 'Constitutional Change and the Future of Britain', Charter 88 Sovereignty lecture 9 March 1992.

British Columbia Citizens' Assembly, 2004. *Making Every Vote Count: the Case for Electoral Reform in British Columbia.* www.citizensassembly.bc.ca

Butler Report, 2004. *Review into Intelligence on Weapons of Mass Destruction.* www.butlerreview.org.uk

Cabinet Office, 2004. *Draft Civil Service Bill: Consultation.*
www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_bill_consultation.asp

Citizenship Foundation, 2006. *Inside Britain: A Guide to the UK Constitution.* Hodder Education

Constitution Unit, 2006, 2007. Research project on A more legitimate and more powerful Upper House? See reports at www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords.html.

Constitution Unit, 2001. *Three into One won't go: the Future of the Territorial Secretaries of State.*

CASC, 2006. *Freedom of Information: One Year On.* July 2006, para 108.

Constitution Unit, 1996a. *Delivering Constitutional Reform*, ch 5.

Constitution Unit, 1996b. *Human Rights Legislation.* Ch 8 : 'Development of a British bill of rights'.

Dorey, P 2006. '1949, 1969, 1999: The Labour Party and House of Lords Reform', *Parliamentary Affairs*, 59(4): 599-620, 2006.

Foster, C 2005. *British Government in Crisis.* Hart Publishing.

Frontier Economics, 2006. *Independent Review of the Impact of the Freedom of Information Act.* http://www.foi.gov.uk/reference/foi-independent-review.pdf

Hale, B 2004. 'A Supreme Court for the United Kingdom?', 24:1&2 *Legal Studies* 36-44.

Hazell, R ed 2006. *The English Question.* Manchester Univ Press.

Hazell, R 2007. 'FOI disclosure of Treasury's 1997 advice about tax treatment of dividends' at http://www.ucl.ac.uk/constitution-unit/news/comment11.htm.

Independent Commission on PR, 2003. *Changed Voting, Changed Politics: Lessons of Britain's experience of PR since 1997.* Constitution Unit, 2003.

IPPR, 1993. *A Written Constitution for the UK.* Mansell.

Jenkins Commission, 1998. Report of the Independent Commission on the Voting System, Cm 4090, October 1998.

JUSTICE, 2007. *A Bill of Rights for Britain?* Forthcoming, September 2007.

King, A 2001. *Does the United Kingdom still have a Constitution?* Hamlyn Lectures: Sweet and Maxwell, 2001.

Klug, F 2007. 'A bill of rights – what for?' in C Bryant ed, *Towards a new Constitutional Settlement,* Smith Institute 2007.

Liberal Democrats, 1993. *Here We Stand: Proposals for Modernising Britain's Democracy.* September 1993.

Lords Constitution Committee 2006. *Waging War: Parliament's Role and Responsibility.* HL 236, July 2006.

Oliver, D 2007. 'Towards a written constitution?' in C Bryant ed, *Towards a new Constitutional Settlement*, Smith Institute 2007.

Ontario Citizens' Assembly, 2007. *Democracy at work: The Ontario Citizens' Assembly on Electoral Reform.* May 2007. http://www.citizensassembly.gov.on.ca

PASC, 2004. *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament.* HC 422, March 2004.

PASC, 2007. *Ethics and Standards: The Regulation of Conduct in Public Life.* HC 121, April 2007.

Scottish Constitutional Convention, 1995. *Scotland's Parliament: Scotland's Right.*

Scottish Affairs Select Committee, 2006. *The Sewel Convention: the Westminster perspective.* HC 983, June 2006.

Seyd, B 2007. 'Why has political trust in Britain declined?' Constitution Unit (forthcoming), summer 2007.

State of the Nation Poll 2004. Joseph Rowntree Reform Trust, at http://www.jrrt.org.uk/FINDINGS.pdf.