# MONITOR

## The Constitution Unit Bulletin

*Issue 7 June 1999* 

## **Devolution Dawns**

The reshaping of the United Kingdom has begun. Devolution went live with the Scottish and Welsh elections in May, and the new governments in Scotland and Wales take up their powers on 1 July. In the English regions the devolution bandwagon is also beginning to roll, as reported on page 4.

This cover article reports on Scotland and Wales. On 6 May voters elected the first Scottish Parliament to have sat since 1707 and the first members of the National Assembly for Wales. In both cases the proportional voting system ensured that no party had an overall majority. In Scotland the parliament comprises 129 seats, with 73 constituencies and 56 regional top-up seats. On a turnout of 58% Labour won 53 of constituency seats consequently only three top-up seats. The SNP won 35 seats, 28 of which were top-up seats, the Conservatives won 18 - all top-up seats - and the Liberal Democrats 17.

In Wales turnout was only 45%. In the new 60-member Assembly Labour won 28 seats, Plaid Cymru 17, the Conservatives 9 and Liberal Democrats 6. Here too most of the 20 top-up places

from the regional lists went to the Conservatives (8 seats) and the nationalists (8 seats).

In both countries there is a new two-party system, with Conservatives displaced by the nationalists as the official opposition party. The electoral contest was regarded in each country as being between Labour and the nationalist party. That seems likely to continue, because the SNP came second in 54 constituencies in Scotland, and Plaid Cymru came second in 14 constituencies in Wales. They are unlikely to perform so well in general elections; but in Scotland and Wales it is not unrealistic for the nationalist parties to aspire to govern.

## The new governments

Donald Dewar was sworn in by The Queen as First Minister in Scotland on 17 May. After a week of negotiations with the Liberal Democrats he formed a coalition government of nine Labour and two Liberal Democrat Ministers, with 11 deputy Ministers (including two more Liberal Democrats). Key portfolios went to the Scottish Liberal Democrat

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leader Jim Wallace (justice and home affairs, and Deputy First Minister), Jack McConnell (finance), Henry McLeish (enterprise and life long learning), Sam Galbraith (children and education), Susan Deacon (health), Wendy Alexander (social inclusion, local government and housing), Sarah Boyack (transport and environment), Tom McCabe (business manager and chief whip) and Ross Finnie (rural affairs, and the second Liberal Democrat in the cabinet). Lord Hardie continues as Lord Advocate.

The coalition agreement between the parties was set out in a 20-page document entitled Partnership Scotland. The greatest stumbling block was student tuition fees, which the Lib Dems had pledged to scrap in their election manifesto (as had the SNP and the Conservatives). The issue has been referred to an independent review body. But whilst Lib Dem backbenchers believe they will be allowed a free vote on the issue, Labour believes both parliamentary groups should support the decision of the coalition government. Failure to resolve this could bring down the coalition. The other key issue is PR for local government, already being considered by the McIntosh Commission on local government reform. The agreement states: "We will ensure that publication of the final McIntosh recommendations is followed by an immediate programme of change, including progress on electoral reform".

In Wales the Labour leader Alun Michael decided to form a minority government rather than attempt a coalition. There will be eight Ministers, known as Assembly Secretaries: Rhodri Morgan (economic development), Edwina Hart (finance), Jane Hutt (health and social services), Peter Law (planning and environment), Tom Middlehurst (life-long education and training; Welsh language, culture and sport), Rosemary Butler (education), Christine Gwyther (agriculture and rural development) and Andrew Davies (business manager). They will work alongside six subject committees of the Assembly, to be chaired by Ron Davies (economic development), Sue Essex (planning and environment), Cynog Dafis (post 16 education, arts, sport, language), Ieuan Wyn Jones (agriculture and rural development), Kirsty Williams (health and social services) and William Graham (pre-16 education, children's issues). Two of the committee chairs are from Plaid Cymru, one is Liberal Democrat, and one Conservative.

The ceremonial opening of the Welsh Assembly was on 26 May. Formal transfer of powers to the Scottish Parliament and Welsh Assembly will take place on 1 July.

## Consequences in Westminster and Whitehall

The consequences are already being felt in Westminster and Whitehall. In Westminster the Procedure Committee has recommended a number of changes to adjust to devolution (HC185: see p5). In Whitehall the Concordats and Memoranda of Understanding, to regulate relations between departments and their respective governments, are undergoing their final, intensive revision.

Donald Dewar left the British government to become Scotland's First Minister. He was replaced as Scottish Secretary not by his number two Helen Liddell but by John Reid MP. Liddell takes Reid's place as Minister for Transport, but it did not pass without comment that a largely English Ministry is now headed by a Scottish MP. Two other Scottish Office Ministers have gone, as Sam Galbraith and Henry McLeish transferred to the new Scottish cabinet. Three Parliamentary Under-Secretaries remain, although they are expected to go after 1 July. Lynda Clark has become Advocate General, the new Scottish legal adviser to the British government.

In Wales Alun Michael has remained as Secretary of State after becoming First Secretary of the Assembly. The junior Welsh Office Ministers also remain in post. This situation - with Alun Michael being a member of the British government and the Welsh administration - cannot continue after 1 July. The Welsh Assembly will inevitably come into conflict with London - and he cannot sit on both sides of the table at once.

The Foreign Office has recognised devolution by establishing a Devolved Administrations Department. Its task will be to represent the interests of Scotland, Wales and Northern Ireland overseas, to offer the assistance of British posts abroad to visiting Scottish and Welsh politicians, and to help broker the differences which will inevitably arise over EU and other international negotiations.

For the impact on Westminster see pp. 5-6.

# 1999 Annual Subscription BARGAIN OFFER!

£50 for individuals or £100 for institutions, will buy you a copy of every report or briefing published by the Constitution Unit during the 1999 calendar year. The Unit has already published 17 Briefings this year, value £99. See order form for further details

## **Constitutional Update**

## Lords Reform

#### The Bill

The House of Lords Bill, which will remove the right of hereditary peers to sit and vote in the House of Lords, has now completed its House of Commons passage and House of Lords committee stage. It is due to begin its report stage in the House of Lords on 15 June, and will then return to the Commons.

Only one substantive amendment was passed during the House of Lords' consideration. This was the anticipated 'Weatherill amendment', moved by the leader of the crossbench peers Lord Weatherill. The amendment - passed by 351 votes to 32 - would allow a total of 92 hereditary peers to stay on in the transitional upper chamber. These represent 10% of hereditary peers plus a small number of office holders. Other amendments - including one to require a referendum on Lords reform - were either withdrawn or defeated.

The government had previously indicated that it would allow the Weatherill amendment to stand when the bill returned to the Commons. It is anticipated that the Commons will pass the amended bill, allowing it to reach the statute book at the end of this parliamentary session. The new transitional house, minus hereditary peers, would then be operational from the autumn. Under a draft Standing Order each party grouping of hereditary peers (and the hereditary cross-benchers) would elect 10% of its members to remain.

### The Royal Commission

The Royal Commission on the Reform of the House of Lords, chaired by former Conservative minister Lord Wakeham, began its meetings in March. The Commission promptly issued a comprehensive consultation paper, and set up a website (www.lords-reform.org.uk) which includes an online questionnaire. Initial written submissions were invited by 30 April, but these will be accepted until 30 June.

The Commission has set up a series of public meetings around the country. The first of these was held in London on 12 May. Meetings in late June and July take place in Manchester, Birmingham, Edinburgh, Cardiff and London.

The Commission has received over 500 written submissions to date. The Royal Commission may be contacted on: 0171 210 0441.

### **Labour Party submission**

The Labour Party's submission was prepared by Professor Keith Ewing of King's College London. Although reported as proposing a wholly-nominated chamber, the document itself is surprisingly noncommittal about composition, and contains no discussion of the merits of electing or appointing members. Instead it sticks largely to principles, such as ensuring the reformed house is representative of the population and distinctive from the House of Commons. The party reiterates its commitment to retaining an independent element in the house and ensuring that no single party has a majority (which itself may imply appointed members). The paper also suggests that the devolved assemblies might be involved in some way in the selection of members of the house. It is inconclusive on the role of the law lords, seems to favour a continued religious presence and concludes that the powers of the house are about right at present.

## **Conservative Party submission**

The Conservative Party also avoids proposing a single model at this stage. It wants to consult on the Mackay proposals (see below) and to build a crossparty consensus for change. The party is totally opposed to an all-nominated House of Lords. It is also opposed to members of the devolved assemblies sitting in the second chamber as representatives of those bodies; and opposed to MEPs having a dual mandate for the same reason - they cannot serve two masters. The Conservatives wish to retain the existing powers of the House of Lords, and possibly strengthen its powers over constitutional matters.

### **The Mackay Commission**

The Mackay Commission was set up by Conservative leader William Hague to consider House of Lords reform, and it reported in April. It proposed two alternatives for the membership of the reformed house. The first would be a largely elected house, comprising 480 members (elected by a majoritarian system) alongside 45 members appointed by the Prime Minister. The second would be a more mixed chamber, comprising 150 members appointed by an independent commission, 100 life peers, 99 representatives of devolved assemblies and 99 directly elected members. Under both schemes most members would serve a single non-renewable term equivalent to three House of Commons terms.

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#### Campaign for an elected chamber

Conservative MP Andrew Tyrie, who earlier published a booklet calling for a largely elected upper house, has now sponsored a parliamentary Early Day Motion to this effect. The motion reads that 'this house believes that the composition of the second chamber of parliament should be determined by election' and had received 152 signatures by mid-May. These comprised 80 Labour MPs, 35 Conservatives, 35 Liberal Democrats and two Plaid Cymru members.

See page 9 for new Constitution Unit briefings on House of Lords reform

## Freedom of Information

After a long wait the Home Secretary Jack Straw published the draft Freedom of Information Bill on 24 May (Cm 4355). It represents a major retreat from the proposals in David Clark's White Paper *Your Right to Know* (Cm 3818, Dec. 1997). The Unit described the White Paper at the time as being unrealistic and too good to be true, but the draft bill swings too far in the opposite direction. The price of gaining support across Whitehall has proved to be a highly restrictive bill by international standards.

This is reflected in the exemption provisions, - which include unnecessarily broad exemptions for policy advice, information about investigations and commercial information - and the capacity to create new exemptions by ministerial order. In place of the overriding public interest test in the previous government's Code of Practice, authorities will merely have to consider the release of exempt information on a discretionary basis.

The bill relies heavily on publication schemes to be drawn up by each public authority, codes of practice from the Secretary of State, and a general duty on the Commissioner to promote good practice. The Data Protection Commissioner is to become the Information Commissioner. The estimated total cost of implementing the Bill is £90 to £125m a year, to be found from within existing resources.

The lead junior Minister is Lord Williams of Mostyn, who also led on the Data Protection Bill. He chairs a Home Office Advisory Group on the implementation of freedom of information, of which Robert Hazell is a member. Robert has also been appointed Special Adviser to the Select Committee on Public Administration, which will conduct a pre-legislative scrutiny of the draft Bill in June and July. Rhodri Morgan MP ceases to be Chair of the Committee on

taking up his post as an Assembly Secretary in Wales.

The Unit is publishing a Commentary on the Draft FOI Bill by Robert Hazell, which compares it with the FOI laws in Australia, Canada, Ireland and New Zealand. See order form for details.

## **English Regions**

The eight new Regional Development Agencies (RDAs) went live on 1 April. Each has a board of 13, with half the members from business and a third from local authorities. One of their first tasks is to prepare an economic strategy for the region.

One of the key stakeholders to be consulted is the Regional Chamber. These are much larger non-statutory bodies, with 40-120 members, of whom 70% are representatives from all the local authorities in the region. They can be designated by the Secretary of State if they meet DETR standards of broad, cross-party representation, with non-local government members comprising no less than 30%. The RDA is then under a statutory duty to consult with them. So far three Regional Chambers have been designated: in the North West, East Midlands and West Midlands.

Several regions have ambitions to go much further. The North East is setting the pace. In a MORI poll conducted in March it showed the strongest support for an elected regional assembly (50% in favour, 27% against). The North of England Assembly is following the example of the Campaign for a Scottish Parliament, and in April held the first meeting of the North East Constitutional Convention, a cross-party body charged with drawing up a blueprint for a directly elected regional assembly.

Not to be outdone, the North West Regional Assembly is convening its own Constitutional Convention to be launched in July. Another pace setter is the Regional Assembly for Yorkshire and Humberside. In January 1999 even the South East Forum changed its name to the South East Regional Assembly.

Despite choosing the name of Regional Assembly, none of these bodies is directly elected - yet. The test for all of them is to formulate a coherent set of functions for an elected assembly; to demonstrate to local authorities and to central government that it would add value; and then to persuade the people of the region, who will have to approve the proposals in a referendum. Richard Caborn, Minister for the Regions, said in a speech in Glasgow that devolution

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for the English regions should get under way immediately after the next election (The Times, 4 June).

The Greater London Authority Bill has passed through the Commons and is now in the Lords. At the Bill's Report stage, the government was successful in moving an amendment to establish a 5% threshold, which parties will have to clear in the top-up section of the ballot to secure a seat.

## **Northern Ireland**

## Report of the First Minister (Designate) and Deputy First Minister (Designate)

This report sets out the ministerial offices to be held by Northern Ireland ministers, including the functions each minister will have. Also proposals in relation to the North/South Ministerial Council, the British-Irish Council and the consultative Civic Forum. It and other reports are available on the Assembly's website: http://www.ni-assembly.gov.uk/

#### **Northern Ireland Executive**

In addition to the First Minister (Ulster Unionist) and the Deputy First Minister (SDLP), the Northern Ireland Executive, when formed, will include; three Ulster Unionists, three SDLP, two Sinn Fein and two Democratic Unionists.

## **Report of the Shadow Assembly Commission**

The Commission was established by the Assembly and reported on 22 February (NNIA 8, ISBN 0953428877). The report contains recommendations on the following matters: planning process estimates for the cost of running the Assembly, organisational structures for the Assembly, staffing, property, and services to Assembly members.

### **Committee on Standing Orders**

The Committee on Standing Orders issued its report on 1 March (NNIA 9 i and ii, ISBN 0953428893). The Committee used the Standing Orders drawn up for the 1973 Northern Ireland Assembly as a base and also referred to the standing orders of a number of parliaments, including Westminster, the European Parliament and the Dáil.

## **Parties and Elections**

The legalisation of UK politics continues to make steady inroads into the previously voluntary world of political parties. The Registration of Political Parties Act 1998 has led to the registration of 80 parties, including those promoting the independence of East Cleveland and Morecambe Bay, along with the Pink Elephant Party, the Stoke on Trent Alliance and the

Witchery Tour Party. The most serious controversy was caused by parties in Scotland who wished to include the description 'green' or 'socialist' despite these labels already having been registered by Great Britain wide parties. Following the threat of legal action by the Scottish Socialist Party, the Registrar of Political Parties adopted a more lenient position, so that six parties now carry the 'socialist' name in their title.

The draft Bill setting out the government's proposals for implementing the Neill Committee's recommendations will be published in late July. The Bill is expected not only to implement Neill's proposals in full, but also to invest the proposed Election Commission with responsibility for increasing election turnout. In practice, this will mean the Commission assuming responsibility for public education, along the lines of the highly successful Electoral Commission in New Zealand.

The government has already acted on one Committee recommendation that did not require primary legislation, the funding of opposition parties in parliament. From April 1999, 'Short money' will be increased by a factor of 2.7, with the bulk of resources being distributed according to the number of seats each party wins. The Conservative Party's allocation will increase from £1.25m to £3.38m p.a. Although the allocative mechanism also takes into account the number of votes won, the financial results penalise the smaller parties.

## Parliamentary Reform

The last quarter has seen three reports from Parliamentary Committees and three backbench initiatives (see below, 'Private Members' Bills') to change procedures in Parliament.

## Procedure Committee's Report on the Procedural Consequences of Devolution (HC185)

This was published on 19 May. While wishing to undertake a full review in due course, the Committee's initial recommendations include:

- abolition of the Scottish, Welsh and Northern Irish Grand Committees
- new rules restricting questions to the Scottish and Welsh Secretaries to matters relating to their reduced responsibilities
- a new procedure for Bills relating exclusively to one part of the kingdom, with a special Second Reading Committee, composed of a minimum of 35 English members for English bills, 18 Northern Irish members for Northern Ireland bills.

20 Scottish members for Scottish bills, and 20 Welsh members for Welsh bills.

The committee also discussed the possibility of Westminster committees holding joint meetings with committees of the devolved assemblies; and access for members of the devolved assemblies.

### 'Westminster Hall': the Main Committee

The Commons Modernisation Committee has recommended a new committee (similar to the Australian Main Committee) to reduce pressure on debates in the chamber (HC 194, 13 April: Sittings of the House in Westminster Hall). Starting in the autumn, the new chamber will sit in the Grand Committee Room off Westminster Hall and provide more opportunity for adjournment debates, debating Select Committee reports, foreign affairs etc.

## **Parliamentary Privilege**

The Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls (a law lord), delivered its report in April (HC214, HL43). It recommends updating the laws regulating freedom of speech in Parliament in a new Parliamentary Privileges Act, and removing the change in the law that allowed Neil Hamilton MP to bring his libel action against The Guardian. It also recommends that all laws should apply to Parliament itself: the institution should cease to be a statute free zone.

## **Private Members' Bills**

There have been several Private Members' Bills proposed in recent months with constitutional implications.

## **Scottish Parliamentary Constituencies Bill**

Bill, introduced by Lord Mackay of Arbrecknish, relates to the reduction in the number of Scottish MPs as a result of the next boundary review. The purpose of the review, provided for under Section 86 of the Scotland Act, is to address Scotland's over-representation at Westminster by increasing the average size of Scottish constituencies from the current 54,000 to the English level of 65.000. The result would reduce the number of Scottish MPs from 72 to around 58. The Mackay Bill, which has passed through the Lords, and is now with the Commons, would bring forward the boundary review so it took place before the next general election. It would also decouple the boundaries of Westminster from those of the Scottish Parliament, so that a reduction in the number of MPs would not lead automatically to a reduction in the number of MSPs. Lord Mackay believes the Westminster review will lead to a cull of 21 MSPs (14 constituency MSPs and 7 top up MSPs).

#### **Referendums Bill**

Conservative MP Andrew Robathan's Private Member's Bill reached the Report stage on 21st May. Bill enacts the Neill Committee's recommendations on the conduct of referendums. and provides for an independent referendums commission, equality of media coverage to the opposing sides and the provision of core funding to the lobbying groups. It is an attempt to put pressure on the government, which has indicated that it will itself introduce legislation before the summer recess to enact the Neill Committee's recommendations. The concern of the Opposition is that the legislation will not be in force before a possible referendum on electoral reform or EMU membership.

### **Crown Prerogatives (Parliamentary Control) Bill**

This Bill, introduced by Tony Benn, seeks to curtail the use of the Crown Prerogative. The bill lists 11 prerogative powers, including seeking a dissolution and choosing a Prime Minister, which would be subject to House of Commons approval by affirmative resolution. The Bill is due to receive its Second Reading on 23 July.

## **Parliamentary Government Bill**

In March Lord Cranborne introduced a Private Member's Bill to strengthen the government's accountability to Parliament. It would require all bills to be published in draft, and record given to Parliament of the consultation, and the government's response; plus an examination by the National Audit Office of the impact of each bill. Cranborne's Bill would also empower the Lords to require a referendum on any constitutional measure; and to prevent excessive delegation of power.

## **Human Rights Act**

On 18 May, in response to a parliamentary question tabled by Angela Smith MP, Jack Straw announced that the Human Rights Act would come into force on Monday, 2 October 2000.

The joint Ministerial/NGO Human Rights Task Force has been meeting monthly to stimulate and monitor preparation for the implementation of the Act. Preparatory steps taken include:

- The drafting of Core Guidance on the Human Rights Act for Public Authorities
- The submission of departmental reports to the Home Office identifying practices and legislation which may be susceptible to challenge under the Act. The reports also identify training needs and an action plan for ensuring compliance with the Act. The Home Office will circulate points on guidance

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and good practice to the departments as part of the on-going communication between the Office and departments.

The Task Force will also be conducting reviews of the readiness of various sectors of public authorities.

On 30 March judgement was given in the case of R v D.P.P. ex parte Kebilene and others. The case challenged a decision of the Director of Public Prosecutions to consent to a prosecution under the Prevention of Terrorism (Temporary Provisions) Act 1989, on the basis of the European Convention on Human Rights (ECHR) and the Human Rights Act 1998. The High Court (The Lord Chief Justice, Lord Bingham of Cornhill, Lord Justice Laws and Mr Justice Sullivan) held that s. 16 A and s. 16 B of the 1989 Act violated the ECHR, and as a consequence the D.P.P.'s decision was unlawful. Lord Bingham concluded that "It seems to me that on their face both sections undermine, in a blatant and obvious way, the presumption of innocence." Leave to appeal to the House of Lords has been granted.

## **Modernising Government**

In March the Cabinet Office published the White Paper *Modernising Government* (Cm 4310), presented jointly by the Prime Minister and Jack Cunningham, Minister for the Cabinet Office. Items of constitutional interest include:

- On legislation, the government is committed to publishing more bills in draft for consultation and pre-legislative scrutiny.
- Wherever possible, regional boundaries should coincide with local authority boundaries at local level, and with Government Office for the Regions' boundaries at regional level.
- The Cabinet Office will publish in the summer its study on how central government is organised and delivers its services at regional and local level.
- The organisation of public sector Ombudsmen in England is to be reviewed, in order to make it easier to make a complaint across different services.

## **Change in Local Government**

The government is pursuing a multi-pronged strategy to rectify the poor turnout in local elections, which reached only 30% at the contests on 6 May. The first, set out in the consultation paper *Local Government*, *Local Choice* (Cm 4298) and draft *Local Government* (*Organisation and Standards*) *Bill* in March, stipulates that councils must seek voters' views on whether to move to a cabinet model and/or a directly elected mayor. The status quo will be an

option only if the proposals are defeated in a referendum. Should councils not hold a referendum - which can be triggered by a petition supported by 5% of voters - the government retains the power to force them to put the issue to a popular vote.

The government is also considering innovations in the ways that local elections are conducted. Reforms being given close attention include electronic voting - which will be used in the Greater London Authority elections in May 2000 - and an extension of postal voting. A report on these, and other issues of electoral administration, will be produced this summer by the Home Office Working Party chaired by Minister of State, George Howarth.

## **Overseas News**

## An Australian Republic?

The Australian Federal Government has released two draft Bills in relation to the proposed Australian Republic. The first, which sets out all the constitutional alterations proposed to establish a republic, will be subject to a referendum if it successfully passes through parliament. If the referendum, which may take place in November, is supported, the Queen will be replaced as head of state by a President.

The second Bill provides for a Committee to be established to call for public nominations for President and prepare a shortlist for the Prime Minister. If the referendum succeeds this Bill will be introduced in Parliament in time for the first President to take office on 1 January 2001. Further information can be found at: http://www.centenary.org.au

## Italian referendum fails

On 18 April the Italians voted in a referendum on abolishing proportional representation for elections to the lower house of parliament. Although 90% of those voting supported the move, the referendum failed due to a low turnout of only 49.6%. Italian referendums require at least 50% participation in order to succeed. However, the Prime Minster and newly elected President, Carlo Ciampi, have both identified the need for further moves towards reform as a priority.

## Calling all overseas experts

The **Monitor** has a growing international readership. If you are an overseas expert and would like to send news items on major constitutional developments outside Britain, please let us know.

## **Constitution Unit News**

## **Summer seminar series**

## **Developing Regional Government in England**

July 13, 12 - 1.30pm

Liz Kerry, Director, Yorkshire & Humberside Regional Assembly

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## **Forthcoming Lectures**

The Home Secretary Jack Straw has agreed to give the Constitution Unit Annual Lecture on Wednesday 27 October at 6.30pm. Further details in the September Monitor.

## **Marquand Lecture**

The Unit has published the Mishcon lecture given by David Marquand at UCL in May. He discusses the 'paradox-laden constitutional revolution on which the government has nervously embarked', and laments the deafening silence about the rationale, implications or ultimate goal of the changes set in train. In the second half he analyses pluralism and populism as competing values which will shape the democratic nature of the new constitutional settlement.

See order form for details.

## **New Research Fellow**

Welcome to Andrea Loux, who joined us in April. Andrea is an American lawyer who comes to us from the Law Faculty at Edinburgh. She is conducting an 18-month study of the research and support needs of the higher courts, comparing the support available to the judges in the Court of Appeal and the House of Lords with that provided to their counterparts in Australia, Canada, France, Germany, New Zealand South Africa and the ECJ. This is a companion study to the research project on the need for an independent Constitutional or Supreme Court being conducted by Richard Cornes (see below).

Welcome also to Bernt Gebauer, Visiting Research Fellow from Freiburg. He is working on a comparative project on coalition government.

## **Constitutional Futures**

The Unit's first book *Constitutional Futures* went into a second reprint within a month of publication. It was the no. 1 Politics bestseller at Dillons in March, and no. 3 in May. Copies are available in all good bookshops, priced £18. Oxford University Press are to bring out a paperback edition in the autumn. In the meantime the hardback can still be purchased at a discount direct from the Unit, cost £13 plus £2 p&p.

## **Constitution Unit Reports**

## The United Kingdom's Highest Courts and Constitutional Reform

The Constitution Unit is undertaking research on the implications of constitutional reform for the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. As Human Rights Act and devolution cases start to reach the UK's top courts they will come under increasing scrutiny. The position of the Appellate Committee (a committee of the House of Lords) and the Law Lords who sit in it is also an issue facing the Royal Commission on Reform of the House of Lords.

The Unit ran the first of the participatory seminars in this project in May. The seminar was well attended by people involved in a range of ways with the work of the highest courts: civil servants, law lords, barristers and academics. The issues discussed included appointment, composition of the court in individual cases, the position of the Law Lords as members of Parliament, the position of the Lord Chancellor, and

whether the UK should have a separate stand alone supreme court - or even a separate constitutional court of the kind found in Spain or Germany. Three of the Unit's staff also met with the law lords at Westminster.

Contact: Richard Cornes.

## Joint Parliamentary Committee on Human Rights

In the White Paper *Rights Brought Home* the government had trailed the establishment of a Joint Parliamentary Committee on Human Rights. In December Margaret Beckett confirmed in a statement to the House of Commons that both Houses would be requested to establish such a committee.

On 27 May the Constitution Unit held a private seminar, hosted in the House of Lords, to discuss the practical issues which will need to be addressed when setting up the committee. Attended by parliamentary clerks, civil servants, academics and human rights representatives the seminar discussed the range of functions the committee may be tasked with. These include legislative scrutiny, conduct of inquiries and monitoring of domestic human rights policy. The scope of the committee's work also has potentially far-reaching effects for its composition, size and staffing and these issues were explored.

The establishment of the committee will contribute in large measure to the profile of human rights in Westminster. However the task lies in ensuring that human rights concerns do not become isolated in this specialist committee but are mainstreamed throughout the work of parliament. The relationship between this and all other committees, standing and select, will be important in this regard.

Whilst no clear date has been set for the establishment of the committee the need for it is already imminent. On 28 April the Joint Committee on the Financial Services and Markets Bill recommended that "On the basis of our experience the two Houses should establish a specialist Human Rights Committee as soon as possible." With the Human Rights Act set to be brought into force on 2 October 2000, the need is all the more pressing.

The Unit will be publishing a short briefing on the establishment of the Joint Parliamentary Committee on Human Rights later in June. See order form.

Contact: Aisling Reidy.

## Lords reform briefing papers

The Unit has recently issued a new collection of briefings on Lords reform. These cover a broad range of issues and draw heavily on experience from second chambers overseas. There are six of these briefings in total.

The first paper - Second Chambers Overseas provides summary information about second chambers around the world. This includes general information such as composition mechanism and size, as applied to all second chambers. It also gives more detailed information on the composition and powers of 20 second chambers representing the bicameral member states of the OECD, plus India, South Africa and the Russian Federation. It ends with five brief case studies of how second chambers overseas work in practice. In all the briefing illustrates how some of the traits of the House of Lords - such as an older and more independent membership - are common features of second chambers, while others - such as its extraordinary size - are not. It also illustrates the connections between the composition and powers of such chambers, and some pitfalls to avoid in reform of the House of Lords.

Another unusual feature of the House of Lords is highlighted in **Second Chambers as Constitutional Guardians and Protectors of Human Rights**. It is quite usual for a second chamber to have special powers when it comes to amending the constitution often a veto, a requirement for a qualified majority or the right to call a referendum. Members may also have the right to appeal to a Constitutional Court if other legislation is felt to breach the constitution or human rights. Given the rapid constitutional change in Britain these may be elements we want to apply to a new House of Lords.

Two briefings look at other unique features of the British system - The Role of the Law Lords and The Role of the Bishops. In each case the briefings look at how this role is exercised now, and what are the options for the future. Should religious representation be retained in the new second chamber, and if so should it be broadened to include other faiths? Will the role of the law lords as legislators prove problematic as the potential for disputes between different democratic institutions in the devolved Britain grows? Is it time for a UK Supreme Court?

A further briefing looks at **Resolving Deadlock**. How are disputes between the houses over legislation resolved in other bicameral countries? The briefing illustrates the many variations of the British system

of 'suspensive veto' and how these are applied overseas. It looks at other systems such as endless shuttle, dissolution of the chambers and resolution through joint sittings. It then particularly concentrates on the relatively common system of resolving disputes through a joint committee of parliament. The German, French and US examples demonstrate different means of using such a system.

The briefing A Transitional House of Lords: the Numbers concentrates on the house which will be left when the hereditary peers are gone. An update of a previous briefing, this considers what will happen to the size of the new chamber over time under different scenarios. In particular it looks at the impact of introducing different retirement ages, and the likely outcome of using future appointments to keep the party balance in the house closer to the result of general elections.

The briefings are now available - see flyer or order form for details

Contact: Robert Hazell.

## A Directly Elected Second Chamber: Lessons from Italy and Australia

The latest in the series of more detailed briefings on second chambers overseas focuses on directly elected chambers. Given the interest in this solution amongst MPs (see page 4) this is a timely topic.

The briefing looks at two directly elected chambers which follow very different models. The Italian Senate mirrors the lower house, as both are elected on PR and have identical powers. The Australian Senate is more complementary to the lower house, as it is elected using PR and the lower house uses the 'alternative vote' which produces a similar outcome to the British system. In Australia the Senate represents the states, which each have 12 seats, and half of the members are elected every three years. Minor parties such as the Greens and Australian Democrats are represented in the upper house - where they generally hold the balance of power - but consistently fail to win seats in the lower house.

In both cases the upper house is powerful - it is difficult to deny the rights of a chamber which is elected by the people. In Italy the chamber has the formal power to bring down the government, and in Australia it exercised this right de facto in 1975 when it failed to pass government supply bills. This led to the biggest constitutional crisis in Australian history, when a general election was forced. Since then the situation has calmed down, and the Senate

has developed important parliamentary roles which are unfulfilled by the government-dominated lower house.

The briefing concludes with lessons for Britain. The first is that an elected second chamber must not simply mirror the Commons. The Italian chamber is so identical to the lower house that it adds little to the system except delay. An upper house elected by PR could have points to recommend it if we stuck to the current system for the House of Commons. Indeed it could help resolve the argument over electoral reform. But such a chamber would fundamentally change the nature of politics in Britain.

The briefing is now available - see order form for details.

Contact: Meg Russell.

## The Constitutionalisation of Public Law

This briefing has been contributed by Lord Steyn, one of the law lords. The briefing begins by looking back to the period when there was little real debate of constitutional issues; especially by lawyers. The British Constitution was defended by the knockdown argument that 'it works'. As the courts have become less deferential towards ministers and officials, and extended the reach of judicial review, it has become necessary to develop the rationale behind a range of constitutional practices.

Lord Steyn begins with a consideration of the development of judicial review and identifies the separation of powers between the executive and the judiciary as fundamental to the legitimacy of this process. He considers the incongruous triple position of the Lord Chancellor (minister, legislator and judge) and the dual legislative and judicial role of the Law Lords. He also touches on the Human Rights Act and devolution to Scotland and Wales. In relation to the courts' role in reviewing measures passed by the devolved legislatures he notes that their role inevitably involves "constitutional review". This sort of review, to establish whether a legislature has acted within its powers, is a role familiar in the United States and in federal systems. Even when the role of European law in the UK is taken into account, it is still a novelty in this country.

The briefing is now available - see order form for details.

Contact: Richard Cornes.

## **Freedom of Information and Business**

In other countries business is a big user of Freedom of Information (FOI): to bid more effectively for government contracts and to obtain information in the hands of government about its competitors. This new briefing provides a guide to business use of FOI, looking mainly at the experience of the USA, Canada and Australia. FOI has enabled businesses there to find out more about the real needs of their public sector customers, and the proposals and performance of their competitors. But to protect information submitted to government which is genuinely confidential, business needs to distinguish it clearly and to explain why it needs to be protected: it cannot simply claim a blanket exemption.

In the UK business information may prove to be well protected, because the draft Freedom of Information Bill protects information submitted to government whose disclosure would be likely to 'prejudice the commercial interests of any person'. However a public authority will still have discretion to disclose exempt information after taking into account all the circumstances including the public interest.

This guide for business on the impact of FOI is written by Jim Amos, who has spent most of his career in the computer industry and is now a Visiting Fellow at the Constitution Unit. It is available as a 28-page Briefing (£5), or in a fuller version with seven Appendices on practice in the USA, Canada, Australia, the UK and the EU (£10). See order form for details

Contact: Robert Hazell.

## Forthcoming research projects

## Pre-legislative scrutiny of draft Bills

The Government plans to improve the quality of legislation by publishing more bills in draft form. This would allow for public consultation and prelegislative scrutiny by Select Committees. One draft bill was published in 1997-98, and in the current session six draft bills have been published so far:

- Pension Sharing Bill
- Financial Services and Markets Bill
- Limited Liability Partnerships Bill
- Local Government (Organisation & Standards)
   Bill
- Food Standards Bill
- Freedom of Information Bill.

There has been no systematic evaluation of what value is added by publishing bills in draft. Whitehall officials say privately that it just adds a further stage

to the legislative process, creating extra work and delay. Parliamentarians complain that they are given far too little time for proper scrutiny. The Unit is hoping to conduct a study to assess:

- what value is added for all the different participants in the legislative process (MPs, Ministers and officials, interested parties)
- how much additional time and resources are required
- whether time is saved in subsequent stages
- what lessons can be learnt from the experiments so far which might lead to improvements in the future.

We do not have the capacity to conduct this study within the Unit. Anyone interested in helping, on a paid or voluntary basis, please contact Robert Hazell.

### **Coalition Government**

The introduction of PR elections for the devolved assemblies means the UK faces the prospect of coalition government. In Scotland, a multi-party administration has already been formed, comprising Labour and the Liberal Democrats; in Northern Ireland, the 1998 Belfast Agreement stipulates cross-community coalition.

While coalitions are not wholly new to the UK - this century having witnessed significant periods of coalition rule at the national level, as well as currently in some local authorities - they will place strain on the traditional 'Westminster' model. The experience of a similar political system - New Zealand - which introduced multi-party government in 1996, is not a happy precedent.

The Constitution Unit is planning a forward looking project to examine the dynamics of coalition rule. Through study visits to selected overseas countries, the research will be designed to draw systematic lessons for the formation, operation and termination of multi-party government. The research will also range more widely, to explore the effects of coalition rule, and how some of its perceived 'weaknesses' might be addressed. The Unit is hoping that the project, which will be led by Ben Seyd, will begin in early 2000.

## **Next Public Seminar**

**Developing Regional Government in England** *July 13, 12-1.30pm* 

Liz Kerry, Director, Yorkshire & Humberside Regional Assembly

at 29/30 Tavistock Square, London WC1H 9EZ **To attend please fax us on 0171 504 4978** 

## Bulletin Board

## New publications by the Unit

<u>The Impact of the Human Rights Act: Lessons</u> <u>from Canada and New Zealand</u> by Aisling Reidy (May 1999) £8 briefing

<u>The Constitutionalisation of Public Law</u> by Lord Steyn (May 1999), £5 briefing

A Directly Elected Uppper House: Lessons from Italy and Australia by Meg Russell (May 1999) £5 briefing

<u>Second Chambers Overseas: A Summary</u> by Meg Russell (June 1999) £8 briefing

Reforming the Lords: The Role of the Bishops by Janet Lewis-Jones (June 1999) £5 briefing

Reforming the Lords: The Role of the Law Lords by Richard Cornes (June 1999) £5 briefing

<u>Second Chambers: Resolving Deadlock</u> by Meg Russell (June 1999) £5 briefing

Second Chambers as Constitutional Guardians and Protectors of Human Rights by Aisling Reidy and Meg Russell (June 1999) £5 briefing

A Transitional House of Lords: Balancing the Numbers by Ben Seyd (June 1999) £5 briefing

<u>Freedom of Information and Business</u> by Jim Amos (June 1999) £5 briefing or £10 report

Commentary on Draft Freedom of Information Bill by Robert Hazell (June 1999) £5

## **Forthcoming Events**

**Opening of Scottish Parliament** 1 July

Freedom of Information conference

7 July

Contact CAPITA on 0171 222 5110

Parliament in the New Millenium

7-8 August

at Wroxton College, Banbury, Oxon.

Tel 01482 465 863 or

Email p.norton@pol-as.hull.ac.uk

### **Publications received**

Reform of the House of Lords: A Consultation Paper, (Royal Commission on Reform of the House of Lords, March 1999)

<u>Senates: Bicameralism in the Contemporary</u> <u>World</u>, by Samuel Patterson & Anthony Mughan (eds.), (Ohio State University Press, 1999)

<u>Unfinished Business: Reform of the House of</u>
<u>Lords</u> by Ivor Richard and Damien Welfare,
(Vintage, 1999)

The House of Lords: Its Parliamentary and Judicial Roles by Brice Dickson and Paul Carmichael (eds.), (Hart, 1999) £30 hb

ISBN 1841130206

<u>The Procedural Consequences of Devolution</u> (Fourth Report of Session, 1998-99), HC185, May 1999

Adrift but not Afloat: The Civil Service and the National Assembly by John Osmond, Institute

of Welsh Affairs, May 1999, £10.

Report on the Economic Aspects of Political Independence, Hume Occasional Paper no. 56, David Hume Institute, 1999

ISBN 1870482273

New Scotland, New Britain by Gordon Brown and Douglas Alexander, The Smith Institute,

1999, ISBN 1 902488 032

Modernising Government, Cm 4310,

March 1999, £9

The Report of the Constitutional Commission on options for a Second Chamber, chaired by Lord Mackay of Clashfern, April 1999, £9.80

If you would like us to mention a publication, website or forthcoming event in the next issue of the Monitor (September), send details by the end of August to Sara Northey Fax: 0171 504 4978, Email: s.northey@ucl.ac.uk.

## **Constitution Unit Website**

http://www.ucl.ac.uk/constitution-unit/