MONITOR

The Constitution Unit Bulletin

Issue 9 December 1999

Reforming the House of Lords and Lessons from Overseas

As the Royal Commission prepares to publish its report, the Constitution Unit's latest book sets out a framework for House of Lords reform. This is based on evidence from seven second chambers in other Western democracies.

Reforming the House of Lords: Lessons from Overseas looks at the upper houses of Australia, France, Canada, Germany, Ireland, Italy and Spain. The conclusions for the UK form a yardstick by which the Royal Commission's proposals, due at the end of the year, may be judged. This new book will be published in January 2000, but subscribers to *The Monitor* can order early copies, at a reduced price (see below).

The House of Lords Act and Transitional House

The House of Lords Act finally received Royal Assent in November, shortly before the end of the 1998/99 parliamentary session. As anticipated, this removed most hereditary peers from the chamber, with the exception of 92 who remain, under the Weatherill amendment. In the

closing stages of the session the government suggested that the amendment was at risk, as peers voted for amendments to the Welfare Reform Bill. However, when the Lords backed down on welfare the compromise was accepted by the Commons.

Earlier, an appeal to the Lords Privileges Committee that the bill should not come into force until after the next general election was rejected. The 'transitional' chamber therefore now comprises 92 hereditary peers, 527 life peers, 26 bishops and 27 current and former law lords.

Ten new life peers were created in November, when 10 hereditaries were given life peerages. These comprised six former Leaders of the Lords, and four hereditary peers of first creation. No announcement has yet been made about the appointments commission promised in the White Paper.

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Lord's Reform Cont.

The choice of the other 92 hereditaries was begun in October with the appointment of the existing Earl Marshall (Duke of Norfolk, Conservative) and Lord Great Chamberlain (Marguess of Cholmondeley, crossbench), followed by the election of 15 other office holders by the whole house. Following agreement between the parties these positions were shared, with nine Conservatives, two Labour, two Liberal Democrats and two crossbenchers elected. The remaining 75 peers were elected by their party groups in November, with the agreed numbers of 42 Conservative. 28 crossbench, three Liberal Democrat and two Labour peers elected. In total only four of the hereditaries elected (all of them crossbenchers) were women.

The Royal Commission

Proposals for the long-term future of the house are due from the Wakeham commission by the end of the year. Given the millennium festivities, publication seems likely in January. A leak to the Sunday Telegraph, purporting to be a draft of the report, created much interest. This proposed a chamber with new powers to scrutinise government and protect constitution, and retaining a one year delay over ordinary legislation. However, only members would be elected, with 400-500 appointed. There would be real concerns about the ability of such a chamber to use its powers. The composition proposals, which were at best an early draft, were not well received.

Lessons from Overseas

In deciding the future of the UK upper house, a key source of information is the operation of second chambers in other countries. These are the sources tapped in the Constitution Unit's latest book, which is the result of a year-long study funded by the Leverhulme Trust.

For example the Canadian Senate - the only wholly appointed upper house in a Western democracy - reinforces the view that a chamber comprising wholly or largely of appointees is unlikely to be able to challenge an elected lower house. The other six chambers studied in the book represent a range of the powerful and the

weak, the directly elected, indirectly elected and appointed, in unitary, quasi-federal and federal states.

One key finding of the study was that a successful upper house must combine three elements:

- A composition which is distinct from that in the lower house. With a party-dominated House of Commons this requires that government should not control the upper chamber - the most effective chambers are controlled by neither government nor opposition.
- Sufficient powers to require government to think again. The Lords' existing powers over legislation are moderate in international terms. Most upper houses have additional powers over constitutional change.
- Sufficient legitimacy in the eyes of the public to use its powers, or realistically threaten to do so. Recent British history, and Canadian experience, show how difficult it is for an unelected house to challenge an elected one.

The conclusions in the book are wide-ranging, covering the role that a new upper house should take, and how that might link to other aspects of the constitutional reform programme such as devolution and human rights, as well as issues of composition. Options such as direct and indirect election, and appointment, are discussed, along with options for the size of the chamber, distribution of seats, and electoral systems.

One of the clearest lessons from overseas is that second chamber reform is difficult to achieve. Reform remains an aspiration in five of the seven countries studied. 'Transitional' arrangements have a habit of becoming permanent, as neither governments nor lower house members have a strong incentive to build an effective upper house. Reformers in the UK will need to keep up strong pressure after the Wakeham report if further reform is to be achieved.

To order Meg Russell's book *Reforming the House of Lords: Lessons from Overseas* (Oxford University Press, 2000, ISBN 0198298315) for the reduced price of £14, plus £2 p&p, complete the flyer enclosed with this mailing.

Devolution - The Inside Story

Wales

by John Osmond

Ron Davies' famous comment that 'devolution is a process, not an event' has continued to provide the framework within which the minority Labour government in Wales has struggled. Meanwhile, its originator finally fell from grace when forced to give up chairing one of the Assembly's committees. He, along with the other three MPs elected to the Assembly, has announced that he will give up his Westminster seat at the next election.

Responses have differed to the 'process or event' question. The now Secretary of State for Wales, Paul Murphy, told the Labour Party conference that "We are pledged to make our new democratic achievement a settled question, unlike our opponents who live in a makebelieve world of claiming new powers without a people's mandate". His choice of the word "settled" was widely interpreted as an effort to put the brakes on Ron Davies' devolution process.

Meanwhile First Secretary, Alun Michael, wounded by the charge of being parachuted in by Tony Blair, and facing a fractious opposition over the farming crisis and EU Objective 1 grants, achieved banner headlines in November when he declared in a lecture that devolution was, indeed, a process. He referred to "dynamic devolution" and added, "while devolution is a place in its own right, this doesn't mean it is static".

The motion to delegate most Assembly decision making powers to the First Minister (reported in the last Monitor) has now been agreed with some amendments, and it is the First Secretary's style that has commanded most attention. He has refused to bow to the majority opposition, and kept such a tight rein on his Ministers - for example, insisting that he answer letters they receive from Westminster MPs - that he attracted accusations of "control freakery" from his own ranks. Agriculture Minister Christine Gwyther's failure to convince Brussels to aid Wales's embattled farmers made her subject to a motion of censure. But Alun Michael simply ignored it. For her part Gwyther took the unusual step of publicly blaming her civil servants.

Such issues grabbed the headlines. Meanwhile the Assembly's six committees were grinding slowly through their briefs, with some claiming the civil service was deliberately smothering them in detail. Already there are over 50 extensive briefing documents for Assembly's on website committee the (www.wales.gov.uk). Somewhere there the devil resides.

John Osmond is Director of the Institute of Welsh Affairs (www.iwa.org.uk).

Scotland

by Graham Leicester

First Minister Donald Dewar delivered his own six month report card on devolution in Scotland in the John Mackintosh Lecture on 9 November (see press release at www.scotland.gov). He grabbed the headlines with the hint that if the Scottish Parliament's committees were not up to the task of playing the powerful role they have been given then 'some will argue that reform of the House of Lords gives an opportunity to bind Scotland to the UK by giving the second Scottish chamber the power to review legislation'. This was taken as a criticism of the way some committees have performed. There is some concern - which Dewar alluded to - that it has proved difficult for opposition committee chairs to distinguish their various roles of advocacy, scrutiny and party political point scoring.

Dewar also noted the importance of keeping the Lib/Lab coalition government together if the wider case for electoral reform is going to be won in the UK. Collapse of the Scottish coalition is in neither party's interests. In practice, the interim conclusions of the Cubie committee on student tuition fees produced costings that look so manageable (estimated £12m in the first year) as to make compromise on the issue increasingly likely.

Finally, Dewar referred to the workload that devolution has caused: more Parliamentary Questions put down in the first four months of the Parliament's existence (including during the recess) than in a whole year at Westminster, for example. That overload is palpable and evidenced in contacts with officials. So far, devolution is stretching the system without delivering the benefits of proximity and coordination that it promised: officials see less

of Ministers now than when they were in Westminster, and 'joining up' policy between eighteen Ministers is more difficult than it was with seven. Deep in the machine the question of how to manage the system better to realise its potential is rising up the agenda.

Graham Leicester is Director of the Scottish Council Foundation (www.scottishpolicynet.org.uk)

Northern Ireland

by Robin Wilson

The report in the last *Monitor* began, 'At the time of writing, the Good Friday Agreement is in the balance.' At this writing (November 19th), Northern Ireland finally appeared on the cusp of a transfer of power.

An openly reluctant George Mitchell - whose limitless patience had survived to broker the deal 17 months earlier - was reinvolved in early September. The British and Irish governments did this hoping that he could end the 'you first' stand-off between Sinn Fein and the Ulster Unionists devolution and decommissioning. Initially his review went nowhere, but by moving proceedings to private locations in London, improved chemistry was secured between the protagonists. Substantive was offered by the notion of fluidity 'sequencing'.

In the 11th week a flurry of statements appeared. These had clearly been the subject of behind-closed-doors deliberations, with their sequence clearly choreographed. On Monday November 15th Mr Mitchell expressed 'increasing confidence' in the outcome. Then General John de Chastelain, chair of the decommissioning commission, urged paramilitaries to appoint an interlocutor to liaise with his commission (the loyalist UVF had done so, but not the IRA). Next day, Mr Trimble delivered a conciliatory statement, indicating that appointment of an IRA interlocutor would be sufficient for the UUP to countenance establishment of an executive and north-south bodies. Sinn Fein's Gerry Adams then issued a statement deploring violence and affirming decommissioning was 'essential'. Next day, the IRA issued a perfunctory statement promising to appoint an interlocutor to the de Chastelain commission. After that Mr Mitchell left, with encouragement all round and his place in history secure.

With this concluded, the two big questions remaining were:

- would the statements by the IRA and Sinn Fein be enough to allow Mr Trimble to sustain a workable (60%+) majority of the UUP's ruling council, given his retreat from the 'no guns, no government' slogan; and
- would the republican leadership derive enough political cover from the establishment of the executive and the northsouth bodies, and to deliver 'product' from the IRA sometime in January?

Robin Wilson is Director of Democratic Dialogue (www.democraticdialogue.org)

Whitehall, Westminster and Devolution

On 1 October the Government published the Memorandum of Understanding and the first four Concordats between the UK, Scottish and Welsh administrations (Cm 4444).

Further bilateral Concordats will be published by individual departments. The four initial Concordats cover Co-ordination of EU Policy Issues: Financial Assistance to Industry; International Relations; and Statistics. The Memorandum of Understanding provides for a Joint Ministerial Committee as a central part of the new machinery for inter-governmental relations. In summit form, it will be chaired by the Prime Minister, with sectoral meetings chaired by the responsible UK Minister. This is unlike the practice in most federations, where such meetings are jointly chaired or there is a rotating chair. Another distinguishing feature is that there is no representation for England: the Memorandum states that 'UK Ministers and their departments represent the interests of England in all matters'.

In October the Government also responded to the Procedure Committee's Report on the Procedural Consequences of Devolution (HC 185). The Government's approach is even more cautious than the Committee's. It argued in favour of retaining the Scottish, Welsh and Northern Ireland Grand Committees and against the Committee's more radical proposal that the Speaker should be able to certify bills as relating exclusively to Scotland, Wales, England or Northern Ireland, so they could then follow a Second Reading Committee procedure. On one item the Government is bolder: it hopes that Westminster will grant access rights to members of the devolved legislatures.

Constitutional Update

Queen's Speech

Constitutional reform continues apace. The Queen's Speech contained four constitutional bills on:

- Freedom of Information
- Local Government Reform
- Party Funding and Electoral Commission
- Reform of Electoral Procedures

The first three bills were published in draft during the last session. The draft Freedom of Information Bill has been the subject of three critical parliamentary reports (HL 97, HC 570, and HC 925). The Local Government Bill will provide for cabinets and elected mayors. The Party Funding Bill implements the recommendations of the Neill Committee. Electoral Procedures will make voting easier, following the report of the Home Office Working Party.

The Queen's Speech promised the publication of more draft bills, and further reform of the House of Lords: "My government are committed to further long-term reform of the House of Lords and will look forward to the recommendations of the Royal Commission".

Neill concerns on Party Funding

The Government's proposed legislation on party funding was broadly welcomed by the Neill Committee in a letter to the Home Secretary on 15 October. But Lord Neill expressed a number of reservations, and urged the Government to:

- grant tax relief on individual party donations
- rethink its proposals on party spending limits during a referendum
- allow for fines to be levied on parties breaking the rules on funding.

Government Reshuffle

The reshuffle on 11 October saw changes amongst some of the Ministers holding constitutional portfolios. Jack Cunningham resigned as Minister for the Cabinet Office and was replaced by Mo Mowlam. Her successor as Northern Ireland Secretary is Peter Mandelson. John Reid had been tipped to succeed George Robertson at Defence, but remains as Scottish Secretary.

Labour - Lib Dem Co-operation

Co-operation between Labour and the Liberal Democrats on constitutional issues, a feature of the reforms so far, is being continued under Charles Kennedy. He is reported to have met recently with Tony Blair to discuss the modernisation of local government. But any agreement between the parties is unlikely to include PR, which remains fiercely resisted by some Ministers.

Human Rights

Lustig-Prean and Beckett v UK (Application Nos 31417/96 and 32377/96), Judgement of the European Court of Human Rights, 27 September 1999; and Smith and Grady v UK (Application Nos 33985/96 and 33986/96) Judgement of the European Court of Human Rights, 27 September 1999.

These two cases, each involving two applicants, resulted from the United Kingdom's policy that gay men and lesbians are barred from service in the Armed forces. The four had previously applied unsuccessfully for judicial review of the decisions resulting in their dismissal from the services. The UK courts, while making clear that they thought the ban unlikely to survive a challenge based on the European Convention of Human Rights, were unable to hold that the policy was 'unreasonable' in the sense required to succeed in a claim through judicial review.

Subject to a partial dissent from one of the seven judges, the Court was unanimous in its findings for the applicants. In both cases the UK was found to have breached Article 8 of the Convention - which guarantees everyone a right to respect for their private life, and prohibits interference by a public authority with the exercise of that right (except in accordance with law and as is necessary in a democratic society in the interests of national security, or for the prevention of disorder).

In the *Smith and Grady* case the Court also found that there has been a breach of Article 13 which provides that, 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority...'. The Court found that the threshold of irrationality required for a successful judicial review action meant that the applicants were denied an effective remedy in the national court.

Overseas News

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Australian Republic - Referendum Fails

On November 6 Australians were faced with two questions in a referendum to amend their Constitution. First, whether the Queen should be replaced by an elected Australian head of state, i.e. a President; and second whether a new preamble should be inserted into Constitution. To constitutional pass, a referendum requires support of a majority of voters, and a majority in at least four of the six states. According to the Australian Electoral Commission on 19 November, with 94% of the votes counted, all states had voted 'no' to the republic question. The lowest no vote was in Victoria, at 50.4%, and the highest in Queensland, at 62.5%. Similarly all states voted no to the preamble question. The Australian Electoral Commission can be found http://www.aec.gov.au/

New Zealand Votes in Second PR Election

On November 27, New Zealand holds its second general election under the mixed member proportional system. Under the system, electors get two votes - one for their constituency MP (elected on a first past the post basis) and one for a party list. List seats are apportioned between the parties to ensure that the number of seats a party wins in the 120 seat House of Representatives reflects its share of the vote. Parties must win either 5% of the vote, or one constituency MP, before being allocated list seats. At time of writing the two main left of centre parties, the New Zealand Labour Party and the Alliance Party were leading the governing National Party and their likely coalition partner, the far right ACT (Association of Consumers and Taxpayers) Party. Full details of the results, including attitudes of the voters to the electoral system, will be available on the Waikato-based NZ Election Study website at http://nzes.org/.

Hail and farewell

Sara Northey, our Administrator for the last two years, has left the Unit to join the National Trust, working in their European and International Affairs section. Her successor is Rebecca Blackwell, who comes to us from Cardiff University; and we also now have an Assistant Administrator, Gareth Lewes, who takes charge of the website and database.

Aisling Reidy, our Rubin Research Fellow in Human Rights, has left to join the Council of Europe's mission in Kosovo. In January we will be joined by Dylan Griffiths, currently Lecturer in Politics at Newcastle, who will be our Devolution Research Fellow and lead our five-year Leverhulme-funded research programme on the Dynamics of Devolution.

Seminar and Lecture Programme

In the coming quarter the Constitution Unit plans to hold a major conference on House of Lords reform, and a seminar on Scottish independence. We are also continuing our series of seminars on Intergovernmental Relations in the UK. See the back page for forthcoming events, or visit our website for upto-the-minute information.

Annual Subscription 2000

Readers are reminded about the opportunity to take out a subscription to the Unit and receive all our publications (excluding books) as soon as they are published. The subscription runs from January to December, so now is the time to sign up or re-subscribe. It also offers a substantial saving on the price of buying each publication individually.

The subscription rate for 2000 is £100 for organisations and £60 for individuals. If you want to subscribe, please do so on the order form enclosed with this mailing.

Constitution Unit News

Constitution Unit Website

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

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Project Reports

Coalition government

The Unit has received funding from the Nuffield Foundation to undertake a study of coalition government. The UK is likely to see more examples of multi-party government in the future, placing strain on our constitutional and administrative frameworks. To help prepare for this change, the Unit will be exploring practice in five other countries with experience of multi-party rule. The research, running for two years from January 2000, will identify a set of practical outcomes to help with the transition to coalition rule.

Contact: Ben Seyd (0171 504 4972).

Constitution Unit 1999 Annual Lecture

The Unit's Annual Lecture for 1999, sponsored by Linklaters, was delivered by the Home Secretary, Jack Straw, before over 250 people at Church House, Westminster. In his speech, the Home Secretary set out a new vision of the relationship between the citizen and the state, incorporating a clearer sense of social responsibility alongside personal rights.

The Human Rights Act and the government's Freedom of Information proposals represented, he argued, the end of the 'citizen as subject' concept. Recasting the link between citizens and the state also lay behind the devolution programme, bringing decision making closer to the voters. The Home Secretary also touched on citizenship education, and the wide role of the new Electoral Commission.

The government clearly hopes the constitutional reforms will lead to greater public confidence and more active participation in politics. The Home Secretary's lecture is the clearest elucidation so far of these aims.

The text of the lecture can be obtained from the Unit - see the enclosed order form.

Intergovernmental Relations Senior Seminars

As devolution goes live, the Constitution Unit has started its series of six senior seminars on intergovernmental relations. These kicked off on October 27, with a seminar on 'Relationship Building: the Formal Structures of Intergovernmental Relations'. Participants were mainly senior civil servants from across

Whitehall. The next seminar, on finance, will be held on December 6 and include a presentation from Elwyn Evans, Head of the Devolved Countries and Regions Team in HM Treasury.

A booking form for the series is included in this copy of the Monitor. Places are still available.

Lords Reform and Human Rights

A new briefing from the Unit, *The House of Lords: In Defence of Human Rights?*, sets out the links between two key planks of the government's programme of constitutional reform. It outlines the role played by the upper house in the past in promoting human rights, but it shows that the chamber has not been consistent in its approach, and has often been hampered by its role as the unelected and subordinate chamber.

The briefing goes on to consider the options for the future, as the upper house is reformed. These include the opportunity for the chamber to take on a clear human rights scrutiny function. This would have implications for the powers and membership of the new chamber.

This briefing is now available - see order form.

Issues around Scottish Independence

The issue of independence is likely to be part of the political debate in Scotland for the foreseeable future. A new briefing from the Unit sets out some of the key questions that would need to be answered if Scotland were to move to independence. These include:

- when should any referendum on the issue of independence be held and what should the question be?
- how quickly can independence be achieved once negotiations have started?
- what status would an independent Scotland have in international law? In particular, what relationship would it have with the EU?
- what relationship would an independent Scotland have with the rest of the United Kingdom and what would the day-to-day impact of independence be for businesses and individuals.

The briefing - see order form for details - is the first stage of a larger Unit project on Scottish independence. If you would be interested in helping on this project, please contact Robert Hazell.

Bulletin Board

New Publications from the Unit

Reforming the House of Lords: Lessons from Overseas by Meg Russell Jan 2000, OUP £18.99, Constitution Unit £16

<u>Citizens, Corporations, Parties and Government:</u>
<u>rights and responsibilities in the new democracy</u>
The Constitution Unit Annual Lecture by Rt Hon.
Jack Straw MP. Oct 1999 £5

Publications Received

Devolution and Concordats

by Oonagh Gay

Parliament and Constitution Centre, Research Paper 99/84 ISSN 1368-8456,

Oct 99 http://hcll.hclibrary.parliament.uk

<u>The House of Lords Bill - Lords Amendments Bill</u> 156 of 1998-99

by Oonagh Gay and Edward Wood Parliament and Constitution Centre, Research Paper 99/88 ISSN 1368-8456, Nov 99, http://hcll.hclibrary.parliament.uk

Government's Response to the fourth report from the Procedural Committee: Procedural

Consequences of Devolution

20 Oct 1999, HC814, Journal Office, House of Commons, tel: 0171 219 3318

Towards a Constitutional Bill of Rights for the United Kingdom

by Robert Blackburn Constitutional Reform Series, Pinter HB 1 85567 529 3, Sept 1999

The Executive in the Constitution: Structure,
Autonomy and Internal Control
by Terence Daintith and Alan Page
(OUP 1999) ISBN 0 19 823870X

The Scotland Act 1998 by Chris Himsworth and Colin Munro (W Green/Sweet& Maxwell, 1999) ISBN 0 414 01278X

Comparing Federal Systems (2nd Ed.) by Ronald Watts (McGill-Queens University Press, 1999) ISBN 0 88911 835

Why Trust has no Part in Modern Politics by Andrew Tucker Centre for Reform Paper No. 13 ISBN 1-90262-12-X Tel: 0171 222 5121 info@cfr.org.uk www.cfr.org.uk £8

Forthcoming Unit Events

Seminars on Intergovernmental Relations

Aimed at key UK policy makers and practitioners, this series of 6 seminars introduces concepts and techniques of intergovernmental relations by reference to overseas comparisons. See the flyer insert, or contact Richard Cornes on 020 7504 4975.

Constitutional Reform and the Top Courts

Tuesday 29th February 2000

UCL Faculty of Law and Constitution Unit **Speakers**: Andrew Le Sueur & Richard Cornes **Contact**: Constitution Unit (0207 504 4977)

Forthcoming Events

<u>Westminster Seminars: Democratic Reform in International Perspective</u>

Is there a Constitutional Path to Independence?

Monday 7th February 2000, 12.30 - 2.00pm **Speaker**: Prof Neil MacCormick FBA, MEP **Venue**: The Council Room, 29/30 Tavistock Square, London, WC1

To book: please fax details to the Constitution

Unit on 020 7504 4978.

Electing a Mayor: The American Experience

Tuesday 28th March 2000, 5.30 pm

Speaker: Prof Paul Peterson, Harvard University **Venue**: British Academy, 10 Carlton House Terrace.

Freedom of Information and Freedom of Expression Conference, 19-20 Feb 2000

Centre for Public Law, Cambridge For speakers and program, refer to www.law.cam.ac.uk/ccpr/news.html or contact Phillip Greenwood, tel: 01223 330080; fax 01223 330055; email: pg211@cus.cam.ac.uk

New Websites

Campaign for an English Parliament www.englishpm.demon.co.uk

If you would like us to mention a publication, website or forthcoming event in the next issue of the Monitor (March), please send your details by the end of February to email: constitution@ucl.ac.uk or fax: 0207 504 4978.