

Monitor 48

Constitution Unit Newsletter

June 2011

A Tale of Two Referendums

On 3 March, the people of Wales voted Yes by 64% to 36% for increased legislative powers for the Welsh Assembly, on a 35% turnout. On 5 May, the people of the UK voted No to AV by 68% to 32% per cent, on a turnout of 42%. The different outcomes are in part the result of different timetables and preparation for each event. The Welsh referendum had long been anticipated and prepared for, while the timescale for the AV referendum was absurdly short.

The debate in Wales began with the report of the Richard Commission in 2004. That recommended enhanced legislative powers for the Welsh Assembly, which were enacted in Part 3 of the Government of Wales Act 2006. The Act provided in Part 4 for a referendum on full legislative powers. In 2008 the new Welsh coalition government (Labour together with Plaid Cymru) established the All Wales Convention to prepare the ground for a possible referendum. It was charged with explaining the powers available to the Assembly, and gauging whether public opinion was ready to ask for more. Growing dissatisfaction with the complex legislative arrangements under Part 3 made the Convention's task easier. In 2009 it recommended full legislative powers, and indicated that a majority in Wales was 'obtainable'. That persuaded all parties to agree to a referendum, and in 2010 the Order to initiate the referendum was approved *nem con* by the Assembly, and by both Houses at Westminster.

The gradualist approach in Wales was shaped by Peter Hain's caution and unwillingness to upset Welsh Labour colleagues hostile to further devolution. But the plodding tortoise eventually won. Contrast that with the hapless hare racing wildly round the track of the AV referendum. The Constitution Unit has said for the past year that a referendum held in this rushed way was likely to be lost. The public know little about electoral systems, and care even less. When the Unit researched public attitudes to different voting systems for the Independent Commission on the Voting System in 2002, we found we were plumbing deep wells of ignorance. The Yes campaign had a huge mountain of ignorance and indifference to overcome. The government gave them very little time.

A second difficulty was the slender difference between first past the post and AV. Both Yes and No campaigns greatly exaggerated what a difference AV might make. It would not change turnout. It would reduce, but not eliminate tactical voting. It would probably make coalition government slightly more frequent. But hung parliaments are already becoming more likely under first past the post, with the steady increase in votes for third and minor parties.

A third difficulty arose from the decision to hold the referendum on the same day as devolved and local government elections. The hope was to increase turnout. But the political parties understandably put their grassroots campaigning effort into the elections, and not the referendum. Lessons could have been learned from Canada, where they held referendums on electoral reform at the same time as provincial elections in Ontario (2007) and British Columbia (2009). Starting from a more propitious background (previous 'wrong winners' under first past the post, and a proportional voting system proposed by a Citizens' Assembly), electoral reform was nevertheless defeated in both cases.

The key lesson from Canada is the need for widespread public education and information before any referendum. And the lesson from the UK's two recent referendums is that it is not enough to rely on the efforts of the Yes and No campaigns. In the AV referendum they engaged in mud slinging and disinformation. In Wales the No campaign decided not to seek designation (and funding) from the Electoral Commission, so there were no officially designated campaign bodies. In neither case were the public well served. The Electoral Commission needs to review the arrangements for public education and information in referendums, and consider the case for a neutral body (perhaps the Commission itself) providing such information in case the campaigning bodies fail to do so.

Watch Robert Hazell's video predicting the AV result and read his blog posts: <http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/150411> and <http://constitution-unit.com/>

Jenny Watson, chair of the Electoral Commission, is talking about the conduct of the two referendums at the Constitution Unit seminar on Wednesday 15 June at 1pm.

Parliament



Government plans for Lords reform

Following the defeat of the AV referendum, Liberal Democrat aspirations have shifted to the delivery of House of Lords reform. The coalition agreement promised to introduce a largely or wholly elected second chamber, with elections held using proportional representation. Following cross-party talks managed by Deputy Prime Minister Nick Clegg, a draft bill (first promised by the end of last year) was published, with a white paper, on 17 May. It proposes an 80% elected chamber of 300, with elections by STV and members serving 15-year non-renewable terms. Church of England bishops would continue to have 12 seats (down from 26), and the 60 appointed members would be independents, chosen by a statutory commission. The chamber's formal powers would remain unchanged, and its new membership be phased in over three general elections, from 2015.

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The Constitution Unit

These proposals are broadly in line with those made by the Labour government towards the end of its term, and also broadly in line with proposals in the Conservative manifesto. However, this does not mean that the proposals will have a smooth passage into law. The Labour side is likely to oppose the bill, probably suggesting that this matter should be subject to a referendum (which the Labour manifesto promised). There is also much opposition on the Conservative benches. Although the Conservatives were formerly pledged to a largely or wholly elected second chamber, David Cameron famously indicated whilst in opposition that this would be a 'third term issue'. The views of the current Conservative incumbents on the Commons benches are not publicly known, but when the Commons last voted on the issue in 2007 Conservatives were split 98:80 against an 80% elected chamber (and 126:57 against a wholly elected one). In the Lords, Conservative peers split 128:22 against a largely elected chamber. One of the difficulties on this issue is that MPs and peers have become accustomed to free votes on Lords reform, so whipping would now prove difficult. More importantly, Lords reform is a multi-dimensional issue, and previous votes have only been on the single principle of proportion elected. Now other dimensions come into play. MPs have variously expressed concerns about the electoral system, 15 year terms, continued presence of the bishops, and the effect on 'supremacy' of the Commons. Peers are concerned additionally about the effects on expertise, and how the transition will work. Each of these is a serious potential obstacle.

The first step will be for the draft bill to be considered by a joint committee of 26 MPs and peers, and the membership and timing of this committee will be important. Previously the cross-party talks included only party frontbenchers, and no representative of the Crossbench peers or bishops. Getting agreement amongst a wider membership will be far more difficult and despite (or perhaps because of) the white paper including various options, the proposals could well get bogged down at this stage. Tellingly, following the AV failure management of the bill has passed from Nick Clegg to his Conservative colleagues, Mark Harper MP and Lord Strathclyde. This avoids claims that this is another 'pet project' being 'imposed' on the coalition and the country. But now that they have day-to-day control, his Conservative colleagues may find it easier to let the matter drop. Even if the bill is ever formally introduced, it faces a rocky passage through the Commons, never mind the Lords. Those with long memories are drawing parallels with Harold Wilson's failed reforms in 1968.

Difficult days in the Lords

The coalition faced enormous difficulties getting the Parliamentary Voting System and Constituencies Bill through the House of Lords, with concerns expressed that conventions in the chamber were breaking down. The bill spent 17 days in committee on the floor, including many late-night sittings and one all-night sitting. There were many allegations of filibustering on the Labour side, and threats from the government to introduce a guillotine (currently unknown in the House of Lords). Labour peers were inflamed by many issues. First the linking in the bill of provisions for the AV referendum with provisions to shrink the size of the Commons, which more properly belonged in different bills. Second, and connectedly, the stringent deadline for passage of the bill created by the 5 May referendum (which also facilitated the mischief). Third, the lack of prior consultation on the bill. And fourth, Labour's relative disadvantage in the Lords as the sole party of opposition, compared to the Conservatives' ability to join forces with the Liberal Democrats when Labour was in power. Amidst many bad tempered exchanges there were five defeats on the bill, one of which saw 28 Conservatives and 14 Liberal Democrats vote against the government. Crossbench votes in the Lords have

also become increasingly key: in one defeat 75 Crossbenchers voted against the government, and just 10 in favour. David Cameron attended a meeting of the Crossbenchers, at which he invited their support for a guillotine motion, but no such motion was put, and it is doubtful whether it would have been approved. There have been 14 defeats of the coalition in the Lords so far, and there may be future trouble on the Fixed Term Parliaments Bill (on which the Lords enjoys an absolute veto under the Parliament Acts), and the NHS reforms. But there are also concerns that the government's patience should not be tested too far.

The Unit maintains an online resource of all government defeats in the House of Lords. For more information and to subscribe see: <http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats>

Lords working practices

Following these developments, there will be much interest in the proposals by the Leader's Group on Working Practices, published on 26 April. The group, chaired by Lord Goodlad, was established by Lord Strathclyde last July. Its report is wide-ranging and ambitious. Proposals include greater power for the Lord Speaker in controlling debates, establishment of a Legislative Standards Committee to comment on the 'technical and procedural compliance of Government bills with standards of best practice in bill preparation', evidence-taking on bills introduced in the Lords, routine use of Grand Committee for report stages of bills, establishment of a Post-Legislative Scrutiny Committee, and establishment of a Backbench Business Committee to mirror that in the Commons. In a separate move, Convener of the Liberal Democrat peers, Lord Alderdice, has proposed the establishment of a wider-ranging Business Committee for the Lords (*House Magazine*, 28 February). At time of writing the Leader's Group report had not yet been debated.

Concern about Lords appointments

In April the Unit published a report *House Full: Time to Get a Grip on Lords Appointments*, expressing concern about the 117 appointments to the Lords since May 2010. This was supported by a team of senior figures on a cross-party basis. The report pointed out that the size of the chamber has grown by almost 170 members since reform in 1999, and that the coalition's plans to achieve proportionality could require a further 350 members (taking membership to over 1100). The report followed widespread concerns about this issue, including a letter from the chair of the House of Lords Appointments Commission to the Prime Minister (reported in his evidence to the Lords Constitution Committee on 16 February) and an unsuccessful attempt by Lord Forsyth of Drumlean (one of the signatories to the Unit report) to amend the Parliamentary Voting System and Constituencies Bill to prevent the size of the Commons being reduced until the size of the Lords was fixed. The report called for an immediate moratorium on Lords appointments until the size of the chamber drops below 750, and reformed appointments thereafter.

Read the report: <http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/152.pdf>

Committee inquiries and reports

The House of Commons Procedure Committee issued a report on *Ministerial Statements* on 26 January. This directly followed the first debate scheduled by the Backbench Business Committee last July, which focused on continuing concerns about statements being

made publicly (i.e. to the media) before they are made to Parliament. The report proposed a new House protocol stating that important ministerial announcements must be made to parliament first, with enforcement by the Speaker and serious breaches being referred to the Committee on Standards and Privileges. The Procedure Committee has subsequently embarked on a new inquiry on one of its staple topics: parliamentary sitting hours. This promises to report before the summer recess and offer MPs a menu of options from which to choose. The Lords Constitution Committee published a short report in February clarifying the arrangements for *Money Bills*, and is now carrying out an inquiry into the process for constitutional change (see 'EU Bill' below).

EU Bill

The EU Bill has been the subject of two more reports from parliamentary committees, adding to criticism that the bill is mainly a political gesture. Both reports focus on the complex provisions for a referendum lock on any future Treaties transferring further powers to the EU. The Commons European Scrutiny Committee said it was unlikely that most of the Treaty provisions which might attract a referendum would ever be invoked; and if one was, an exception could be applied (HC 682, January 2011).

The Lords Constitution Committee (HL 121, March 2011) criticised the complex and highly technical nature of the referendum lock provisions. Clause 4 lists eight types of transfer of competence and five types of transfer of power which engage the referendum lock. In all the bill specifies over 50 policy provisions where a referendum might be required. This hinders transparency and accessibility of the law. It also goes against the general principle that referendums should only be used for fundamental constitutional change. Since no Parliament can bind its successors, the bill could be ignored by future Parliaments amending or repealing its provisions.

Executive

Localism Bill

The Localism Bill has several items of constitutional interest:

- It gives councils a power of general competence
- It provides for referendums for elected mayors in certain authorities to be specified by the government (expected to be England's 12 largest cities)
- It allows councils to return to the old committee system, and give up the cabinet system
- It gives residents the power to instigate referendums on any local issue, and power to veto excessive council tax increases.

The Police Bill will also introduce directly elected police commissioners. In a Constitution Unit seminar on 13 April Prof Tony Travers (LSE) examined the ideas behind the New Localism agenda. Many of the government's plans seek to distribute power away from Town Halls, by offering community groups control of local services, local planning or the ability to initiate local referenda. Here the New Localism agenda meets David Cameron's 'Big Society'. But there were questions about the capacity of other bodies to provide public services. Many authorities already operate through a plurality of providers, and small charities and community groups may not be able or willing to take on more. There was also concern whether a local authority can transfer risk to the service provider if a statutory service fails.

Watch Tony Travers' seminar on 'The New Localism': <http://www.ucl.ac.uk/constitution-unit/events/public-seminars-10-11/new-localism>

Schedule 7 of the Public Bodies Bill Abandoned

The coalition government headed off a potential defeat in the Lords in late February by quietly abandoning Schedule 7 to the Public Bodies Bill. The Public Bodies Bill is the statutory basis of the coalition's 'Bonfire of the Quangos' and contains a long list of organisations that will, if the Bill is passed, be scheduled for modification or abolition. Schedule 7 was controversial because it operated as a Henry VIII clause, giving ministers the power to modify or abolish around 150 organisations if they chose to do so in future. None of the Schedule 7 organisations were part of the current quango review.

Opposition to Schedule 7 had centred on the inclusion of a number of a quasi-judicial bodies (such as the Judicial Appointments Commission) within it, with the Lord Chief Justice, amongst others, having expressed particular concern at the effect this might have on judicial independence. Announcing the change to the government's position by adding his name to a motion seeking the removal of Schedule 7, Lord Taylor of Holbeach acknowledged the strong feeling in the Lords that Schedule 7 conferred too much power on ministers at the expense of Parliament.

The Draft Cabinet Manual: The Verdict

On 14 December 2010, the Cabinet Office published the draft Cabinet Manual, specifying a three month period in which all those interested could examine the draft.

The Cabinet Secretary, Sir Gus O'Donnell led a Constitution Unit seminar on the Cabinet Manual in February 2011. Responding to criticisms that it was a first step towards a written constitution, Sir Gus said the Manual was about the operation of the executive, not the whole of the UK constitution. It was a 'high level summary' rather than being comprehensive: its aim was to guide rather than direct.

Three separate select committees devoted hearings to the draft Manual: the Commons Political and Constitutional Reform Committee (PCRC), the Public Administration Committee (PASC) and the Lords Constitution Committee. All three committees recommended clarification of the purpose(s) of the Manual. There was also concern that the draft had attempted to move beyond describing existing practices and into prescribing executive action, and clarifying practices which had not yet crystallised.

Both the Lords Constitution Committee and PASC dismissed the idea that the draft was the start of a written constitution for the UK; or that there should be any endorsement of the Manual by Parliament. The aim is for Cabinet to endorse the final version of the Manual later this year.

The current draft Cabinet Manual can be read or downloaded from the Cabinet Office website: <http://www.cabinetoffice.gov.uk/news/draft-cabinet-manual-published>

A video and transcript of Sir Gus O'Donnell's seminar are available at: <http://www.ucl.ac.uk/constitution-unit/events/public-seminars-10-11/cabinet-manual>



Devolution

Scotland

The Scottish Election of 2011 has to go down as the most exciting in its short history (and probably for decades to come). The size of the SNP win was staggering. The size of its majority (it has 69, 53% of 129 seats) is not the notable part. The most staggering part is that it gained a majority at all – given that the system was designed to stop one party winning in this way. Indeed, ironically, the talk before devolution was that proportional representation was chosen by Labour to stop the SNP ever getting the majority it needed to push hard on the independence agenda. Put more positively, the system is designed to make it unlikely that one party achieves a majority unless it gains a majority of the vote. PR is supposed to produce a different kind of party system in which the largest party forms a coalition government with at least one other party (as Labour did with the Liberal Democrats in 1999 and 2003) or a minority government (as the SNP did in 2007, performing the unlikely task of fulfilling a full 4-year term with 36% of the seats). However, the Mixed Member Proportional (or 'additional member') system clearly does not make it *impossible* to gain a majority of seats without a majority of the vote because it is not entirely proportional. The explanation for the SNP's win comes from the role of first-past-the-post to elect 73 of its 129 MSPs. The SNP secured 73% (53) of those seats from 45.4% of the vote. While it received only 16, or 30%, of regional seats from 44% of the regional votes, this was not enough to offset its constituency majority.

The second surprise is how well the SNP did in the constituency vote. In the three previous elections it came behind Labour: in 1999 Labour won 53 constituency seats to the SNP's 7; in 2003 the split was 46 and 9; and, even in 2007, the split was 37 to 27, with the SNP becoming the largest party on the back of its 26 regional seats (to Labour's 9). Now, 53 SNP compares to 15 Labour. The third is that the SNP did well in areas that, in the past, were Labour strongholds. One of the most notable areas is Glasgow, where Labour won 10 of 10 constituencies in 1999 and 2003, then 9 in 2007. Nicola Sturgeon was the SNP's exception and, at the time, this seemed like a symbolic blow to Labour's dominance. In 2011, the SNP took the majority (5 of 9) of the constituency seats in Glasgow – a result that must seem like a crushing blow to Labour. The result for the Scottish Liberal Democrats is more predictable. It suffered from its association with the UK coalition government, securing only 5 seats (17, 17, 16 in 1999, 2003, 2007). The Scottish Conservatives did comparatively better, securing 15 (18, 18, 17). The small parties were, again, marginalised – the Greens secured 2, only one more than independent Margo MacDonald.

The short term future seems clear: the SNP goes on with a clear mandate for a referendum on independence and to continue its wider policy agenda (for example, by returning to its aim to set a minimum price for a unit of alcohol); Scottish Labour will elect a new leader in the Autumn, following a 'root and branch' review initiated by Iain Gray before his departure; the Liberal Democrats work to distance themselves from their electorally-toxic UK counterparts; and the Conservatives may return to a peripheral role in the Scottish Parliament. From 2007-11 they often propped up the SNP, securing small policy concessions for support on key votes (most notably on the budget). Now, they are reduced to 'keeping an eye' on the SNP.

Dr Paul Cairney, University of Aberdeen



Northern Ireland

If the election to the Scottish Parliament saw a seismic shift in the political landscape, in Northern Ireland, as so often, the tectonic plates ground more slowly.

There were small percentage shifts in first-preference votes—the Assembly election is under the single transferable vote—and seats which consolidated the position of the principal ethno-nationalist parties, the Democratic Unionist Party (38 seats) and Sinn Féin (29), at the expense of the Ulster Unionist Party (16) and the SDLP (14). But the main mover was the small, liberal Alliance Party (8), whose first preferences rose by nearly half to 7.7 per cent.

This entitled the party to a seat in the Executive, formed using the D'Hondt proportionality rule, at the expense of the UUP, in addition to the justice ministry held for another year at least under special arrangements by the party leader, David Ford. That meant a make-up of four DUP and three SF ministers, in addition to the returning first and deputy first minister couple of Peter Robinson and Martin McGuinness respectively, with two for Alliance and just one each for the SDLP and UUP—whose ministers already felt marginalised in the preceding term.

The big story of the election was an extraordinarily slow-moving and inefficient count. But perhaps the biggest story was the one really large shift since the last assembly poll—the precipitate fall-off in turnout.

At 54.5 per cent of registered electors, this showed a nine-point drop on 2007. This despite the campaign by the DUP to get out the Protestant vote to stop SF prevailing and McGuinness taking the first-minister position. A televised leaders' debate in the week of the election attracted just one in 20 registered voters. There are three reasons for this, none of which bodes well for the new Assembly term. First, the big claim for power-sharing devolution for Northern Ireland—which only Alliance unequivocally backed before the Belfast Agreement—was that it would be an antidote to paramilitary violence. Yet the move from relatively impartial if remote rule from Westminster to contested sectarian governance has seen violence perversely rise during both periods of devolution (1999-2002 and 2007-present), while falling during the direct-rule interregnum.

This is remarkably mirrored in popular confidence. Every year the Northern Ireland Life and Times Survey asks respondents if they believe 'community relations' are better than five years ago and whether they expect them to be better in five years time. This feelgood/optimism quotient has also fallen during the two periods of devolution, while rising in the interim. A consultation document from the Office of the First Minister and Deputy First Minister last autumn on 'cohesion, sharing and integration'—the product of protracted negotiations between the DUP and SF—was withdrawn after it was roundly criticised by experts and reconciliation practitioners for fatalistically accepting sectarian division.

The second problem is that, while this was widely billed in the media as a 'bread and butter' issues campaign, none of the parties with the exception of Alliance—whose manifesto ran to 150 pages!—offered much beyond populist proposals to keep down the regional rate (the only locally variable revenue source), to defer (again) water charges and to urge a reduction in corporation tax (based, like the parallel campaign in Scotland, on a misreading of the now fatally wounded 'Celtic tiger'). Defined by their communal affiliations rather than along a left-right spectrum, they offered voters no significant policy choices.

And the third, and related, problem is that devolution is making no difference—except in a negative sense. The inability of the executive to manage public services effectively—including its refusal to raise the necessary additional revenue—has seen hospital waiting lists also rise under both periods of Stormont rule, having similarly been brought down when London took over.

In education, there has been deadlock ever since the former executive collapsed in 2002 over the continuation of academic selection at 11—Protestant parties support it, Catholic parties (and most educationalists) oppose, leaving a chaotic and unregulated transition through private examinations. Meanwhile there are 80,000 empty school places because of the unwillingness of the main parties to integrate the education system, as the all-too-brief 1974 power-sharing executive decided.

Finally, the recession has hit Northern Ireland hard. The economy was identified as the priority in the early 2008 Programme for Government—which was not annually iterated, as the Belfast agreement required, despite the onset of a global capitalist crisis—but a lengthy process of review and consultation left the outgoing executive still without a policy when the election took place. Meantime, unemployment nearly doubled in the four-year term.

During the Northern Ireland 'troubles', there was endless discussion of constitutional options that might supersede direct rule. The *Irish Times* cartoonist Martyn Turner once presciently drew a person with a clipboard interviewing an Everyman figure, asking: 'Now which form of devolved government would you prefer to be unemployed under?'

Dr Robin Wilson is an Honorary Senior Research Fellow of the Constitution Unit and author of *The Northern Ireland Experience of Conflict and Agreement: A Model for Export?* (Manchester University Press, 2010).

Wales

The first months of 2011 have seen a flurry of activity that will define how devolved government in Wales works for some years to come.

The first key event was the referendum on the National Assembly's legislative powers, held on 3 March. The result was a ringing endorsement of the Assembly's role, with approval by 63.5 per cent of the vote, with 36.5 per cent voting No (about 7:4). Geographically speaking, the Yes vote was evenly spread across Wales, with only one local authority area voting No (and that by just 320 votes). The turnout was only 35 per cent, but that was still higher than some had predicted. It had been a low-profile public campaign, with no official No campaign organisation, and consequently no access to broadcast media for either campaign. The technical nature of the issue will not have helped either. This result set the scene for the new Assembly, elected on 5 May, to assume those legislative powers.

The Assembly election produced a significant swing in seats to Labour, which won 30 seats – exactly half of those in the Assembly as a whole, as it did in 2003. Despite expectations that voters would punish the Lib Dems and a significant decline in votes, they lost only 1 seat. The Conservatives positively benefitted, gaining 2 seats; Plaid Cymru lost 4, down to 11, but many of its defeats were by slim margins. Turnout was 42 per cent. Labour increased its share of the constituency vote by ten points and its share of the regional vote by 7 points. On the regional votes, both Plaid and Lib Dems lost 3 points, and the Conservatives gained 2. The overall changes in votes were therefore modest, and appear to have reflected UK-wide factors more

than specifically Welsh issues. Many familiar faces vanished from the Assembly, including the Conservatives' leader, Nick Bourne, and Plaid's deputy leader, Helen Mary Jones. Indeed, more than a third (23) of the new AMs had not been elected before. Predictions that the Lib Dems would be wiped out or reduced to a single seat, and that the Greens or UKIP might gain a foothold in the Assembly, did not materialise.

Following the election, Labour announced it intended to govern alone, without a coalition or other partner. Labour has experience of trying to govern with just 30 (it did so after the 2003 elections), and knows how easy it is to lose a majority and how tough that can be in any event. Carwyn Jones, re-elected as first minister, was keen to emphasise he would govern 'without triumphalism or tribalism'. Labour's decision has followed 'discussions' with Plaid Cymru, though apparently not with the Lib Dems, and may change in the coming months. Lord Elis-Thomas, presiding officer in the first three Assemblies, did not run for a fourth term, and was succeeded by Rosemary Butler from the Labour Party.

How the new government will proceed is an open question. Until 2010 Labour had held office in both Cardiff and London, and that greatly facilitated the practical working of government. The referendum on legislative powers was a result of Labour seeing a much more difficult situation in Westminster on the horizon. The legislative proposals in its manifesto were thin, however, and the main commitment was to 'stand up for Wales' and focus on 'delivery'. The big question will be whether they can in fact do so.

The executive has now been renamed as the 'Welsh Government'. It has seven ministers and three deputy ministers, so is slightly smaller than the outgoing coalition (which had eight ministers and four deputy ministers). While Jones refreshed his administration and promoted some former junior figures, most of the ministers were previously in Cabinet and two key ones – Leighton Andrews at Education and Jane Hutt at Finance – kept their posts. Lesley Griffiths is the new health minister. There is no formally-designated deputy first minister, and the Counsel General is to be an outside appointment and announced later.

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Courts And The Judiciary

Towards a British Bill of Rights?



The Human Rights Act (HRA) is having a bad time of it. There have been a sequence of criticisms of the Act and its operation from within the Conservative side of the coalition government and elements of the print media. In November, Prime Minister David Cameron declared himself to be 'physically ill' at the prospect that prisoners should be allowed to vote because of decisions by the European Court of Human Rights. Together with Home Secretary Theresa May, he said he was 'appalled' at the Supreme Court decision in February that convicted sex offenders should be entitled to apply to remove themselves from the Sex Offenders Register. Most recently, there has been outcry about 'super-injunctions'. These are a particularly sore point within the media, against whom these instruments are primarily directed. (The Times expressed its dissatisfaction with one such injunction by running a redacted version of the prohibited story under the heading 'Premiership footballer **** wins new gag over **** with TV star').

In their defence, judges say that they are simply following their statutory duty: Parliament has enacted the Human Rights Act and

judges are duty-bound to implement it unless and until Parliament should decide otherwise. Kenneth Clarke, under a duty as Lord Chancellor to preserve judicial independence, reportedly wrote to Theresa May indicating that she should not speak about judges in such critical terms. (*Guardian*, 10 March).

In March the government appointed an independent commission of experts to look at the possibility of a British bill of rights, reflecting a pledge in the Coalition Agreement. The commission's brief is to investigate the possibility of a Bill of Rights that would incorporate British obligations under the ECHR and ensure that these rights continue to be enshrined in UK law in a way that (according to the Ministry of Justice press release) 'properly reflects our traditions'. It will also investigate options for reform of the ECtHR ahead of the British chairmanship of the Council of Europe in November of this year.

The composition of the commission appears to reflect the diverse political views within the coalition, with a roughly half-half split between defenders and sceptics of the HRA (with almost all of those involved being QCs). This division suggests that it is likely to have difficulty agreeing recommendations on anything resembling a new bill of rights. Its terms of reference make the prospect of agreement even more remote. The ECtHR is central to the modern ECHR system. Without a significant amendment of the ECHR itself (which would require the agreement of all 47 members of the Council of Europe) it is difficult to see how a new bill of rights could satisfy the dual objectives envisaged in the commission's brief, both incorporating the ECHR and permitting British legislators and judges to effectively dissent from the judgments of the ECtHR. However, some reform of the ECtHR itself may be achievable. The Council of Europe made a (non-binding) declaration at the end of April that the ECtHR should refrain from interfering in domestic asylum and immigration decisions that are fair and respectful of human rights, except in the most exceptional circumstances. The effect of this this intervention remains to be seen.

Keep up to date on our Judicial Independence Project at: <http://www.ucl.ac.uk/constitution-unit/research/judicial-independence>

Information Policy



Freedom is back in fashion?

The Protection of Freedoms Bill, currently before Parliament, is a disparate collection of reforms including some key manifesto promises of both the Conservatives and the Liberal Democrats. It covers everything from the legal hours of marriage, jury trials, CCTV regulation and terrorist suspects' detention. Most of the coverage has focussed on the law and order and 'big brother' aspects of the bill.

But the bill also aims to reform FOI and information rights by creating a new 'right to data', increasing the power of the Information Commissioner and tidying up some of the protocols around the Office.

The FOI Act will be amended to create a new 'right to data'. This means a data-set must be released in a reusable format and available to the requester for re-use in accordance with the terms of a licence to be drawn up by the Secretary of State. It is inspired by developments elsewhere, particularly the US data.gov and the UK's own data.gov.uk, and is part of the government's commitment to increasing online proactive transparency and accountability, and encouraging re-use. This would mean the release of raw data and a more liberal interpretation of copyright. Importantly, this part of the Bill is under the Cabinet Office, rather than the Ministry of Justice.

The second change relates to the Information Commissioner's 'corporate independence', which will be enhanced by removing the need for the Justice Secretary's consent for some activities, like charging for certain services or making staff appointments. The Information Commissioner will in future be limited to a single five-year term. Despite early indications that the Information Commissioner might become a party appointment, the ICO remains under the Ministry of Justice rather than Parliament, unlike in Scotland. The view from the MOJ was that the Commissioner is already accountable to Parliament through annual reports, and can only be dismissed with a motion through both Houses. Future Commissioners will also become subject to parliamentary pre-appointment scrutiny, and the statute will now explicitly state their appointment must be 'on merit'. It will also allow the Commissioner to stay on beyond age 65.

Other initiatives are more interesting but perhaps also more problematic. The MOJ are consulting on extending FOI to more public entities under Section 5 powers, and are undertaking post-legislative scrutiny on the FOI Act later this year. The Scottish government recently put on hold moves to extend its FOI Act to private companies performing public functions, and few FOI regimes, with the notable exception of South Africa, do so. This isn't the first time this has been tried in the UK. The Brown government, after lengthy consideration, decided to expand FOI to only a very few bodies.

Both the Conservative and Liberal-Democrat manifestos had promised to extend the UK Freedom of Information Act to a range of new organisations – including some private ones – not currently covered by the Act. New bodies suggested included the Association of Chief Police Officers, the Universities and Colleges Admissions Service (UCAS), academy school trusts and the Financial Ombudsman Service (although a number of these are in the process of being covered anyway). Initial press reports hinted that FOI could also cover Network Rail and even utility companies, though the latter two may be subject to other disclosure rules.

The Protection of Freedoms Bill gives this area a tidy-up of sorts. Companies owned by more than one public entity are not covered by FOI at the moment. This loophole will be closed, and while the MOJ have not put a number on the amount of companies affected, a notable example is the Manchester Airports Group, owned by ten greater Manchester councils.

So where does this leave FOI? The most concrete transparency initiatives from this government thus far have been in the area of data reuse and proactive publication; there are no guarantees that the FOI Act will be expanded or that the MOJ's post-legislative review will initiate any changes to the law. While David Cameron's aim is to 'turn government on its head' using information technology, where FOI fits into this is less clear.

People On The Move

Michael Pownall has retired as Clerk of the Parliaments (i.e. chief clerk in the House of Lords) and has been replaced by **David Beamish**. Beamish has in turn been replaced as Clerk Assistant by **Ed Ollard**. **Lt General David Leakey** took over as Black Rod in February, replacing **Lt General Sir Freddie Viggers**. **Sir Michael Peat** is to retire as Principal Private Secretary to the Prince of Wales. The following were appointed as party political members of the Electoral Commission in October 2010: **Baroness (Angela) Browning**, former Conservative MP for Tiverton, **Lord Kennedy**, former Director of Finance for the Labour party, **Prof David Howarth**, former Lib Dem MP for Cambridge, **George Reid**, former SNP MSP and Presiding Officer of the Scottish Parliament.

Constitution Unit News

Coalition Government: First Year report card

The Unit will soon publish an interim report from our study of coalition government, based on the 60 interviews we have conducted so far in Whitehall and in Parliament. In Whitehall officials report that both parties have displayed a lot of emotional intelligence and worked hard to develop effective relationships, in a welcome contrast from the Blair/Brown years. Cabinet government has been revived, with Cabinet committees meeting a lot more frequently. Coalition issues are resolved before going to Cabinet committee in half a dozen informal forums. The weekly meetings between the PM and Deputy PM are the most important, followed by the Quad (PM, DPM, Osborne and Alexander), and frequent meetings between Letwin and Alexander.

In Parliament the coalition has behaved no differently from other majority governments, taking Parliament for granted. This was particularly in evidence on the AV referendum bill and the health service reforms. The coalition may have less flexibility to accommodate Parliament because its legislative proposals are already a carefully constructed coalition compromise which they dare not unpick. But the parliamentary parties are beginning to get more involved, led by the Liberal Democrats' parliamentary party committees.

The Lib Dems have had a lot of influence on coalition policy, but struggle to demonstrate it. This is exacerbated by their choice to go for breadth of ministerial representation across Whitehall, rather than focusing on a few departments. It is harder to demonstrate lots of small wins, mostly invisible to the electorate; and difficult for the Lib Dems to say how much worse a solely Conservative government might have been. The Lib Dems hope to reassert their influence in a mid-term review of the coalition agreement which is due to start in summer 2011 and concludes in September 2012. That will be a test of party democracy in both parties. It will also test the coalition, because there will be far more scope over 15 months than in the original five days of coalition negotiations for parliamentarians and party members to express their discontents. For that reason the mid-term review may be softened into something more incremental and less challenging.

Keep up to date with the comings and goings of the coalition with our weekly updates: <http://www.ucl.ac.uk/constitution-unit/research/coalition-government>

Parliament's Impact on Legislation

This new two-year project, funded by the Nuffield Foundation, is now getting underway. It will look in detail at the passage of around 10 bills through both chambers of Parliament, analysing the origins and eventual outcomes of all amendments proposed. The project will ask to what extent Parliament has influence on the outcome of legislation, but also who in particular within Parliament wields that influence, and how different groups work together. For example, are government backbench MPs more likely to be listened to than opposition parties? Or to what extent is there coordination between party groups in the Commons and the Lords? A pilot study on the Identity Cards Bill (paper available on the Unit website) found that many government amendments originated with non-government actors, and showed many interesting patterns not seen when this topic was last studied in detail more than 35 years ago.

Five bills will be taken from the 2005-10 Parliament and a further five from the current parliament, allowing comparison of processes under single party majority and coalition government. This desk research will

be followed up with interviews. A team of five researchers will work on the project: it is led by Meg Russell, with Meghan Benton as Research Associate, and two new Research Assistants, Daniel Gover (full-time) and Kristina Wollter (part-time) will be responsible for much of the desk research. Additional support will be provided by Simon Kaye.

The Policy Impact of House of Commons Select Committees

This Nuffield-funded project, conducted in collaboration with the House of Commons Committee Office, is now complete. It represents the largest study on select committees in 30 years, analysing almost 700 reports and over 5000 recommendations and conclusions within them. It traced the outcome of 1800 recommendations aimed at central government to assess the extent to which these were accepted and implemented, and this quantitative analysis was complemented by over 50 interviews.

The project concluded that select committees are more influential than might normally be assumed, and that many of their recommendations go on to be put into effect. However a strict quantitative analysis is difficult, and likely to be misleading. There are many ways in which select committees influence the policy process, beyond the recommendations in their reports. Perhaps the most important is 'anticipated reactions', whereby ministers and officials change their behaviour to avoid potential criticism by a committee. The project report will be launched in June in the House of Commons and will be available on our website shortly.

House Full: Time to get a grip on Lords appointments

In April the Unit published a briefing by Meg Russell, supported by 18 senior figures, calling for a moratorium on appointments to the House of Lords and changes to the process for any future appointments (see Parliament section for further details). This publication attracted significant media attention, and a Downing Street response.

A copy of the report and a video of Meg Russell discussing it with Tony Wright of UCL Department of Political Science are available at: <http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/190411>

Constitution Unit Staff Update

Daniel Gover and Kristina Wollter join the Unit as Research Assistants on the project on Parliament's Impact on Legislation. Daniel was previously working as a researcher for Stephen Timms MP, and has an undergraduate degree in Politics from Nottingham and a Masters from Cambridge. Kristina has previously been a much-valued intern at the Unit, and also at the Hansard Society, and has a Law degree from Lund University in Sweden.

Interns

As always, the Unit is grateful for the hard work and diligence of our interns: Leo Ratledge, Patrick Graham, Alex Jacobson, Andreas Kutz and Babak Moussavi. Special mention and congratulations to Ruchi Parekh, who is off to Harvard!

Bulletin Board Constitution Unit Newsletter

FOI Live 2011, Tuesday 23 June



FOI Live is the Constitution Unit's annual conference on Information Rights. It is a unique opportunity to meet, share ideas and network with academics, specialists and practitioners. This year's conference will focus on the experience of the requester and the debate around open data. Representatives from the Ministry of Justice and Information will also round up the developments in Freedom of Information over the past year. Places will be limited so book early!

Programme:

1.00-2.00

Speeches by ICO and MOJ representative
Presentations covering developments in FOI and information rights. Speakers: Graham Smith, ICO and others tbc

2.00-3.00

Requesters Q&A
Requesters from the media and NGOs take your questions. Speakers: Maurice Frankel, Campaign for FOI and others tbc

3.30-4.30

Discussion: Open Data, FOI and the future
Representatives of the Open Data community, the Cabinet Office and MOJ. Speakers: Chris Taggart, Openly Local and others tbc

More information about FOI Live 2011 and how to register is available at:

<http://www.ucl.ac.uk/constitution-unit/events/foilive-2011>

Missed an event?

We now film all the presentations from our events and these can be viewed on our website. You can also subscribe to our seminar series on iTunes U for automatic updates (in audio or video). All the information and links can be found at: www.ucl.ac.uk/constitution-unit/events

Forthcoming Events

Information about all our events is available at <http://www.ucl.ac.uk/constitution-unit/events>

Public Seminars

- **Wednesday 15 June, 1pm.** Jenny Watson, Chair of the Electoral Commission, will talk about issues relating to the AV referendum
Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)
- **Wednesday 6 July, 6pm.** Prof Justin Fisher (Brunel University) discusses reforming the current system of party funding
Venue: Council Room, The Constitution Unit (Public Seminar Series, free and open to all)

These public seminars are funded by her family in memory of Barbara Farbey, late of UCL, who greatly enjoyed them and who died in 2009.

FOI Seminar: Open Local Government, Monday 23 May

Chris Taggart developed OpenlyLocal and is a member of the Open Knowledge Foundation's Working Group on Open Government Data. Openly Local puts many different types of information about the workings of local councils in one place allowing for mash-ups or comparative analysis.

Booking information is available at: <http://www.ucl.ac.uk/constitution-unit/events/foi-10-11/open-local-government>

Judicial Independence: Notes from the Canadian Supreme Court Thursday 7 July

Justice Rosalie Abella will speak on her experience of independence and accountability as a judge on the Supreme Court of Canada. This event is part of our project on The Politics of Judicial Independence and should prove an interesting follow-up to our recent lecture by Lord Phillips on judicial independence from the perspective of the UK Supreme Court.

More information about the event and the project is available at: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/canada>

Constitution Unit Publications

- Robert Hazell and Ben Yong, *'Putting Goats amongst the Wolves: Appointing Ministers from outside Parliament'*, Constitution Unit Report, 28 February 2011.
<http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/151-cover.pdf>
- Meg Russell, *'House Full: Time to Get a Grip on Lords Appointments'*, Constitution Unit Report, 20 April 2011
<http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/152.pdf>
- Meg Russell and Meghan Benton, *'The policy impact of parliamentary oversight committees: visible and less visible factors'* paper to Political Studies Association conference, London, 19-21 April 2011.
- Ben Worthy and Gabrielle Bourke, *'Open House: The Impact of Freedom of Information on Westminster'* paper to Political Studies Association conference, London, 19-21 April 2011.

Unit in the News

Salmond warned it might take two referendums - The Times (10 May)
<http://www.thetimes.co.uk/tto/news/uk/scotland/article3013779.ece>

BBC Politics Show: impact of the Lib Dems on coalition government (2 May)
<http://www.bbc.co.uk/programmes/b007tj15>

In praise of... a Lords moratorium - Guardian (21 April)
<http://www.guardian.co.uk/commentisfree/2011/apr/21/lordreform-lords>

Downing Street attacked over Lords move - Financial Times (20 April)
<http://www.ft.com/cms/s/0/0b45555a-6b85-11e0-a53e-00144feab49a.html#axzz1MhQvDN83>

Radio 4 Beyond Westminster: Delivering Devolution (15 April)
<http://www.bbc.co.uk/iplayer/console/b010dd45>



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