

# **Conservatives' Constitutional Agenda**

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## **Summary of Key Points**

The Conservative party have a big agenda for constitutional reform in the next Parliament, including big commitments of their own, and unfinished business from Labour's constitutional reforms.

The big Conservative commitments are to reduce the size of Parliament (Commons and Lords); introduce a British bill of rights; legislate to require referendums for future EU Treaties, and reaffirm the supremacy of Parliament in a Sovereignty Bill; introduce English votes on English laws; and hold referendums on elected mayors in all major cities.

Unfinished business from Labour includes strengthening the autonomy of the House of Commons; further reform of the House of Lords; and devolution, where all three assemblies are demanding further powers.

### **Ministers and the Executive**

How serious Cameron is about his constitutional reforms will be tested by early decisions on which ministers he puts in charge of what; whether he reduces the size of his government by 10%, as well as the Commons; and strengthens the Ministerial Code.

Key ministerial posts will be the Cabinet Office minister put in charge of Civil Service reforms; the Leader of the House, in charge of parliamentary reform; the Justice Secretary, on the British bill of rights. Cameron will also need to decide where to place the policy lead on Lords reform; the referendum requirement for EU Treaties, and the Sovereignty Bill; English votes on English laws; and whether to have a Cabinet Committee on constitutional issues.

The Ministerial Code could be strengthened by upholding the primacy of Cabinet and its committees, tightening the rules on collective decision making, and being re-issued as part of a new Cabinet Manual.

The Civil Service will resist fixed term contracts for senior civil servants, and putting more non executive members onto Whitehall departmental boards. New Zealand is a better model than Australia for fixed term contracts. More work is needed on the purpose and functions of Whitehall boards before any more non-execs are recruited.

### **Devolution**

Immediate decisions are required on whether to continue with three territorial Secretaries of State; and to hold the referendum on primary powers for Wales in 2010. Early decisions will be needed on greater tax powers for Scotland (Calman) and devolution finance generally (Barnett), and on transfer of policing and justice to Northern Ireland. English votes on English laws can be introduced more slowly.

### **Parliament**

The immediate decision is whether to shrink the House of Commons by 10% in time for the next election in 2014/15. To achieve that, a White Paper will be needed by July, and a

bill in November 2010. Immediate decisions will also be needed on establishing a Business Committee and electing Select Committee chairs, to implement the Wright reforms.

In the Lords, the immediate decision is how many Conservative peers to appoint. To catch up with Labour, Cameron would be justified in appointing 30-40 new Conservative peers; but if he follows the same policy of restraint as Labour, he could do so gradually, narrowing the gap by 10 peers a year.

### **British bill of rights, and the judges**

The British bill of rights can be developed more slowly, with a Green Paper and White Paper in 2011, public consultation led by an independent commission in 2012, and draft bill in 2013. The process is as important as the content, to build up public ownership and legitimacy, and overcome resistance from lawyers and judges, who are strongly attached to the Human Rights Act.

The judges may resist repeal of the Human Rights Act. They will defend the budgets of Legal Aid and the Courts Service against public spending cuts; and resist attempts to restrict judicial review or their interpretation of EU law and the ECHR, and any threat to the Judicial Appointments Commission.

### **Europe**

The EU Treaties (referendums) bill and the British bill of rights both raise the issue of entrenchment. The courts are likely to hold that the referendum requirement is non-justiciable. But the British bill of rights will be deemed to apply to all other laws (like the Human Rights Act), unless expressly disapplied.

### **Transparency**

Publishing every item of government expenditure over £25k is laborious but feasible. It will do little to help reduce public expenditure, and nothing for public trust, since the cases publicised will be negative examples.

### **Review of constitutional watchdogs**

Constitutional watchdogs may be reviewed as part of a wider review of quangos. The Conservatives want to abolish the Standards Board; streamline the Electoral Commission; but strengthen the Information Commissioner. This raises wider questions about the design of other constitutional watchdogs, on which Cabinet Office should give a lead.

### **Monarchy**

Early preparation is required for the Queen's diamond jubilee in 2012, and contingency planning for a possible regency (if the Queen should become incapable), as well as for the accession of King Charles III.

## **More referendums**

Conservative plans involve greater use of referendums: for any future EU Treaties, and to initiate parliamentary debates and table laws; for elected mayors in ten major cities; and to empower citizens to initiate referendums on local issues, and veto Council tax rises. There may also be a referendum in 2010 on primary legislative powers for the Welsh Assembly.



## Summary of Key Decisions and Timetable

This table was to have been in the concluding chapter of the report. It is placed at the front to bring home the range of different ministers and departments involved, and the number of early decisions required. The table is set out by subject matter, to correspond with the order of chapters in the report.

Constitutional reform item	Lead Department	Action required	Date
<b>Ministers and the Executive</b>			
Decide to establish Cabinet Committee on Constitution	No 10 Cabinet Office	Executive action	May 2010
Reduce the number of Ministers in government	No 10 Cabinet Office	Executive action	May 2010
Limit the number of Special advisers	No 10 Cabinet Office	Executive action	May 2010
Strengthen Collective Cabinet government	Cabinet Office	Revisions to Ministerial Code and Cabinet Manual	May 2010
Approve Ministerial Code and Cabinet Manual	Leader of the House	Parliamentary resolution	May 2010
Protect the independence of the Civil Service	Cabinet Office	Implement Part 1 of Const Ref and Governance Bill	2010
Fixed term contracts for top two tiers of Civil Service	Cabinet Office	Negotiations with CS unions, and CS Commissioners	2010-11
Strengthen Whall departmental boards by more non executives	Cabinet Office All govt depts	Executive action Headhunters to find suitable candidates	2010-12
One or three territorial secretaries of state	No 10	Executive action	May 2010
<b>Devolution</b>			
Welsh referendum on primary legislative powers	Wales Office	Welsh Secretary lays Order Votes in HC, HL Referendum	June July Nov 2010

Replacing Barnett Formula, fiscal autonomy for Scotland	HM Treasury	Cabinet Committee JMC Devolution White Paper	2010 – 2017 for full phasing in
English votes on English laws	Leader of the House	Refer to Procedure Committee	For report 2011
SNP referendum bill on Scottish Independence	Scotland Office	Ignore	2010
Abolition of Regional Assemblies	Communities and Local Government	Already done by current government	
Slimming down Regional Development Agencies (RDAs)	DBIS	As part of public expenditure cuts	2010
<b>Parliament</b>			
Reduce the size the House of Commons by 10%	MoJ	Cabinet Committee White Paper Legislation	May-June July Nov 2010
Strengthen Select Committees	Leader of House	Implement Wright recs on election of chairs, members. Amend Standing Orders	May-June 2010
Reduce government control of the parliamentary timetable	Leader of House	Establish Business Committee on Wright model	May-June 2010
Approve Ministerial Code, war making power	Cabinet Office Leader of House MoD	Parliamentary resolution	May 2010 July 2010
Rebalance the number of Conservative peers	No 10	Executive action	2010-2015
Reduce House of Lords to 250-300 members, once elected	MoJ	Cross party talks Cabinet committee White Paper	Second term? 2015-2020
Reducing the cost of the House of Commons	Leader of House	Announce as part of government public spending cuts	2010-11

<b>European Union</b>			
United Kingdom Referendum Bill on EU powers	FCO	Cabinet Committee White Paper Legislation	2011? No urgency, save for political reasons
United Kingdom Sovereignty Bill	FCO/MoJ	As above	As above
<b>British bill of rights</b>			
Repeal the Human Rights Act and replace it with a British Bill of Rights	MoJ	Cabinet Committee GP and WP Public consultation Draft bill Legislation Implement	2010 2011 2012 2013 2014 2015, anniversary of Magna Carta
<b>Elections and political parties</b>			
Individual voter registration	MoJ	Decide on speeding up timetable	2010
Review structure and process of Parliamentary Boundary Commissions	MoJ	White Paper on reducing size of House of Commons	July 2010
<b>Judiciary</b>			
Cut legal aid and Court Service budgets?	MoJ Treasury	Consult judiciary	2010-11
<b>FOI and Privacy</b>			
Publish all items of government spending over £25k	Treasury NAO?	Pull together all financial information. Publish in accessible way	2011-13
Publish 20 government datasets	Cabinet Office	Publish on single website, data.gov.uk	2010-11
Scrap national ID register and ContactPoint database	Home Office DH	Cancel contracts Pay penalties? Legislation required?	2010

<b>Constitutional Watchdogs</b>			
Review CWs as part of review of Quangos	Cabinet Office	Review purpose and expenditure of each quango every 3 years	2010-13
Strengthen independence of Information Commissioner	MoJ	Make Info Commissioner appointed by Parliament. Legislation	When a suitable legislative vehicle arises
Strengthen design of other CWs	Cabinet Office	Build up centre of expertise	2011-12
Create Office for Budgetary Responsibility	Treasury	Establish initially on non statutory basis	May-June 2010
Abolish Standards Board for England	DCLG	Include in wider local govt legislation	2011-12
<b>Monarchy</b>			
Prepare for Queens Diamond Jubilee	DCMS	Appoint lead minister and team of officials	2010-12
Prepare for possible regency	MoJ	Contingency planning	
Prepare for demise of Crown	MoJ	Plan for – Accession – Coronation – New Civil List	
Consider ending male primogeniture and ban on Catholics	MoJ	Consult 15 Commonwealth governments where Queen is head of state	

# 1 Introduction

A programme of constitutional reform to strengthen our parliamentary democracy and our national identity provides an inspiring mission for our party

(David Cameron, 'Family, Community, Country' speech to Carlton Club, 27 July 2005)

The Conservative party is not generally associated with constitutional reform. But they have introduced constitutional changes in the past, big and small: the introduction of life peerages in 1958, entry into the European Community in 1973, the departmental select committee system in 1979. They have a big agenda for further reforms in the coming Parliament, and they will inherit substantial items of unfinished business from Labour's 1997 constitutional reform programme. Their own agenda includes legislation to require referendums for any future EU Treaties, a Sovereignty Bill to re-affirm the supremacy of the UK Parliament, and a British bill of rights. The unfinished business includes strengthening Parliament; further reform of the House of Lords; and devolution, where all three assemblies are demanding more powers.

The purpose of this briefing is first to set out the Conservative agenda for constitutional reform, by drawing on reports of Conservative party task forces and other policy documents, and speeches of the party leader and leading spokesmen, to identify the main policy commitments. At the start of each chapter we summarise the main commitments in that policy area. We then work through how those policy commitments can best be implemented, in what order and what timescale. We approach the task in the same spirit as the Unit's previous policy briefings on the Blair and Brown agenda (Hazell 2003, 2007). We do not question the desirability of the policy commitments, but we offer our best advice on how they can be brought into effect, and the obstacles which need to be overcome.

The briefing opens with an explanation of the Conservative approach and philosophy towards constitutional reform, drawing mainly on speeches by David Cameron and his constitutional spokesmen. It then goes through the major constitutional issues, item by item, identifying Conservative policy on each issue, and issues which they will need to address. The briefing identifies the lead ministers and departments for each issue, to show where the policy lead will lie; and at the end it sketches out possible timetables for the main reforms which the Conservatives wish to implement.



## 2 Conservative Philosophy underlying their constitutional agenda

The starting point of the Conservatives' constitutional reform agenda is the electorate's political disengagement. The main principles which emerge from speeches, Democracy Taskforce and other papers are intended to be solutions to this problem. There are four key principles:

1. Decentralisation and the redistribution of power to the people. People feel disenchanted with politics and politicians because of a 'us and them' attitude and a sense of powerlessness over political issues. Decentralising power will help people to feel more capable of influencing politics, and more motivated to do so (Cameron 2009a)
2. Distrust of big government intrinsic to Conservative ideology is a strong distrust of big government and bureaucracy and the impact this has on the freedom of the individual
3. Accountability. The uncurbed power of the executive is what makes people feel powerless. Increasing its accountability should help to increase public trust, and people's propensity to become politically involved (Cameron 2009a)
4. Transparency of the governing elite is a crucial means by which politicians can be held to account. It will make politics appear more accessible to people, and make people feel more empowered to get involved (Cameron 2009a, 2009d)

### 2.1 Decentralisation and the redistribution of power to the people

In a speech given by Cameron in May 2009, the party leader makes clear the link between the electorate's sense of powerlessness and the need to decentralise and redistribute power:

...when it comes to the things we ask from politics, government and the state - there is a sense of power and control draining away; having to take what you're given, with someone else pulling the strings.

...So we rage at our political system because we feel it is self-serving, not serving us...Pounded by forces outside their control, people feel increasingly powerless.....deprived of opportunities to shape the world around them, and at the mercy of powerful elites that preside over them.

When people feel powerless, they also feel anxious and insecure...[there has been a] collapse in personal responsibility that inevitably follows the leeching of power and control away from the individual and the community into the hands of the elite.

...there is only one way out of this national crisis we face. We need a massive, sweeping, radical redistribution of power.

Every decision government makes, it should ask itself a series of simple questions: Does this give power to people, or take it away? Could we let individuals, neighbourhoods and communities take control? How far can we push power down? (Cameron 2009a)

## **2.2 Distrust of big government**

Belief in decentralisation follows from the traditional Conservative distrust of big government and a large bureaucracy:

The British state has developed over centuries into a powerful entity charged with delivering important goals. To protect its citizens from internal and external threat. To redistribute wealth from the richest to the poorest. To ensure public services - education, healthcare, welfare - are there for all who need them.

... But the more the state does, the greater the risk that it gradually becomes master over the citizens it's meant to serve. That's why we have traditionally created checks to keep the right balance of power.

Checks to stop the state exerting too much power over us, in other words, protecting personal freedom. And checks to help us exert power over the state, in other words, ensuring political accountability. But the last twelve years of Labour Government have diminished personal freedom and diluted political accountability...

In the Freedom of Information Act, data protection laws, Scottish and Welsh devolution, and even the attempt to invest citizens with fundamental human rights we can see concrete evidence of good intent. But this liberal strand in Labour has been crushed by the overwhelming dominance of the political authoritarians.

This authoritarian strand of the party was guided by two things: a political philosophy and a style of government. Their philosophy has at its heart a belief that the state is the answer to most problems. Conservatives start with an instinctive desire to give people more power and control over their lives. But we're not naïve. We know the state cannot let go completely. The right power balance is something that must be constantly negotiated ...So a Conservative government would constantly ask two essential questions: Does this action enhance personal freedom? And does it advance political accountability?

And at the heart of our programme for government will be our intention to change fundamentally the balance of power between the citizen and the state so that ultimately it's people in control of their government, not the other way round.

...This is progressive Conservatism in action, a traditional suspicion of state power combined with a clear grasp of the modern world producing the right approach, and the right plan of action to increase personal freedom and political accountability, restore trust, and help bring about the new politics we need so badly (Cameron, 2009b).

Conservative philosophy also fears the propensity for big government to impinge on the freedom of the individual, as Dominic Grieve explained in a March 2009 speech:

But it seems to me that the zealous regulation of conduct, the imposition of state-defined orthodoxy on public and private conscience and the overburdening of law and regulation, have the consequence of undermining that confidence and are deterring participation and engagement. What we need, so as not to oscillate between an over regulated society on the one hand and anarchy on the other is, pragmatism; others might call it common sense.

Increasingly, common sense is not being used to moderate societal norms and the government has become the arbiter of what is acceptable and what is not. This is not a Conservative understanding of the role of government. There is a profound difference in attitude in political terms: on the one hand the Conservative approach of having a free society where people learn to influence each other's behaviours by intermingling and by reasoned argument supported, as a last resort, by the requirements of the rule of law; and on the other hand the Labour Party's approach under which the government through legislation determines a template of how we should behave (Grieve, 2009).

### **2.3 Accountability**

The main means for redistributing power is to strengthen Parliament, and increase transparency.

Again, the driving principle of reform should be the redistribution of power - from the powerful to the powerless. That means boosting Parliament's power to hold the government of the day to account. The House of Commons' historic functions were to vote money for governments to spend, and to scrutinise laws. It now barely bothers with the first, and does the second extremely badly.

...If we're serious about redistributing power from the powerful to the powerless, it's time to strengthen Parliament so it can properly hold the government to account on behalf of voters... (Cameron 2009a).

Parliament needs to change its style as well as substance:

Parliament has not adapted quickly enough to a radically changing democratic environment in which the media have supplanted much of its role, deference to the institution has sharply diminished, the public's taste for the traditional style of parliamentary discourse has waned and yet in which, with the sharp increase in legislation and executive intrusiveness, parliamentary scrutiny has never been needed more. the House of Commons is falling far short: both of rising public expectations and of any satisfactory performance in its core functions of scrutinising both legislation and the overall performance of the executive. (Conservative Party Democracy Taskforce Report: 2007).

## 2.4 Transparency

In the same May 2009 speech Cameron spoke about the need for ‘near total’ transparency and the positive impact this would have on the public’s perception of politics:

If we want people to have faith and get involved, we need to defeat this impression by opening politics up - making everything transparent, accessible - and human.

And the starting point for reform should be a near-total transparency of the political and governing elite, so people can see what is being done in their name.

...we will extend this principle of transparency to every nook and cranny of politics and public life because it is one of the quickest and easiest ways to transfer power to the powerless and prevent waste, exploitation and abuse.

...But transparency isn't just about cleaning up politics, it's also about opening up politics. Right now a tiny percentage of the population craft legislation that will apply to one hundred percent of the population. This locks out countless people across the country whose expertise could help. So why not invite them in on the process? ...In time, this will have a transformative effect on our politics, taking power from the party elites and the old boy networks and giving it to the people. (Cameron 2009b)

We will publish every item of government spending over £25,000.

It will all be there for an army of armchair auditors to go through, line by line, pound by pound, to hold wasteful government to account (Cameron 2009a).

## 2.5 From Principles to Policies

Next we link these principles to the policies the Conservatives have put forward in their constitutional agenda. What follows is a selection of the main policy commitments to illustrate how they fulfil these principles. Some policies appear under more than one heading.

### Distrust of Big Government

- Reduce the size of central government, in the executive and in Parliament
- Reduce government spending
- Reduce the number of Quangos
- Reduce the amount of legislation

### Decentralise power

- Increase the powers and functions of local government
- Abolish regional tiers of government
- Hold simultaneous referendums in 12 cities on directly elected mayors
- Directly elected police commissioners

- Respect for the devolved governments, and more harmonious relations with them

#### Strengthen accountability of Whitehall

- Strengthen government department boards, with majority of non executive members drawn from private sector
- Fixed term contracts for the top two tiers of the Civil Service
- Endorse the Ministerial Code by vote in parliament
- Limit the number of Special Advisers by statutory cap
- Publish the salaries of the 35,000 most senior civil servants
- Publish the expenses of all public servants earning more than £150,000

#### Strengthen Parliament

- Abolish the practice of automatic timetabling for government bills
- Strengthen Select Committees, by enabling backbenchers to elect their chairs, and giving them time to launch their reports on the floor of the House
- Give the Commons more control of its agenda and timetable
- Parliamentary control of war making power and Treaties
- More effective scrutiny of public finances
- Make the House of Lords predominantly elected

#### Redistribute power to the people

- Require a referendum on any subsequent EU treaties
- Citizens should have power to initiate debates and table laws
- Power to instigate referendums on local issues, and veto high council tax rises
- Power to directly elect police commissioners

#### Greater transparency

- Publish government spending over £25k, to enable armchair auditors to go through it
- Publish all government contracts over £10k
- Local authorities to publish on line details of all spending over £500
- Identify and publish on line the most useful government information in 20 different subject areas (eg crime mapping, public sector job vacancies)

#### Greater economy in Parliament

- Reduce the size of the House of Commons by 10 per cent
- Reduce the size of the House of Lords to between 250 and 300 once elected
- Abolish Regional Select Committees



### 3 Ministers and the Executive

**Key commitments are:**

- Limit the number of Special Advisers
- Strengthen the Ministerial Code
- Ensure more decisions are made by Cabinet as a whole
- Protect independence of the Civil Service
- Fixed term contracts for civil servants, more non-execs on Whitehall boards.

**Other decisions and contingencies to prepare for:**

- Number of Ministers in government
- minority or coalition government.

#### 3.1 Limit number of Special Advisers

In October 2009 there were 74 Special Advisers serving the Brown government: 25 in No 10 and 49 in Departments. It has been at around this level since 1997, when Blair became Prime Minister and appointed twice the number of Special Advisers there had been under John Major. This led to criticism from the Committee on Standards in Public Life (CSPL 2000), which recommended capping their number in statute. The Conservative Democracy Task Force has recommended halving their number (CDTF 2007a).

The new government could announce that it is halving the number of Special Advisers, and go back to the same number as there were under John Major. This would mean reducing the No 10 Policy Unit from 25 to 8 people, and allowing most Cabinet Ministers one rather than two Special Advisers. This could be done in three possible ways, depending on how much the Prime Minister wants to bind himself or his successors:

- Simply making fewer appointments, and announcing the reduced figure
- Introducing a cap on the number of Special Advisers by including a limit in the Ministerial Code and the Code of Conduct for Special Advisers
- Introducing a cap in legislation.

The third means would need to await a suitable legislative vehicle. If the current civil service legislation is not passed before the election, and is re-introduced, that could provide the means.

#### 3.2 Strengthening the Ministerial Code

There are two strands to this: strengthening the content, and strengthening the way the Code is enforced. In terms of content, the Conservative Democracy Task Force suggested that the new Code should define the main responsibilities of the Prime Minister and Secretaries of State (CDTF 2007a), and re-assert that no major decisions should be taken without full consultation and joint decision in Cabinet or Cabinet

Committee (this is currently in para 2.6 of the Ministerial Code). Some comment has suggested that David Cameron will be no keener than Tony Blair or Gordon Brown to allow discussion outside their inner circle (Forsyth, 2009). The Cabinet Office are currently consolidating the guidance for Ministers which is scattered across a dozen different documents into a more comprehensive and effective Cabinet Manual. The new government will want to take ownership of this, with a suitable foreword by the Prime Minister. The Cabinet Manual can be revised and updated by subsequent administrations; but the aim from the start should be to develop a wider sense of ownership beyond the current administration for the ethos and rules of behaviour embodied in the Manual.

One way to achieve this would be for the Code to be approved by parliamentary resolution rather than simply promulgated by the Prime Minister. In terms of enforcement, there is now an Independent Adviser on Minister's Interests (currently Sir Philip Mawer). He investigates allegations of breaches of the Ministerial Code when asked to do so by the Prime Minister. The enforcement machinery could be strengthened by giving the Independent Adviser discretion to investigate complaints of his own motion; and the right to publish his reports (or report direct to Parliament) without authorisation from the Prime Minister.

### **3.3.1 Protect independence of the Civil Service**

The long awaited plans for a Civil Service Act are now contained in the Constitutional Reform and Governance Bill, introduced in July 2009. It provides for:

- establishment of the Civil Service Commissioners on a statutory basis, with oversight functions for appointments to the Civil Service, and hearing complaints that the Civil Service code has been breached;
- appointments to the Civil Service to be made on merit on the basis of fair and open competition;
- A Code of Conduct which requires civil servants to carry out their duties in accordance with the core Civil Service values of integrity, honesty, objectivity and impartiality. There is also a requirement for a separate Code of Conduct for special advisers.

Which parts of the bill are passed will depend on negotiations in the wash up once the election is called. If these parts are not passed before the election, the new government may want to re-introduce the provisions in Part 1 of the bill on the Civil Service.

### **3.3.2 Fixed term contracts for senior civil servants**

The Civil Service Act will be welcomed by Whitehall and the civil service unions, although it makes little difference in practice to the powers and functions of the Civil Service Commissioners. Less welcome will be the Conservative proposals to introduce fixed term contracts for the top two tiers in the Civil Service, and to strengthen the boards of Whitehall departments by introducing a majority of non executive members from the private sector (Maude, 2009a).

Fixed term contracts have been used in Australia and New Zealand since the 1980s for departmental heads, to improve their performance and get them to focus more on results. In Australia heads of department are on maximum fixed term contracts of five years. The Prime Minister can terminate an appointment on the recommendation of the Cabinet

Secretary. When a fixed term expires there is no obligation to find another position for the head of department, who is retired: unless she/he finds another post, which most do. In 1996, after the election of the Howard government, the contracts of six Departmental Secretaries were terminated. At the time of the initial transition, the government offered a pay loading of 20% to encourage existing Secretaries to convert their permanent appointments to fixed term.

A study of the impact of fixed term contracts on the Australian Civil Service found that:

- Ministers wanted ‘their’ person for the job, and were mistrustful of anyone they inherited
- A new emphasis on short term objectives, to the detriment of the longer view
- Greater vulnerability meant the department was more likely to offer ministers what they wanted to hear
- Lack of tenure at the top was discouraging future appointees, with a loss of talent to the private sector (Weller and Wanna, 1997).

One avenue of protection suggested by Australian commentators was greater transparency of relationships between ministers and civil servants, as in New Zealand. There all chief executives are employed on short term, renewable contracts for a maximum five years, and can be removed at any time. But the advantages of greater responsiveness and accountability delivered by fixed term contracts have been buttressed by arrangements which have protected civil servants from politicisation:

- The State Services Commissioner controls the process of senior appointments, consulting ministers on their requirements
- Rejection of the State Services Commissioner’s advice must be made public
- The State Services Commissioner is the employer, reviews and reports on the annual performance of chief executives, and has power to seek their removal
- A chief executive can be removed before the end of his contract only for ‘just cause’
- Performance agreements between ministers and chief executives specify outputs in key target areas to help achieve the government’s desired outcomes
- This helps to institutionalise the fundamentals, that the role of chief executives is to carry out the instructions of elected ministers, and they are to be formally judged on their professional performance in implementing the minister’s and government’s programme (Mulgan, 1998).

On balance the New Zealand model is to be preferred, and the government should make inquiries to determine how readily it might transfer to the UK, and with what improvements (the performance agreements are cumbersome, and struggle with the usual difficulty of separating responsibility for outputs and outcomes).

### **3.3.3 Strengthening Whitehall departmental boards**

Similarly the government should pause before making radical changes to departmental boards. The Conservative plans are for Whitehall boards to be chaired by Cabinet ministers; with a much stronger role for non-executives, who would be involved in the recruitment and appraisal of the civil servants on the board, and would be able to

recommend removal of the Permanent Secretary. A majority of the non-execs would come from the commercial private sector (Maude 2009)

The Conservatives are right to focus on boards as being key to raising departmental performance, and to seek greater ministerial involvement. Boards should assume more collective responsibility, and not simply be advisory to the Permanent Secretary (who chairs most departmental boards). But the private sector model is not directly transferable, because the role of company boards and their non-execs is different; and full ministerial involvement would require ministers to be the chief executive or executive chairman, which most ministers will be unable or unwilling to do.

Non-execs could play a stronger role, but the following issues need to be worked through first:

- Who appoints the non-execs? Where does their legitimacy come from?
- Should they be appointed by Ministers, or the Permanent Secretary? If the latter, should they also have the right to recommend his removal?
- Will financial accountability to the NAO and Parliament remain through the Permanent Secretary as Accounting Officer, or should there be more collective accountability?
- Should ministers chair every board meeting; or should there be separate strategy and management boards?

Board coaches and headhunters advise that it is very difficult to find suitable people who are willing to serve on Whitehall boards, so it is best not to rush. These points are discussed in more detail in Parker and Paun (2010), which analyses the performance of Whitehall boards, and offers 12 suggestions for their improvement.

### **3.4 Strengthen collective Cabinet government**

A series of recommendations for strengthening Cabinet government have been made by the Conservative Democracy Task Force (CDTF 2007a), the Better Government Initiative (BGI 2007, 2008), and in recent evidence to the Lords Constitution Committee's inquiry into the Cabinet Office and the Centre of Government. Three former Cabinet Secretaries argue for the streamlining of Cabinet Office and No 10, removal of executive units from the centre, and re-assertion of the principle that the Cabinet Office serves Ministers collectively (Armstrong, Butler and Wilson, 2009). The Better Government Initiative made similar recommendations (BGI, 2009).

This is more a question of political will than clarifying the rules. There are two fault lines: whether policy initiation lies with the centre or in Whitehall departments; and whether Cabinet Office primarily serves the Prime Minister or the Cabinet as a whole. If the Prime Minister wants to reassert the old conventions, he can lead by example, slimming down the centre, upholding the primacy of Cabinet and its committees, and tightening the rules on collective decision making (Parker and Paun, 2010). The weak description of issues that require collective decision in para 2.6 of the Ministerial Code could be strengthened, and amplified by examples, along the lines of paras 5.11 to 5.14 of the New Zealand Cabinet Manual.

One other issue which is more a question of political will is reducing the amount of legislation. The Conservatives have said they want to do this. If so they might want to

revive the Future Legislation Committee, merged by Blair into LEG, which controlled access to the legislative programme. But it needs to be chaired by a senior Cabinet figure, who has the confidence of the Prime Minister, and who can say no to his colleagues. LEG will also need more forceful leadership if there is to be an increase in pre-legislative scrutiny (see 5.1.3), because departments are reluctant to sacrifice the additional time required; or if there are to be additional checks on legislative proposals like Privacy Impact Assessments (Grieve and Laing, 2009).

That leads into a final point about collective government, which is the importance of chairing Cabinet committees. The Prime Minister cannot chair them all. He needs to have at least one senior member of the government without a departmental portfolio, whom he trusts, to chair the main committees which he cannot chair. This was the role played by Lord Whitelaw under Mrs Thatcher and Michael Heseltine under John Major. It is crucial to the effective working of Cabinet government.

### **3.5 Number of Ministers in government**

In 2001 the Conservative Manifesto said: “We will cut the number of government ministers and, once we have strengthened parliamentary scrutiny, we will reduce the size of the House of Commons”. The Norton Commission on Strengthening Parliament, established by William Hague as Conservative leader, recommended capping the size of Cabinet at 20, junior ministers at 50, and having only one parliamentary private secretary (PPS) per department (Norton Commission 2000). In 2004 Michael Howard as Conservative leader proposed a Smaller Government Bill, which in addition to reducing the number of MPs, would cut the number of Ministers by 20 per cent.

David Cameron has pledged to reduce the size of Parliament, but despite press rumours (eg ‘Cameron to cull Cabinet and ministerial posts’ Daily Telegraph 9 Sept 2009) he has been silent about the size of his government. It will take a long time to reduce the number of MPs (see 5.1 below), but Cameron risks incurring the criticism that he will weaken Parliament if he does not correspondingly reduce the size of government. The number of Ministers has crept upwards over the years, as has the size of the ‘payroll vote’ (Ministers, whips and PPSs in the Commons, whether paid or unpaid). In the Brown government there are 23 Cabinet Ministers, 71 junior Ministers, and 45 MPs acting as unpaid PPSs, with 141 MPs in the ‘payroll vote’ (out of a total of 349 Labour MPs). If Cameron wanted to reduce the size of government by 10 per cent (the same target as his planned reduction of MPs) there would be 21 Cabinet Ministers, 64 junior Ministers and 40 PPSs: taking the government back to the size it was under Mrs Thatcher. And if he wanted to make the reduction permanent, he could amend the House of Commons Disqualification Act 1975 which limits the number of holders of ministerial office who may sit and vote in the House of Commons (whether paid or not). The present maximum is 95. If the House of Commons is reduced by 10 per cent, the maximum number of Ministers in the House should be reduced to 85.

One easy way of reducing the size of Cabinet would be to get rid of the three separate territorial Secretaries of State, for Scotland, Wales and Northern Ireland. This has been suggested by the Cabinet Secretary at the formation of every new government since 2001: as a consequence of devolution these are not proper Cabinet level jobs, and their posts could be amalgamated (see 4.1 below). If policing and justice is devolved to Northern Ireland the case will become yet stronger, because that post will join the other two in ceasing to have any major executive responsibilities.

### **3.6 Minority or coalition government**

It will be apparent immediately after the election if there is a hung Parliament, with no single party having an overall majority. If the Conservatives are the largest single party, they do not automatically have the right to form the new government. But it is most unlikely that the Liberal Democrats would want to support Labour if they have slumped in the polls. Nor will they want to enter formal coalition with the Conservatives. The most likely outcome is a minority Conservative government, with a supply and confidence agreement from the Liberal Democrats to support them for the first 12-18 months, in exchange for Conservative support for certain Liberal Democrat policies. In that first year the Liberal Democrats would look for strong progress on devolution and decentralisation (ch 4), an elected House of Lords (ch 5) and a British bill of rights (ch 8). Electoral reform for the House of Commons would take far longer, and is anathema to the Conservatives.

A Conservative minority government would hope to call an election in 2011 to gain a majority. It might not succeed: and it should not spurn minority government. Minority government can be made to work, so long as the Prime Minister does not govern in a majoritarian way, and is willing to negotiate different cross-party alliances to get legislation through. The SNP government in Scotland shows that a government in a weak position in Parliament can still be surprisingly effective (Hazell and Paun, 2009).

## 4 Devolution and Decentralisation

### Issues to decide:

- One or three territorial Secretaries of State
- SNP referendum on Scottish independence
- Welsh referendum on primary legislative powers
- Replacing Barnett formula, and fiscal autonomy for Scotland
- English votes on English laws.

So far the Conservatives have allowed other parties to make the running in shaping the devolution agenda. That may be about to change. Even if their inclination is to duck some of the harder questions, there are several policy issues on which a new Conservative government will be obliged to respond:

- the SNP's proposed legislation for a referendum on independence
- the likelihood of a referendum on primary legislative powers for the Welsh Assembly
- the Calman Commission's proposals to give Scotland greater responsibility for raising its own revenue
- three separate reports adding to criticism of the Barnett formula
- the devolution complications of a British bill of rights (see 8.3).

There will also be a decision on Day One for the Prime Minister to decide whether to continue with three territorial Secretaries of State, or merge them into one.

### 4.1 Strengthening the Union

The Conservatives quickly accepted the political reality of devolution. They remain a Unionist party, but one committed to the further decentralisation of power. They are willing to accept some of the inevitable anomalies which flow from the present asymmetries of the devolution settlement. These are some of the key messages which David Cameron gave in a speech on the Union in Edinburgh in December 2007, and in subsequent speeches in Belfast and Cardiff (Cameron 2007; 2008b; 2009).

I passionately believe in the Union and the future of the whole United Kingdom.

The future of our Union is looking more fragile - more threatened - than at any time in recent history. The SNP now promises to deliver independence within ten years. At the same time there are those in England who want the SNP to succeed, who would like to see the Union fracture. They seek to use grievances to foster a narrow English nationalism. We must confront and defeat the ugly stain of separatism

If it should ever come to a choice between constitutional perfection and the preservation of our nation, I choose our United Kingdom. Better an imperfect union than a broken one. (Cameron, 2007).

Cameron also emphasised the need to reduce top down, centralised government. Decentralisation is a strong part of Conservative philosophy (see 2.1), and the belief that if you give people greater responsibility, they will behave more responsibly. The Conservatives can be expected to support further decentralisation, so long as it does not threaten the Union.

Cameron said that he would seek to address any unfairness in the Union. There are three elements of unfairness in the post-devolution arrangements, all hangovers from privileges granted to Scotland, Wales and Northern Ireland in the pre-devolution days:

- Retaining the three territorial Secretaries of State
- Continuing the Barnett formula for funding devolution
- Over-representation at Westminster.

## **4.2 The territorial Secretaries of State**

The most glaring anomaly is continuing with three separate Secretaries of State. The original justification was to enable the voices of Scotland, Wales and Northern Ireland to be heard in Cabinet. Post devolution their voices and representation now chiefly come through the devolved institutions. The Scottish Secretary is largely redundant. The Welsh Secretary still has a significant job regarding legislative powers for Wales and decisions about a referendum on primary powers, but even that is not time-consuming at ministerial level; while the Northern Ireland Secretary's job will shrink considerably once devolution of policing and justice is completed.

Merging the posts would save two Cabinet places, and offer greater flexibility in Cabinet formation, in policy fields where the Conservatives are short of experience. Retaining the separate offices would not only increase the size of Cabinet, but mean that the Secretaries of State would need to be drawn from pools of inexperienced MPs. It would also help streamline and strengthen the centre. Under the current fragmented arrangements Whitehall has five different centres responsible for devolution (the Ministry of Justice is responsible for devolution strategy; Cabinet Office for overall co-ordination; plus the Scotland Office, Wales Office, and Northern Ireland Office). This exacerbates the fragmented and asymmetric approach to devolution, pursued through separate bilateral relations. A merged 'Secretary of State for the Union' could take a more strategic and synoptic view, leading government thinking on the unresolved issues of devolution; and combating separatism in all parts of the UK. It should be a free standing department, not an extension of the Department for Communities and Local Government. That would be bad news politically (DCLG is an English department), and functionally (it is also a busy one).

Two parliamentary committees have accepted the case for merger. In 2003 the Lords Constitution Committee recommended the creation of a Department of the Nations and Regions (Constitution Committee, 2003 at para 67). In 2009 the Commons Justice Committee recognised that the arguments for retaining the separate posts were essentially political, and said:

The direction of travel may well be towards a single Constitutional Minister with lead responsibility for the functioning of the system of devolved government ...

### 4.3 Devolution finance

The Scottish, Welsh and Northern Irish governments are funded by single block grants, with an annual adjustment by a population-based formula (the Barnett formula) to reflect changes in equivalent spending in England. The formula was meant to deliver convergence on English spending levels (the ‘Barnett squeeze’), but has not done so. Its demise has long been predicted, but the difficulty has been to come up with an acceptable alternative.

In summer 2009 three separate reports were published, all highly critical of the Barnett formula, and devolution funding arrangements more generally. A House of Lords ad hoc Select Committee concluded that the Barnett Formula should no longer be used, but be replaced by a needs-based system. Relative need should be decided using a small number of need indicators, which are regularly reviewed by an independent, expert body. The transition period could be three years for countries receiving increased grants, seven years for those whose grant is reduced.

In the same month the Holtham Commission on Funding and Finance for Wales published its first report. It warned that the Barnett squeeze would cause Wales to become increasingly underfunded relative to its needs, creating an urgent requirement to reform the funding arrangements for Wales. Holtham follows in the footsteps of the Calman Commission on Scottish Devolution, which sets out a blueprint for much wider reform of the devolution funding arrangements, accepts that a grant should be needs-based, and is the most important of the three reports (Calman, June 2009).

Calman argues that any new fiscal regime must meet the requirements of equity, autonomy and accountability. It must be fair to all regions, redistributing from wealthier to poorer; it must give the Scottish parliament freedom in matters of taxation, spending and borrowing; and it should make the parliament responsible by raising the funds to implement its policies, from free prescriptions to road bridges. A final criterion is transparency. The new fiscal regime should make much clearer to Scottish voters how much is spent in Scotland, and how much is raised in taxation from all sources.

To give the Scottish Parliament greater autonomy and responsibility, Calman proposed a ‘Scottish rate’ of income tax, replacing 10p in the pound of tax levied at UK level. The Treasury would deduct that amount from the block grant, and it would then be up to the Scottish government to decide whether to levy 10p to maintain the same budget, or to levy more or less. Control over stamp duty, land tax, landfill tax, air passenger duty and aggregates levy would also be devolved, with corresponding cuts in the Scottish block grant.

On 25 November the government accepted almost all Calman’s recommendations, in particular the devolution of 10p in the pound of income tax (Scotland Office, 2009). Jim Murphy announced they would introduce a new Scotland Bill as soon as possible in the new Parliament, with implementation of the financial arrangements during the next term of the Scottish Parliament (2011-15). David Cameron announced that the Conservatives would produce their own White Paper and legislation:

We agree that the current balance does not work. We want to achieve a better balance using the recommendations in the Calman Report as a starting point. We accept that the Scottish Parliament needs to have more financial

accountability through greater powers over raising and spending taxes and over borrowing.

In practice a Conservative White Paper is likely to be very similar. There are no other big taxes which can easily be devolved. It might go further in relation to borrowing powers. There may be little time for a major rethink if the new government introduces big spending cuts, leading to corresponding cuts in the Scottish block grant. That will bring home the realisation that if Scotland had greater freedom to levy its own taxes, its budget in future need not be reduced. It would be a matter of choice for the Scottish government, which could levy additional tax if it wanted to maintain additional service standards.

#### **4.4 SNP Referendum bill on Scottish independence**

The SNP government published a White Paper on 30 November to conclude their national conversation on Scotland's constitutional future (Scottish Government, 2009). It set out four broad options: the status quo; devolution plus, implementing the Calman package; devolution max, devolving the fullest possible range of responsibilities to Scotland while still remaining part of the UK; and full independence. In the New Year the SNP will publish a referendum bill, setting out their proposed question on Scottish independence; but raising the possibility of a multi-option referendum, if the other parties want to propose devolution plus or devolution max. The referendum bill will be defeated. The SNP will then portray the unionist parties as denying Scotland a choice.

If a Conservative government wishes to stop separatism, it should resist being provoked, and respond in a calm and measured fashion. It should not try to mount a legal challenge to the bill, even if UK government lawyers advise one. It should not be led into supporting a multi-option referendum which includes further powers for the Scottish Parliament (see below) as an alternative. The multi-option referendum will confuse Scottish voters, and may boost support for independence, in the belief that option would strengthen the hand of the Scottish government in negotiations to secure greater autonomy. Nor should the UK government be tempted, as Lord Forsyth of Drumlean and Wendy Alexander MSP have been, to say 'Bring it on'. Instead the unionist parties should play a perfectly straight bat and vote the bill down in the Scottish Parliament. They can argue that there is no sign of majority support for independence in Scotland, and no sign of any increase in support. Opinion polls have shown for the last 15 years that support for independence in Scotland has remained steady at around 25 to 35 per cent, and this has not changed since the SNP came to power in 2007.

#### **4.5 Greater powers for Wales, Scotland and Northern Ireland**

After ten years of devolution, all three devolved governments are seeking an extension of their powers. With its strong commitment to decentralisation, a new Conservative government may feel it has the confidence to respond positively to these proposals.

##### **4.5.1 Wales**

Wales is the most pressing case. The original model of 'executive devolution' did not work. It made the Welsh government and Assembly dependent on Westminster for all their primary legislation, but Westminster did not have the interest or time to legislate for Wales. The Government of Wales Act 2006 ushered in a new settlement, in stages. The

current stage is experimenting with limited Legislative Competence Orders (LCOs), which are proposed by the Assembly, laid before Parliament by the Secretary of State, and (if approved) made by the Queen in Council. There is still a blockage at Westminster, where many Welsh MPs have been reluctant to grant any significant legislative powers to the Assembly. So far four LCOs have been passed, out of six introduced. This process is proving politically fraught, and with a Conservative majority at Westminster disputes about LCOs could have dangerous broader ramifications. Ironically greater additions to Welsh legislative competence have been made not by LCOs but by Acts of Parliament – eg the powers to reform local government. These have conferred more substantial powers than LCOs, but proved less controversial.

The next stage, under Part 4 of the 2006 Act, envisages granting a full range of primary legislative powers on the Assembly, but only after approval at a referendum. The Labour/Plaid Cymru government in Wales are committed to holding a referendum by May 2011. They established an All Wales Convention chaired by Sir Emyr Jones Parry to consider the matter further. His report in November came out strongly in favour of primary legislative powers, but said nothing about the timing of the referendum, save that it should not be held at the same time as the next Assembly elections. The Welsh Assembly is to debate whether to initiate a referendum on 9 February.

The procedure for initiating a referendum is laid down in the 2006 Act. The Welsh Assembly Government must first propose a motion to the Welsh Assembly, which must be passed by a two-thirds majority. After consultation the Secretary of State then submits the proposal to Parliament, where it is subject to votes in both Houses. If approved, the Secretary of State then lays the necessary Orders for the referendum, including the question. This arrangement means that any formal request for a referendum will command broad support from the political parties in Wales. The Electoral Commission is required to advise on the intelligibility of the question. This may not be easy since the distinction between primary and secondary legislative powers is lost on most members of the public. A question such as ‘Do you approve giving the National Assembly full primary legislative powers under Part 4 of the Government of Wales Act 2006?’ is not of itself readily intelligible. But in practice the referendum debate should generate plenty of background material which should help to explain the issues at stake.

The main difficulty is about the timing. The procedure will take at least six months. The Labour/Plaid Cymru government have a commitment to hold the referendum by May 2011. If that is to be achieved the referendum will need to be held by November/December 2010, to avoid the issues being caught up in the Assembly election campaign. For that to be achieved the latest date for initiating the procedure would be May 2010, immediately after the UK general election. That may be too sudden for the new UK government to make up its mind. Perhaps for that reason, the parties in the Assembly hope to initiate the procedure in January/February 2010, and invite Peter Hain to lay the draft Orders in the final months of this Parliament. He will regard this as premature (see Hain 2009), and may decline to do so. If he feels obliged to do so, he may seek a Conservative undertaking that they will continue the procedure after the election.

The whole procedure for holding a referendum before Part 4 powers can be granted is an elaborate compromise to try to satisfy the devo-supporters and the devo-sceptics within the Labour party. If the Conservatives felt more confident about conferring full primary powers, they could legislate to remove the referendum requirement and simply implement Part 4. But this would sit uncomfortably with their pledge to enact a

referendum requirement for future EU Treaties (see chapter 6). If the Welsh referendum requirement can be so easily cast aside, critics will say, what value can be placed on the new requirement for referendums on EU Treaties?

In practice the Conservatives will probably be divided similarly to the Labour party. This reflects divisions in Wales itself. Although opinion polls in Wales have generally shown support for the Assembly having law making powers, it takes time to convert soft polling support into hard votes in a referendum. A recent poll suggests that 42% would vote Yes for law making powers, 37% No (YouGov, 27 October).

The attitude of a future Conservative government depends critically on whether the Cabinet want the Assembly to acquire primary legislative powers. The 12 Conservative AMs in the Assembly are strongly in favour of primary powers, but the three Conservative MPs from Wales are against (as are most Labour Welsh MPs). But the balance of support in both main parties may change after the election. September polls suggested that after the election there might be as many as 18 Conservative MPs from Wales, while the number of Labour Welsh MPs might slump from 29 to 14 (Guardian 15 Sept 2009, reporting YouGov polling analysed by ElectoralCalculus). The new group of Conservative Welsh MPs will contain some devo-supporters, some devo-sceptics, and some in the middle. They will want to shore up their support, and some will fear that a Conservative government that blocked calls from Wales for a referendum would risk undermining that support.

#### **4.5.2 Scotland**

The proposals for Scotland are much more modest, reflecting the fact that the Scottish Parliament already has extensive legislative powers. The Calman Commission proposed only minor re-adjustments, that Holyrood should be given powers to control airgun legislation, powers over drink driving and speed limits, and the running of Scottish elections (this last in the wake of the 2007 Scottish elections, when almost 150,000 ballot papers were rejected). In the other direction, Calman suggested that Westminster should regain responsibility for food content and labelling; the regulation of health professionals; the winding up of companies; and aspects of Scottish law on charities.

The complexities of the model of tax devolution recommended by Calman are considerable, and will take time to resolve. That is not the case for the recommendations about powers. If the Conservatives wished to indicate their support for the Calman package as a whole, they could embrace action on these proposals as soon as possible.

#### **4.5.3 Northern Ireland**

The Northern Ireland Assembly also has extensive legislative powers. The only remaining powers waiting to be transferred are policing and justice. The Northern Ireland Act 2009 paves the way, but further subordinate legislation will be required in the Northern Ireland Assembly and at Westminster to give effect to the transfer.

The parties in Northern Ireland have been divided over the financial package to accompany the transfer; how the new justice department fits into the wider Executive, and which party might control it; and 'community confidence' (unionist code for whether the republicans are showing sufficient support for the new Police Service for Northern Ireland).

The parties are still a long way from resolving their differences. In September the Northern Ireland Assembly passed the second stage of the Justice Bill, voted through by the DUP, Sinn Fein and the Alliance party. [The UUP said the time is not yet right because of the lack of community confidence; and the SDLP believe that they should be entitled to the new ministry.] The Northern Ireland government also want to be able to call on the Treasury's contingency reserve if the security situation worsens. It now seems unlikely that policing and justice can be devolved soon; and the NI Executive may yet collapse, leading either to fresh elections or calls for a restoration of direct rule.

#### **4.6 Inter governmental relations**

In his speech on the Union David Cameron said:

A Conservative Government at Westminster will govern the United Kingdom, including Scotland, with respect. I will work tirelessly for consent and consensus so we strengthen the union and stop separatism (Cameron 2007).

To signal a fresh start Cameron could revive the machinery for intergovernmental relations under devolution, which Tony Blair neglected and Gordon Brown has only partially restored. After a five year lapse, Brown restored plenary meetings of the Joint Ministerial Committee (JMC), the forum for First and deputy First Ministers, but left them to be chaired by Jack Straw. As a mark of respect these meetings should be chaired by the Prime Minister, and held annually, as the Memorandum of Understanding between the UK and devolved governments requires. This would be a more useful mark of respect than Cameron's proposal that he attend an annual question time in the Welsh Assembly (and possibly the Scottish Parliament), which risks entangling Westminster too much with the devolved institutions.

Lower levels of the JMC, such as the JMC Domestic, struggle for business, because so many devolution issues are bilateral. Whether there is a revival of 'sectoral JMCs' (meetings of subject Ministers, eg on Agriculture, or Transport) must depend on whether there is genuine political will and enthusiasm for them. The choice should come as much from the devolved governments as the UK government.

#### **4.7 Reviewing the number of Scottish, Welsh and Northern Irish MPs**

Before devolution Scotland and Wales were both over-represented at Westminster. Scotland had 72 MPs when pro rata to population it should have had 57; Wales had 40 when it should have had 32. Since 2005 the number of Scottish MPs has been reduced to 59: it is allowed two more seats for the sparsely populated Highlands and islands. But Wales still has 40. There is little justification for Welsh over-representation, but it will be defended so long as Westminster remains the main source of primary legislation for Wales. If this logic is accepted, then once the Assembly has primary legislative powers, the number of Welsh MPs should be reduced to 32 to come into line with the English quota.

But post devolution there may be an argument for going further. During the 50 years of the first Stormont parliament from 1922 to 1972 the number of MPs from Northern Ireland was reduced by a third, a devolution discount to reflect the fact that much of the work of political representation was being done in Belfast. Research by the Constitution

Unit has similarly shown that post devolution Scottish and Welsh MPs have reduced workloads compared with their English counterparts, in terms of their postbags, and constituency work (Paun 2008). If the same one third discount were followed, Scotland would have 40 MPs, Wales 22 and Northern Ireland 12. This is politically explosive, and might be a gift to nationalist parties in all three parts of the country. But the combined reduction of 40 MPs would achieve more than half the Conservative target of reducing the overall size of the House of Commons by 10 per cent, or 65 MPs (for the mechanics and timing, see para 5.1 below).

## **4.8 The English Question**

The English Question can be divided into two broad questions: whether England needs a stronger political voice, to balance the louder political voice now accorded to Scotland and Wales; and whether England too would benefit from devolution, by devolving power within England. England could find a stronger political voice through an English Parliament, or English votes on English laws. To devolve power within England, possible solutions have included regional government, city regions, stronger local government, elected mayors.

### **4.8.1 An English Parliament**

This is the solution propounded by the Campaign for an English Parliament. It would in effect create a federation of the four historic nations of the UK, with England having its own separate government as well as parliament. Such a federation could not work because England would be too dominant, with 85 per cent of the population. No other federation in the world has survived where one of the units is so hugely dominant. No heavyweight British politician has espoused the idea of an English Parliament, and public attitude surveys over the last ten years show relatively little support. The Conservatives briefly flirted with the idea in 1999 under the early leadership of William Hague, but subsequently fell back on the policy of English votes on English laws.

### **4.8.2 English votes on English laws**

This has been Conservative party policy in the 2001 and 2005 election manifestos. It has been proposed by the Norton Commission on Strengthening Parliament, by Sir Malcolm Rifkind, and Lord (Kenneth) Baker. Most recently it has been proposed by the Conservative Democracy Task Force, in their 2008 report on the West Lothian Question.

The Task Force proposed that:

- Bills that are certified as ‘English’ would pass through the normal Commons process at Second Reading, with the whole House voting
- The committee stage would be undertaken by English MPs only, in proportion to party strengths in England
- At Report stage, the Bill would similarly be voted on by English Members only
- At Third Reading the Bill would be voted on again by the whole House. Since no amendments are possible at this stage, the government would have to accept any amendments made in Committee or on Report, or have the Bill voted down and lost.

By limiting the Committee and Report stage of Bills to English MPs, this scheme would protect England from having measures that a majority of English MPs found unacceptable being passed by non-English votes. However, its provisions for the Third Reading stage would also protect a government from having measures relating to England which it found unacceptable foisted on it. In this respect the Task Force sought to modify previous party policy, and to address the criticism that full strength English votes on English laws would be unworkable.

Both sides would have an incentive to bargain, with political compromise offering a way of resolving any potential constitutional crisis. As Lord Hurd put it:

The government of the United Kingdom would have to ensure that its English measures were acceptable to enough English MPs – or else not put them forward. There would be nothing extraordinary in this process: it is called politics (Hurd 2000).

There remain significant difficulties in implementing such a policy, at both a technical and political level. The technical difficulty is identifying those English laws which would be subject to this procedure. Strictly speaking there is no such thing as an English law, in the sense of a Westminster statute which applies only to England. The territorial extent clauses in Westminster statutes typically extend to the United Kingdom, Great Britain, or England and Wales. Many statutes vary in their territorial application in different parts of the Act. Either Parliamentary Counsel would need to draft statutes differently, separating out all the English provisions into England only bills; or there would need to be two separate committees for the committee stage. The Speaker would risk being drawn into controversy in identifying those parts or clauses which apply only to England, and his rulings would be contested. On England and Wales bills, there is the further issue of inviting Welsh MPs to join the ‘exclusive’ stages of debate.

The political difficulty lies in making the case for English votes on English laws when a Conservative victory will have solved the political problem. A Conservative government will have a majority of MPs in England as well as across the UK. It risks looking defeatist if it seeks to inoculate itself against a future scenario when it has lost its majority again. It will also face the charge that it is creating two classes of MPs, ending the traditional reciprocity whereby all members can vote on all matters. By ending the equal voting rights of all MPs, the Conservatives could no longer claim to be Unionist, but would have become an English party. An English party sounds less like a party of government, certainly for the Union as a whole.

### **4.8.3 Regional Assemblies and Regional Development Agencies**

The last two sections of this chapter are a reminder of Conservative policy, without analysis of how it might be implemented. The Conservatives are committed to the abolition of Regional Assemblies, and slimming down Regional Development Agencies (RDAs). Gordon Brown announced his own plans to abolish Regional Assemblies in July 2007, on publication of the Review of Sub National Economic Development and Regeneration. Five out of the eight Regional Assemblies have already gone, with the remaining three to go in 2010. They are being replaced by smaller Local Authority Leaders Boards established in each region.

RDAs have also been threatened with abolition, but the latest Conservative policy statement anticipates retaining them while stripping them of their planning, housing and regional strategy powers. In Green Paper no 9 on decentralisation the key commitments are as follows:

Removing regional government. We want to devolve power from regional quangos back down to local councils. We will:

- abolish all regional planning and housing powers exercised by regional government
- abolish the Government Office for London and devolve its functions to London boroughs or the Mayor
- strip the Regional Development Agencies of their powers over planning, and give local governments the power to establish their own local enterprise partnerships
- abandon plans to regionalise fire control
- replace the Infrastructure Planning Commission with speeded up public enquiries. (Control Shift, Conservative party, 2009).

#### **4.9 Strengthen local government**

The same Green Paper set out the following agenda for decentralising responsibility and power to local authorities and local communities. These policies are included for the sake of completeness: how to implement them falls outside the scope of this briefing.

Giving local communities a share in local growth. Instead of top-down targets, we will:

- enable local authorities to benefit financially when they deliver housing;
- give local authorities the right to retain the financial benefits arising from new business activity;
- give local authorities a new discretionary power to levy business rate discounts; and
- make the local government funding settlement more transparent.

Freeing local government from central control. We will free councils from central and regional bureaucracy. We will:

- end Whitehall capping powers and give local residents the power to veto high council tax rises via local referendum;
- give local councils a 'general power of competence';
- abolish process targets applied to local authorities, and the Comprehensive Area Assessment;
- end all forced amalgamations of local authorities.

Giving local people more power over local government. We will put more power in the hands of local people and make councillors more accountable to their citizens. We will:

- provide large cities with the opportunity to choose to have an elected mayor;
- give people the power to instigate referendums on local issues;

- make the police accountable to the people they serve through directly elected commissioners, crime maps and quarterly beat meetings;
- abolish the Standards Board;
- let local people choose the organisational structures of their local councils.

Giving local people more ability to determine spending priorities. We will give local councils the freedom to spend money on the things that matter, and local communities more power over how money is spent. We will:

- phase out ring fencing, so that decisions about how councils spend their budgets are taken by councils and their citizens alone; and
- make it easier for local government to raise money for local projects on the bond market (Conservative party, 2009).



## 5 Strengthening Parliament

### **Conservative commitments:**

- Reduce the size of the House of Commons by 10 per cent
- Strengthen Select Committees
- Reduce government control of the parliamentary timetable
- Enable the public to put things on the parliamentary agenda
- Reduce House of Lords to 250-300 members once it is elected.

Strengthening Parliament is a strong theme running through recent Conservative manifestos and many of David Cameron's speeches. The focus is mainly on the Commons, where there is no shortage of proposals for strengthening the way Parliament works. These are to be found in reports from the Norton Commission on Strengthening Parliament (2000) and Ken Clarke's Conservative Democracy Task Force (2007), as well as from independent bodies such as the Hansard Society (2001, 2005, 2006) and the Constitution Unit (2007).

The challenge facing the new government is how to select and prioritise between the different proposals. This task has in part been done by Tony Wright's Select Committee on Reform of the House of Commons, which highlighted three key areas: electing Select Committees, more backbench control over the parliamentary agenda, and more public input. With the government's hesitation and delay in finding time to debate the Wright report, it will be largely up to the new Parliament to implement and give life to its proposals. This could be a defining moment for parliamentary reform, much as the St John Stevas reforms of 1979 built on strong proposals inherited from the previous Parliament.

The Conservatives also have commitments to reduce the size of the House of Commons; and significantly to reduce the House of Lords, once elections have been introduced for the second chamber. This chapter looks first at reform of the House of Commons, and then the Lords.

### **5.1 Reforming the House of Commons**

#### **5.1.1 Reducing the size of the House of Commons**

The Conservative commitment to reduce the size of the House of Commons is long standing, and can be found in the 2001 and 2005 manifestos. It was repeated by David Cameron in speeches in summer 2009, with a target of reducing the Commons by 10 per cent. Sir George Young reiterated the commitment to the 2009 party conference in the following terms:

So we will instruct the Boundary Commission to set out detailed proposals to reduce the number of MPs by ten percent for the next General Election after this one.

Our proposals would simply increase the average size to around 77,000: the size of many constituencies today including my own.

But, crucially, we will address the disparities that exist between constituency populations. So as well as reducing the number of MPs, we will change the law to ensure that every constituency is broadly the same size.

The House of Commons elected in 2010 will have 650 members. The target is thus to reduce the House to 585 members, for the next general election to be held at the latest in 2015. This will require a wholesale boundary review of all constituencies, to remove 65 constituencies, and raise the average size of each constituency from 70,000 to 77,000 electors.

There is a wholesale review of all parliamentary constituencies every 8 to 12 years, conducted by the parliamentary boundary commissions (there are four separate commissions for England, Scotland, Wales and Northern Ireland). The last periodic review commenced in 2000, and was completed in 2008. The timetable varied for each commission: England took the longest, at 6½ years. The next periodic review is due to start in 2012, and if it follows a similar timetable might not be completed until 2018.

The four parliamentary boundary commissions are independent bodies which operate under the provisions of the Parliamentary Constituencies Act 1986 as amended by the Boundary Commissions Act 1992. The ex officio Chairman of each Commission is the Speaker, but he is a figurehead. The work of the boundary reviews is led by Deputy Chairmen, who are High Court judges. England is the main problem, with 82% of all the constituencies. The main reason for the slow progress of the reviews in England is that they are staggered, with successive waves spread out over five years. A second is the painstakingly slow process of public consultation, with almost half the reviews going to Local Inquiries, which then add 12 to 15 months to the timetable. A third is that the judges continue to sit in court, and lead the reviews largely in their spare time. A fourth is that the parliamentary commissions often have to wait for local government reviews, because the building blocks for parliamentary constituencies are local government and ward boundaries. A fifth is that no single body is charged with co-ordinating and driving the exercise forward.

What might be done to speed up the process?

- Abolish Local Inquiries, and rely upon written representations only. This would be supported by most election experts. Half of all Inquiries result in no change at all. Of all the wards in areas for which Inquiries were held in the last periodic review, only 3% were moved between constituencies as a consequence
- Abolish the consultation process altogether, and allow the Commissions' original recommendations to be final. This might save six months; but it might make the Commissions' recommendations more vulnerable to challenge in the courts, delaying the process even further
- Increase the staffing and resources of the Boundary Commission (and for England, the number of Commissioners). Increasing staffing and resources is what happened in 1992, when the Major government was very keen for the fourth periodic review to be completed before the next general election. The secretariat was increased from 12 to 40 staff, and a target end date set of

December 1994. The review, which had started in February 1991, was completed in April 1995, and the report submitted to Parliament in June

So in the recent past, 3 to 4 years is the fastest the English Commission can move to complete a review. That suggests that it will require streamlining of procedures as well as additional resources if a review is to be completed within the life of a single Parliament. The cost of a comprehensive review of parliamentary boundaries is about £12m; of a speeded up review probably £15m.

Legislation will be required to reduce the size of the Commons and to give the parliamentary boundary commissions new marching orders. It will not be easy to introduce legislation straight away, because several tricky issues need to be resolved first:

- The timescale for the reviews: by what end date will the commissions be asked to report?
- The new procedure. Will Local Inquiries be abolished? Will consultation be abolished altogether?
- The body in overall charge: should this be the Ministry of Justice, or the Electoral Commission?
- The leaders of the Boundary Commissions. Should they continue to be serving judges?
- The electoral quota: will it be the same across the UK? Will Wales or Northern Ireland be allowed to preserve their existing quotas? Or will there be a devolution discount and proportionately larger constituencies in Scotland, Wales and Northern Ireland (see 4.7 above)
- The rules of the different commissions (which have diverged in their interpretation): will they be harmonised? (Butler 1992; Rossiter, Johnston and Pattie 1999)
- Parity. At the last review, 87% of the constituencies in England and Wales came within 10% of the electoral quota. How far should the commissions go to override natural and local boundaries in the quest for parity?
- The building blocks for the exercise: if parity prevails, the commissions may need to cross many more local authority boundaries, and go smaller than wards and down to polling districts. In that case they would need a new IT system to handle polling district data, which would add a year to the exercise and also to the cost.

As an aside it should be mentioned that – contrary to Conservative belief – greater parity will not help much to reduce the bias against the Conservative party in the operation of the electoral system. There are six different factors which combine to give Labour about 100 seats more than the Conservatives, if both parties poll equally. Malapportionment is only one out of the six factors, and unequally sized electorates make only a small contribution to the total bias (Johnston, McLean, Pattie and Rossiter 2009; Johnston, Rossiter and Pattie 2008). If the quest for greater parity slows down the reviews, the government may prefer speed over parity. And if the Conservatives really wanted to tackle the bias in the way votes are translated into seats, they would need to consider some form of PR.

If the government introduced legislation to abolish Local Inquiries, and was able sufficiently to increase the staffing and resources of the Boundary Commissions, the

timetable for policy planning, legislation, wholesale boundary reviews and their implementation might be as follows:

Date	Activity
May 2010	General Election
	Establish Cabinet Committee to plan policy and legislation
July 2010	White Paper
November 2010	Bill introduced, Second Reading
July 2011	Royal Assent
September 2011	Boundary Commissions start reviews
April 2012	Provisional recommendations published
July 2012	End of consultation period
October 2012	Final recommendations for new boundaries published
December 2012	Report laid before Parliament
May 2014	Next general election?

This is a fast track timetable. The legislation will be controversial in both Houses: in the Commons, where MPs will fear for their seats; and in the Lords, where concerns will be expressed about gerrymandering and curtailing of due process. The start of the timetable mirrors Labour's fast track approach in 1997, when after a May election they published the white papers on devolution in Scotland and Wales in July, and introduced the Scotland and Government of Wales bills in the autumn. At the end of the process the timetable allows 18 months between publication of the new boundaries and the likely date of the next election. That is generous for two reasons. In the past the English Boundary Commission has always overshot the target completion date. And the political parties might need more time for candidate selection when there are 65 fewer constituencies, than when there are the same number of seats but with slightly different boundaries. Electoral Returning Officers might also need more time if there are constituencies which cross local authority boundaries.

Finally a brief word about who is in overall charge of boundary reviews. Under the Political Parties, Elections and Referendums Act 2000 (PPERA) the Electoral Commission would have been placed in overall charge, absorbing the functions of the parliamentary boundary commissions after the completion of the fifth general review. However, the Electoral Commission was not keen to take on the work; and in its 2007 review of the Electoral Commission, the Committee on Standards in Public Life recommended a reprieve for the boundary commissions. The government agreed, and Part 3 of the Local Democracy, Economic Development and Construction Act 2009 removed the responsibility for electoral boundary matters from the Electoral Commission, and recreated a separate Local Government Boundary Commission for England. The Electoral Commission remains opposed to taking on boundary reviews. The Ministry of Justice remains in overall charge, since the parliamentary boundary commissions report to them.

### 5.1.2 Parliamentary agenda and timetable

The Wright Committee has now laid the ground for reforming the way the parliamentary agenda is planned and timetabled. It called for a clearer distinction between the

scheduling of government and non-government business, with the latter being given to a Backbench Business Committee, elected by the whole House. It would have responsibility for scheduling items such as Select Committee reports and general debates, which would be guaranteed an average of one day per week. There would also be a House Business Committee, comprising the Backbenchers plus frontbench representatives from the three main parties, which would agree the overall schedule of business. The next week's business would be approved by the House, rather than presented to it for information, thus giving the House ownership of its agenda, even if this is usually agreed to on a whipped vote.

In his 2009 party conference speech, Sir George Young mentioned three other priorities:

- To end the automatical timetabling of government bills
- To oblige the government to give topical statements
- To abolish the Modernisation Committee.

These are relatively easy to achieve. It is the government which moves a programme motion at the end of second reading with the timetable for a bill. The government can instead revert to previous practice, and introduce selective guillotine motions when a bill is not making adequate progress. Similarly with the Modernisation Committee: as a temporary committee this will lapse at the end of this Parliament, and the government would need to introduce a motion in the new Parliament to revive it. But if it has a reforming agenda it may come to regret leaving procedural change with the Procedure Committee, which in the past has often been a byword for slowness and caution. The government might seek to ensure that reform-minded people were on the Procedure Committee; but that would conflict with the Conservatives' stated intention of prising the government's hands away from Select Committees.

Sir George's proposal to oblige the government to give topical statements in prime time was linked to swapping time spent on Opposition debates, and would therefore require the agreement of the Opposition. The new Speaker John Bercow has said he would require the government to answer urgent questions more frequently, which will also help increase the topicality of the Commons.

### **5.1.3 Strengthening Select Committees**

This topic is also overshadowed now by the work of the Wright Committee. The main Conservative proposals for strengthening Select Committees are

- Select Committee chairs to be elected by backbenchers
- More time for Select Committee reports on the floor of the House
- More pre-legislative scrutiny of bills
- More pre-appointment scrutiny hearings.

(Young, 2009; Cameron, 2006; Democracy Task Force, 2007).

The Wright Committee proposed that Select Committee chairs should be elected in a secret ballot by members of the House as a whole; with Select Committee members then being elected afterwards in secret ballot in party groups. They rejected a simple tidying up of existing arrangements, but also rejected the maximalist solution of the House electing both members and chairs: this was feared to be too ambitious, especially at the start of a

new Parliament with many new members. The committee's recommendations will be put to the test early in the new Parliament. A chaotic or long drawn out process will not be a good advertisement for the new model (remember the election of the new Speaker in 2000). Under the old rules, it could take as long as three months before the Select Committees are set up in a new Parliament. The Wright report suggests six weeks, which will be a good target to aim for.

More pre-legislative scrutiny of bills depends on more bills being published in draft. That is a matter for government, not Parliament. It depends on the Cabinet Office and Legislation Committee being firmer with departments about preparing bills in good time; and departments being willing to wait six to 12 months while the draft bill undergoes pre-legislative scrutiny. When push comes to shove, departments with urgent bills tend to prevail; and senior Cabinet members can go behind Legislation Committee to No 10 to get their way.

If there is more pre-legislative scrutiny of draft bills that has consequences for the workload and the independence of Select Committees. They often have to conduct pre-legislative scrutiny at short notice, and to a tight timetable. It displaces the other work of the committee. Instead of the committee conducting inquiries of its own choosing, it may find it is following the government's own legislative agenda.

Pre appointment scrutiny hearings were introduced as part of Gordon Brown's Governance of Britain agenda in 2007. With the agreement of the Liaison Committee, 60 of the top public appointments have been selected for this treatment, and by end 2009 19 'preferred candidates' had appeared before the relevant Select Committee. In October the Children, Schools and Families Committee reported against the appointment of the proposed new Children's Commissioner, but the Secretary of State appointed her anyway. The Liaison Committee and Cabinet Office have commissioned an evaluation of the process, due to be published in March. Some Select Committees would like to go further, and have a power of veto; but the likelihood is some refinement of the list of public appointments subject to scrutiny, and possibly closer involvement by Parliament in a few key appointments.

#### **5.1.4 Public involvement in setting the parliamentary agenda**

With the limited time available to them, the Wright Committee made only modest proposals for public initiation of parliamentary business. They backed existing proposals to establish a Petitions Committee, suggesting that this role be given on an experimental basis to the Procedure Committee. The Conservatives have gone much further, with two proposals to enable the public directly to influence the parliamentary agenda:

- A petition signed by a set number of voters (say 100,000) would trigger a formal debate on the topic
- A petition of one million electors could require Parliament to consider a bill. (Cameron and Herbert, 2008; Cameron, 2009a).

This would introduce a significant element of direct democracy into our system of representative democracy. The hope is that giving citizens the initiative in this way would enable people to re-engage with politics, over which they feel they have little influence. The risk is that if Parliament repeatedly rejects petitions, it may reinforce people's sense of powerlessness. These issues are discussed further in chapter 13.

### **5.1.5 Controlling the prerogative powers**

David Cameron and the Democracy Task Force have called for an enlargement of Parliament's role in scrutinising the prerogative powers of going to war; ratification of international treaties; making senior appointments; and reorganising government departments (Cameron 2006, Task Force 2007).

The government is in broad agreement. It has introduced pre-appointment scrutiny hearings for senior public appointments (see 5.1.3 above). Its proposals for more effective scrutiny of treaties are in Part 2 of the Constitutional Reform and Governance Bill, introduced in July 2009. This would give legal effect to a resolution of the House of Commons that a treaty should not be ratified. The Commons could resolve against ratification and make it unlawful for the Government to ratify the treaty. The House of Lords could require a further statement from the government explaining why the treaty needed to be ratified.

The government had also proposed closer parliamentary scrutiny of the war making power. In the 2007 Governance of Britain green paper they proposed that the government should seek the approval of the House of Commons before going to war. A consultation paper was published seeking views on the modalities (Ministry of Justice, 2007). In the 2008 Constitutional Renewal white paper the government expressed its preference for a detailed resolution of the House rather than a statutory regime. This was agreed by the parliamentary Joint Committee scrutinising the draft Constitutional Renewal Bill. It remains for the government to bring forward a draft resolution. If the Brown government fails to do so, the next government could complete this unfinished business by coming forward with its own resolution.

The proposal for parliamentary scrutiny of reorganisations of Whitehall departments originates from the Public Administration Select Committee (PASC), in their 2007 report on Machinery of Government Changes. PASC recommended a debate and vote in Parliament before any major change to the machinery of government; and that statutory functions should be given to government departments, not interchangeable Secretaries of State. The government disagrees. One issue is who should conduct the initial scrutiny: should it be the relevant departmental Select Committee(s), or an overarching Select Committee like PASC? Another is whether David Cameron is willing to submit any initial reorganisation of Whitehall flowing from the formation of his first Cabinet to parliamentary scrutiny.

A final item to mention is the proposal from the Conservative Democracy Task Force that the Ministerial Code should be approved by parliamentary resolution rather than simply promulgated by the Prime Minister. If significant changes are made to the Code, a parliamentary debate would be another way of publicising them, as well as indicating a new approach to relations between Parliament and the Executive.

### **5.1.5 Reducing the cost of the House of Commons**

In his speech to the 2009 party conference, Sir George Young included economy as one of the principles behind Conservative reforms. Strictly many elements of House of Commons costs are for the House of Commons Commission, where the government

does not enjoy a real majority. Conservative proposals for reducing the cost of the Commons include:

- Reducing the size of the House by 65 MPs, which should save £15.5 m in salaries and expenses and allowances
- Abolishing MPs' £10k communications allowance, which should save £6.5m pa
- Abolishing the Regional Select Committees, saving £1m pa.

There may be further savings from the new regime for MPs' expenses and allowances, proposed in November by the Committee on Standards in Public Life (CSPL 2009). The new Parliamentary Standards Authority published a consultation paper on the new expenses regime in January (IPSA, 2010), with the intent of introducing the new system in time for the new Parliament. CSPL also recommended changes to the remit of IPSA, giving it control of MPs' pay as well as expenses. The government has moved amendments to the Constitutional Reform and Governance Bill to this effect, which are supported by the Conservatives.

## **5.2 Reforming the House of Lords**

### **5.2.1 Rebalancing the numbers of Conservative peers**

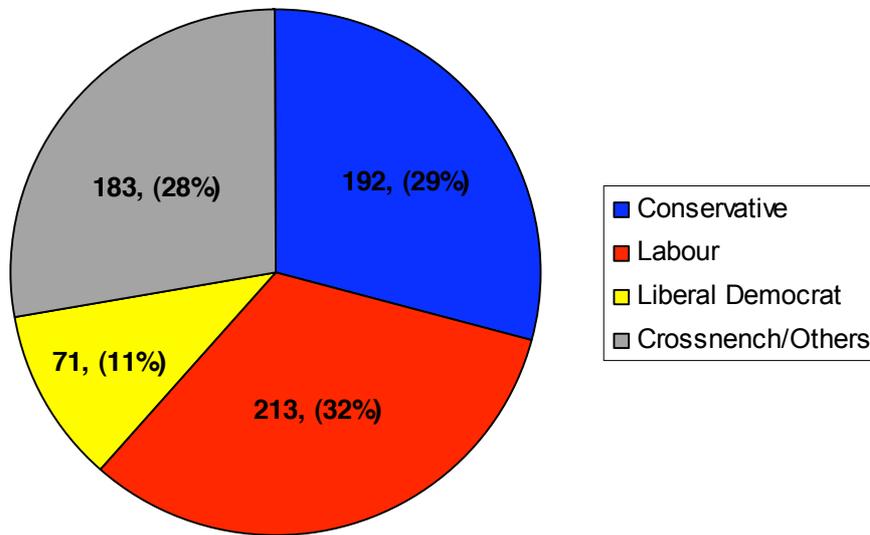
One of the early tasks facing the new government will be to replenish the numbers of Conservative peers in the Lords. After the removal of most of the hereditary peers in 1999 the Conservatives remained the largest party group, with 50 more peers than Labour. But since then the government has steadily topped up the numbers on the Labour side, following their policy that the size of the party groups should broadly reflect the balance of votes cast (not seats won) at the previous general election. The Conservative group has become older, and being older has a lower average attendance, than the other party groups, as a result of failure to replenish. That will need rectifying.

It can be rectified in two ways. One is to support the retirement provisions in Part 3 of the current Constitutional Reform and Governance Bill (see 5.2.2 below). That would enable a rejuvenation of the Conservative group, boosting their daily attendance. The second is to appoint more Conservative peers. But how many peers should Cameron seek to appoint?

The current composition of the different party groups and Crossbenchers is shown in the pie chart and table below. In round numbers, in late 2009 Labour had 215 peers, the Conservatives 190, the Liberal Democrats 70 and the Crossbenchers 180.

**Figure 5.1 Composition of the House of Lords  
in October 2009**

Seat number (percentage of House)



**Figure 5.2 Composition of House of Lords by Party Strength,  
14 October 2009**

Party	Life Peers	Hereditary: Elected by Party	Hereditary: Elected Office Holders	Hereditary: Royal Office Holder	Bishops	Total
Conservative	144	39	9	0	0	192
Labour	209	2	2	0	0	213
Liberal Democrat	66	3	2	0	0	71
Crossbench	150	29	2	2	0	183
Bishops	0	0	0	0	25	25
Other*	21	2	0	0	0	23
<b>TOTAL</b>	<b>590</b>	<b>75</b>	<b>15</b>	<b>2</b>	<b>25</b>	<b>707</b>

NB Excludes 11 Members who are on leave of absence, 2 who are suspended, 16 disqualified as senior members of the judiciary and 1 disqualified as an MEP. There are normally 26 Bishops in the Lords: in October one diocese must have been vacant.

Source: [www.parliament.uk](http://www.parliament.uk)

\*12 are non-affiliated, 3 are DUP, 2 are UUP, 2 are UKIP, 2 are Labour Independents and 1 is a Conservative Independent.

The new government has the power to create new peers, and in theory can create any number. In practice the power is now circumscribed by new conventions. The main one is that so long as the chamber remains all appointed, no party should seek an overall majority in the Lords. A second principle proposed by Labour (and endorsed by the Wakeham Royal Commission) is that the size of the party groups should broadly reflect the balance of votes cast at the previous general election. In practice Labour has been restrained in following this principle: it was not until 2006 that the Labour group in the Lords first overtook the size of the Conservative group, as shown in Figure 5.3 below.

**Figure 5.3 Size of party groups in House of Lords 1997 to 2009**

Year	Lab	Con	Lib Dem	Total size of House	Difference between Lab and Con
1997	116	477	57		- 361
1998	157	495	68	1146	- 338
1999	175	476	69	1165	- 301
2000	181	232	54	662	- 51
2001	199	231	62	688	- 32
2002	200	221	65	700	- 21
2003	188	215	65	679	- 27
2004	181	210	64	664	- 29
2005	201	202	68	691	- 1
2006	206	205	74	715	+ 1
2007	211	206	78	736	+ 5
2008	216	202	78	738	+ 14
2009	216	198	72	732	+ 18

Source: House of Lords Information Office: figures from January each year.

How restrained should Cameron be? Three sets of nominations will affect the numbers in the Lords before he might become Prime Minister. There is a list of working peers due to be announced in February, currently undergoing propriety vetting by the House of Lords Appointments Commission. Next there is the dissolution Honours list of ex-MPs. Finally Gordon Brown may publish a resignation Honours list. Recent dissolution Honours lists have run to about 25 new peerages. If we assume that the first two lists reflect the current party balance in the Lords, and the February list has 20 working peers, the dissolution Honours 25 and the resignation list 5, then at the start of the new Parliament in 2010 the Labour group will number around 240 peers, the Conservative group 210 and the Liberal Democrats 80.

Lord Strathclyde has said he needs 40 additional peers, which sounds about right. If Cameron follows a similar policy to Labour of restraint and gradualism in creating new peers, he might aim to bring the Conservative group into line with the size of the Labour group over the course of the next Parliament, narrowing the gap by 10 peers a year. But in the first year Cameron might be able to appoint a lot more than 10 new peers, if the retirement provisions in the current bill are passed and some of the more elderly Conservative peers retire.

There are other reasons for proceeding gradually. First, Cameron will want to avoid accusations of patronage and flooding the Lords with placemen. He is also vulnerable to

the charge that he is further increasing the size of an already over large House of Lords at the same time as he seeks to reduce the size of the Commons. Second, quality matters more than quantity. The Lords is a useful recruiting ground for ministerial talent: it can provide people with a wide range of senior management and leadership experience which is in short supply in the Commons. Third, there are logistical constraints. The Appointments Commission cannot process a large block of names all at once; and the House of Lords has run out of space, and will be hard pressed to find office space for all the new peers.

A final reason is that so long as the Conservative and Labour groups remain broadly of equal size, the actual size of the Conservative group will not make much difference to how often a Conservative government is defeated in the Lords. Contrary to what might be supposed from Figure 5.1, it is the Liberal Democrats who determine the outcome of most divisions in the House of Lords. Although on paper the Crossbenchers are the largest group holding the balance of power, they attend to vote far less than party members (Russell and Sciara 2008). Because of their higher participation and high cohesiveness, in nine divisions out of ten it has been the Liberal Democrat votes which determine whether the Labour government wins or loses (Russell and Sciara 2007). The same is likely to hold true for a Conservative government.

Before making any new appointments the new government will want to consult the party chairman and chief whip, and the leader and chief whip in the Lords, to find out what kind of fresh appointments they would like to see. They should also consult the chairman of the House of Lords Appointments Commission (HoLAC), Lord Jay. Strictly HoLAC has no locus in relation to party nominees save for vetting for propriety; but in 2006 the commission rejected several Labour nominees, leading to the ‘cash for peerages’ inquiry. HoLAC is now taking a broader interest in the balance of skills and experience in the Lords, and has commissioned an audit of the career backgrounds of the current peers, which may serve to highlight gaps that need to be filled.

### **5.2.2 Strengthening the interim House**

There is a growing recognition that the interim House needs some interim reforms, which cannot wait on reaching consensus on more comprehensive reforms leading to an elected House. In 2008 and 2009 Lord Steel of Aikwood introduced a bill which would put the House of Lords Appointments Commission on a statutory basis; end the system of by-elections for replacing the 92 hereditary peers; enable peers to retire; and to be disciplined or expelled. The government opposed the Steel bill on the ground that improving arrangements for the interim House might delay more comprehensive reform. But in the Constitutional Reform and Governance Bill introduced in July 2009 it adopted three out of the four measures in the Steel bill. Neither the government nor the Conservatives currently wish to put the Lords Appointments Commission on a statutory basis.

Part 3 of the government’s Bill contains provisions to end the system of by-elections for hereditary peers. It also provides for a power to discipline peers through expulsion or suspension; and for retirement. The Conservatives may want to support the disciplinary and retirement provisions, but not the gradual removal of the remaining hereditary peers. The Conservatives have always regarded the hereditary peers as bondsmen, guarantors of the pledge that a fully reformed second chamber will be achieved; and not to be removed until that happens (Strathclyde, 2009). The Conservatives also include a disproportionate

number of hereditary peers on their benches: 48 Conservative peers, one quarter of the Conservative group, are hereditaries.

If the Constitutional Reform and Governance Bill is not passed before the election, a Conservative government may wish to re-introduce the provisions for discipline and retirement. Retirement is the more important issue, given concerns about not increasing the overall size of the Lords. The leader in the Lords may want to take soundings of the other groups to find out how many peers might be likely to retire. That in turn will depend on the retirement package on offer.

### **5.2.3 Towards an elected second chamber**

In Total Politics magazine in February 2009 David Cameron said 'In terms of reform, having a more elected chamber, which is what I favour, to be frank it is not an urgent priority'. This section outlines Conservative proposals for an elected second chamber, but does not elaborate on them, because it is clear that this is not something a new Conservative government will pursue in its first term.

In 2007 the House of Commons voted for an 80% or 100% elected second chamber. Jack Straw then initiated cross party talks for 18 months, leading to the July 2008 white paper *An Elected Second Chamber*. Through participating in the cross party group the Conservatives have articulated in some detail their plans for an elected second chamber, which are as follows:

- A House reduced in size to 250-300 members
- Elected in staggered elections, one third being elected at each general election
- By first past the post, from 80 three member constituencies
- Producing 240 elected members, and 60 appointed members
- Serving long terms of 12 to 15 years, non-renewable.

The main difference from Labour and Liberal Democrat proposals is the electoral system. Under first past the post, one party could develop an overall majority in the Lords, even with staggered elections, because third and minor parties would be under represented. This outcome would be much less likely under a proportional system. The Conservatives' proposed 80 constituencies would be similar in size to the old Euro constituencies used for elections to the European Parliament before 1999 (the government prefers larger units similar to the current Euro constituencies). To try to ensure that the Lords retains its character as a place for independent minded people towards the end of their careers, the Conservatives would like former members of a reformed second chamber to be ineligible to become MPs.

The Conservatives (like the other political parties) are not of one mind about Lords reform. For a different set of views, much closer to those of Labour and the Liberal Democrats, see Tyrie, Young and Gough (2009). In private David Cameron is said to have described Lords reform as a third term issue. There is certainly no appetite for an elected Lords amongst the Conservative peers, who voted strongly for an all appointed House in 2007 (as did the House of Lords as a whole). Much may depend on the attitude of newly elected Conservative MPs, who may be more reform minded than their predecessors in the Commons; and on the tide of events. The present government has repeatedly been forced to bring Lords reform off the back burner when events have forced it to do so.

## 6 Europe: Treaties, Referendums and Sovereignty

### Conservative commitments:

- Legislate to require referendum for future EU Treaties
- Sovereignty Bill to make it clear ultimate authority stays in Britain
- Opt out from Social Chapter and European Charter

### 6.1 Referendum requirement for future EU Treaties

After ratification of the Lisbon Treaty (on which the Conservatives had promised a referendum) David Cameron gave a major speech setting out the Conservatives' new policy on Europe:

Never again should it be possible for a British government to transfer power to the EU without the say of the British people. If we win the next election, we will amend the European Communities Act 1972 to prohibit, by law, the transfer of power to the EU without a referendum. And that will cover not just any future treaties like Lisbon, but any future attempt to take Britain into the euro. We will give the British people a referendum lock to which only they should hold the key – a commitment very similar to that in Ireland. This is a major constitutional development...we will challenge the other political parties to accept the referendum lock and pledge never to reverse it. (Cameron: 2009)

#### 6.1.1 Approval of EU Treaties

There are already several locks before the UK can approve EU Treaties:

- A draft Order in Council must be approved by each House of Parliament before the UK ratifies a mixed agreement (s1(3) of the European Communities Act 1972)
- Any Treaty increasing the powers of the European Parliament must be approved by primary legislation (s12 of the European Parliamentary Elections Act 2002).
- Any Treaty amending the founding 1957 Treaties or the 1992 Treaty of European Union (Maastricht) also requires primary legislation (s5 of the European Union (Amendment) Act 2008).

To these three parliamentary locks the new policy would add approval of the people in a referendum. The policy raises a number of questions. Can the new law be made to work? Will it apply to all future EU Treaties? When would a referendum be held? And what if the people voted No?

#### 6.1.2 Will the new law be effective?

There are two questions here:

- Would a future government and Parliament be bound by the new law?
- Would the courts enforce it?

The answer to the first question is probably not. The comparison with Ireland is misplaced. Ireland has a written constitution and a constitutional court which has the right under the Constitution to hold government activity to be unconstitutional. Under the UK's doctrine of parliamentary sovereignty, a government can always invoke the current sovereignty of the current Parliament to repeal the legislation of a previous Parliament.

So it would be very difficult for the new law to be legally entrenched. A later Act of Parliament could always repeal it. It is true that in New Zealand, another country without a written constitution, they have entrenched provisions of their Electoral Acts by requiring a 75% majority in Parliament for any subsequent amendments. The 75% requirement has been observed by subsequent Parliaments, and the view in New Zealand is that this particular 'manner and form' requirement has effectively become entrenched (Joseph 2007). But the NZ provisions have never been controversial, and never been tested in the courts. It would be very different in the UK, where this referendum requirement will be controversial, and probably contested. Realistically, the best that can be hoped for is that the referendum requirement would become politically entrenched. Cameron seems to recognise this where he says 'we will challenge the other political parties to accept the referendum lock and pledge never to reverse it'. On the other hand, the likelihood is that a Bill to give effect to an amending treaty would itself contain the procedural requirement for a referendum before its entry into force, so requiring opponents to carry an amendment to delete the referendum requirement.

As for using the courts to enforce the referendum requirement, the probability is that they would consider the issue to be non-justiciable. Much would depend on the political context and climate: in Jackson it made a difference that the Parliament Acts had been accepted law for over half a century. But the courts are reluctant to issue orders that cannot be enforced, and the courts cannot supervise the organisation of a referendum. So the only remedy if the government disobeyed a court order to hold a referendum would be committal of the minister for contempt. This would be an additional reason for the courts holding that the issue was not justiciable.

### **6.1.3 Which Treaties will be subject to the referendum requirement?**

How will the new law identify which future treaties are subject to the referendum requirement? Cameron talks about 'the transfer of power to the EU without a referendum'. Not all EU Treaties necessarily involve transfers of power. There will be future accession Treaties (eg Croatia); there may be reorganisation of functions within the EU; or changes in voting arrangements; or changes like the introduction of one Commissioner per member state. There are constant additions to the treaties already concluded by the European Community, Euratom or by the European Union with non-member States. Presumably these would not be regarded as increasing EU powers and so not subject to the referendum requirement.

At its strongest, the transfer of power would mean conferring fresh powers in an area where previously the EU has had no competence. But in some cases the transfer of power may be relatively insignificant: does this justify holding a referendum? In practice, the powers of the EU have also grown through decisions of the ECJ, and through 'creeping competence'. These jurisprudential and incremental increases in the power of the EU would not be caught by the referendum requirement, though on the other hand

they do not occur as a result of any new treaty. It may not be easy to define which treaties 'transfer power to the EU' so as to require a referendum. And the government will be asked, who will decide? Will it be left ultimately to the courts to determine whether a Treaty comes into the defined category? Or will it be for ministers to certify: and can a ministerial certificate be put beyond challenge?

Cameron was also concerned about the further transfer of powers envisaged under the Lisbon Treaty:

But people will rightly say that the Lisbon Treaty does not just transfer powers to Brussels today. It allows further powers to be transferred in the future, because it contains a mechanism to abolish vetoes and transfer power without the need for a new Treaty. We do not believe that any of these so-called ratchet clauses should be used to hand over more powers from Britain to the EU. Furthermore, we would change the law so that any use of a ratchet clause by a future government would require full approval by Parliament.

In practice this is already covered. The European Union (Amendment) Act 2008, which gave effect to the Lisbon Treaty, requires parliamentary approval for further changes in powers under the Treaty, enumerated in a long list in s6. These add to the locks relating to economic and monetary union already contained in ss. 2 to 4 of the European Communities (Amendment) Act 1993.

#### **6.1.4 When would the future referendum be held?**

The referendum would need to be held after the parliamentary debates; between signature and ratification. That is the Irish practice and also that of other Member States who carried out referendums on earlier treaties, on the Treaty establishing a Constitution for the European Union or on the Lisbon Treaty. A referendum before the establishment of a treaty text would not be practicable. This would give the people the benefit of the politicians' considered views, and would enable the parties to set out their respective positions. In practice for the process to have reached this stage, the government of the day will have negotiated the Treaty, signed it and probably also carried an enabling Bill through Parliament. It will therefore campaign for a Yes vote – as did all those Member State governments which had referendums post Lisbon. The referendum could present a major difficulty for the government if it was unpopular or the electorate wanted to deliver a kick for other reasons. But the requirement could provide an advantage to the government in the earlier Treaty negotiations, strengthening their bargaining position.

#### **6.1.5 What if the people voted No?**

At the least this would be a major embarrassment, undermining the authority of the government; at worst it could bring the government down. The Conservative Government which sought power to ratify the Treaty of Maastricht in 1993 survived only by subjecting the issue to a vote of confidence in the House of Commons. The other political risk is that people might vote No because of opposition to EU membership as such. If that is a real fear the issues could be separated out by a two question referendum:

1. Do you wish the UK to remain a member of the EU?

2. On the assumption of continued UK membership, do you approve the UK's accession to the latest EU Treaty?

## **6.2 Sovereignty Bill**

In his same post-Lisbon Treaty speech, Cameron included a further commitment:

Because we have no written constitution, unlike many other EU countries, we have no explicit legal guarantee that the last word on our laws stays in Britain. There is therefore a danger that, over time, our courts might come to regard ultimate authority as resting with the EU. So as well as making sure that further power cannot be handed to the EU without a referendum, we will also introduce a new law, in the form of a United Kingdom Sovereignty Bill, to make it clear that ultimate authority stays in this country, in our Parliament.

This is not about Westminster striking down individual items of EU legislation. It is about an assurance that the final word on our laws is here in Britain. It would simply put Britain on a par with Germany, where the German Constitutional Court has consistently upheld - including most recently on the Lisbon treaty - that ultimate authority lies with the bodies established by the German Constitution. (Cameron 2009).

In effect the Sovereignty Bill would seek to codify the grundnorm of the British constitution. But again, it makes a huge difference that Germany has a written constitution and Britain does not. For the same reasons that an EU referendum bill could not be entrenched, the Sovereignty Bill could not stop a later parliament repealing it or disapplying it.

### **6.2.1 What is the objective?**

That raises the question: what are the Conservatives trying to achieve? Is this primarily a political gesture, to appease UKIP and the Eurosceptics within the Conservative party? Or is the Sovereignty Bill intended to have real legal effect? And if the latter, is the objective solely to safeguard parliamentary sovereignty against further encroachments from the EU; or (as hinted at in some of Cameron's other speeches) from other sources? Parliamentary sovereignty is also threatened by the courts' interpretation of the ECHR, by devolution, and by further development of the common law. Is the real policy objective to try to protect government policy and legislation from growing judicial intervention?

### **6.2.2 What would a Sovereignty Bill say?**

Drafting concentrates the mind. Is the objective something like the following, declaring to the courts that Parliament can if it wishes direct them not to apply EU law; or the ECHR (the ECHR is covered in the third paragraph of the draft below)?

*This Act recognises the Queen in Parliament to be the primary source of law in the UK, and the ultimate source of all legal authority.*

*If at any time Parliament decides to legislate in a way which is incompatible with EU law, and expressly so declares by disapplying the relevant provisions of the European Union (Amendment) Act 2008, the UK courts shall give effect to UK and not EU law.*

*If at any time Parliament decides to legislate in a way which is incompatible with the ECHR, and expressly so declares by disapplying the relevant provisions of the Human Rights Act 1998, then the UK courts shall give effect to UK law and not to the ECHR.*

### **6.2.3 What are the likely obstacles?**

There will be three major sources of opposition, assuming the government has a sufficient majority to get its Sovereignty Bill through the Commons. The first is the House of Lords, where the government has no majority. The bill will be referred to the Lords Constitution Committee and to the EU Committee. Both committees are likely to report against the bill; the first on legal and constitutional grounds; the second because of the damage the bill would do to the UK's standing in Europe. If the Sovereignty Bill had been included in the Conservative manifesto, the Lords might feel obliged not to block it or wreck it under the Salisbury convention. But the Liberal Democrats (who hold the balance of power in the Lords: see chapter 5.2) no longer subscribe to the Salisbury convention. If they decided to oppose the bill, the government might need to invoke the Parliament Acts to force the bill through.

The second source of opposition will be the judges. The wider the bill ranges the more the judges will be likely to attack it. It is worth remembering their reaction to the ouster clause in the Asylum and Immigration Bill 2003. Although the judges would not risk a set piece battle with Parliament, they will resist any attempt to take power from the courts: in particular their role in interpreting and enforcing ECHR rights, and EU law. The respective roles laid down by the law lords in Jackson were that the courts would respect the province of Parliament; but Parliament must respect the province of the courts.

The third source of opposition will be the EU. There may be puzzlement rather than opposition if all the bill does is to declare sovereignty along the lines of the draft above. Parliament already has the power to safeguard its legislation from attack from EU law applied by the UK courts if it so wishes: Thoburn. If the UK at any time in the future did want to disapply EU law in UK legislation, it would have to insert a notwithstanding clause: 'Notwithstanding the requirements of the ECA 1972, ...'. But the UK could not do so with impunity. If an attempt were made actually to invoke the 'sovereignty' provision, the likely result would be that the Commission would take the UK before the ECJ for infringement proceedings under the Art 226 procedure (now Art 258 TFEU). In effect the UK would be forced to choose between compliance and a negotiated withdrawal from the European Union – a route now provided by the Lisbon Treaty.

### **6.3 Opt out from social and employment legislation, Charter of Fundamental Rights, and criminal justice**

The reaction from the EU will also depend on how strongly the government pursues Cameron's wish to repatriate three sets of powers which he believes should reside with Britain, not the EU. These are:

- Social and employment legislation
- The EU Charter of Fundamental Rights

- Criminal justice.

What Cameron said in his speech of 4 November was:

We will want to negotiate the return of Britain's opt-out from social and employment legislation in those areas which have proved most damaging to our economy and public services ...

The second British guarantee we will negotiate is over the Charter of Fundamental Rights. We must be absolutely sure that this cannot be used by EU judges to re-interpret EU law affecting the UK. We will want a complete opt-out from the Charter of Fundamental Rights.

The third area where we will negotiate for a return of powers is criminal justice. We will want to prevent EU judges gaining steadily greater control over our criminal justice system by negotiating an arrangement which would protect it. That will mean limiting the European Court of Justice's jurisdiction over criminal law to its pre-Lisbon level, and ensuring that only British authorities can initiate criminal investigations in Britain.

Cameron recognised that taking back power in these areas is not something which the UK can do unilaterally. It would require the agreement of all 27 member states. This briefing is not the place to enlarge on the likely difficulties. Sir Stephen Wall has pointed out that no concessions would be made to the UK without Britain giving something in return: such as the budget rebate. Charles Grant has said the other member states would be most unlikely to restore Britain's opt out from the Social Chapter. The third change, negotiating for the return of powers under criminal justice, is not really necessary. Under the Lisbon Treaty the UK already has a highly flexible opt out from all new EU laws to do with justice, policing or immigration (technically, a right to opt in).

## 7 Elections, Referendums and Political Parties

### Conservative commitments:

- Speed up individual voter registration
- Speed up boundary reviews to reduce Parliament by 10 per cent
- Legislate to require referendums for EU Treaties
- Legislate for referendums on elected mayors and local issues.

### 7.1 Elections

#### 7.1.1 Individual voter registration

The Conservatives have long supported individual electoral registration (IER) as a means of improving the comprehensiveness and accuracy of the electoral register, and reducing electoral fraud. At their initiative a new clause was added to the Political Parties and Elections Act 2009 for the introduction of IER, replacing the current voter registration system by heads of households. Introduction will be in two phases. From 2010 to 2015 individual information (National Insurance number, date of birth and signature) will be collected by Electoral Registration Officers on a voluntary basis. The Electoral Commission will monitor take-up, and in July 2014 will make a formal report on whether the provision of personal identifiers should be compulsory for everyone who wants to be on the electoral register.

The Conservatives have criticised the long time scale, and want to speed up the process. There are three obstacles to doing so. The first is that it will require fresh legislation to depart from the gradual and voluntary approach in the 2009 Act. The second is an increase in the initial cost. The voluntary programme of IER is estimated to cost £45m in 2010-11, £30m in 2011-12, and £20m pa thereafter. Making the process compulsory would cost more initially, with £60m in Year 1, but overall the costs would be halved. The third difficulty is that compulsion from the start might damage public confidence in the new system, and put at risk the accuracy and integrity of the electoral roll. The Electoral Commission will be consulting about their evaluation approach, but they will be concerned to maintain integrity of the registration process and the confidence of electors, and to ensure that personal data is properly managed and protected.

It is worth remembering that postal voting was speeded up at government insistence in 2003, against the advice of the Electoral Commission, and electoral fraud increased as a result. So the government should consult the Electoral Commission before speeding up the process, and think hard before overriding the Electoral Commission's advice.

#### 7.1.2 Reduction in size of Parliament: changes to Parliamentary Boundary Commissions

If the government wishes to reduce the size of the House of Commons by 10 per cent in the life of a single Parliament, it will need greatly to speed up the process of parliamentary boundary reviews (see ch 5.1.1). This may require reviewing the future of the parliamentary boundary commissions (their functions were due to be transferred to

the Electoral Commission, but they were then granted a reprieve). More likely is a further reprieve; but radical streamlining and speeding up of the way they conduct boundary reviews. This will require urgent legislation in the first year of the new government, which will be contested with accusations of gerrymandering. It will also require additional expenditure to increase the staffing of the boundary commissions to enable them to speed up the process. A rough cost estimate is £15m.

### **7.1.3 Electoral Administration**

The Electoral Commission was set up in 2000 to regulate elections, referendums and the funding of political parties. It is not popular with politicians, but it would be difficult now to get rid of it. Following a critical report by the Committee on Standards in Public Life in 2007, it has been trimmed a little: it is no longer responsible for electoral policy or electoral boundary setting. It is accountable to a Speaker's Committee of the House of Commons. If the government wished to trim it further, it would not be easy, because its budget is set by the Speaker's Committee (see 11.3).

Following the passage of the Political Parties and Elections Act 2009, the Electoral Commission is to have four additional Commissioners appointed by the political parties, which may make it more sensitive to their needs. Under the same Act, it will be heavily involved in the introduction of individual voter registration. It may also be required to supervise referendums under PPERA 2000. It will be responsible for conducting the referendum on legislative powers for the Welsh Assembly (see ch 4.5.1), and any future referendums on EU Treaties. But it will not be responsible for any independence referendum authorised by the Scottish parliament (unless invited to do so); nor for referendums on elected mayors, or local issues.

### **7.1.4 Electoral administration in Scotland**

The Calman Commission (see ch 4.5.2) proposed to devolve power to Scotland over the running of elections to the Scottish parliament. The SNP have accepted the recommendation. If the government agree, they will need to decide whether to devolve both administrative and legislative powers, or only administrative powers.

## **7.2 Referendums**

The House of Lords Constitution Committee is starting an inquiry in January 2010 into Referendums in the UK. It will ask when a referendum is and is not required to support a constitutional change. In this connection it will be interested in the Conservative plans to require a referendum for any future EU treaties; and in Conservative proposals to hold referendums for elected mayors in ten major cities, and to confer a power on citizens to initiate referendums on local issues. Conservative plans to empower citizens involve greater use of referendums.

There may also be one or two referendums which are not part of Conservative plans. In 2010 the new government will need to decide whether to authorise a referendum on primary legislative powers for the Welsh Assembly (see ch 4.5.1). It may also have to decide how to react to Alex Salmond's proposed Scottish independence referendum bill (see ch 4.4).

### 7.3 Regulation and funding of political parties

The last five years have seen three reviews of the funding of political parties: by the Electoral Commission (2004), the Constitutional Affairs Select Committee (2006), and Sir Hayden Phillips (2007). Building on the previous reviews, Phillips concluded that the status quo was no longer sustainable. He recommended:

- a cap of £50,000 on donations
- reducing major parties' spending on general elections from £20m to £15m
- additional state funding.

The Phillips report was followed by inter party talks, with a draft agreement published in August 2007, but the talks were suspended in December. There had been two main obstacles: the Conservatives wanted the £50,000 cap on donations to apply to trade union contributions to the Labour party; and Labour wanted action to curb Lord Ashcroft's special fund for marginal constituencies.

Phillips' main recommendations were broadly similar to the Conservative submission (Clean Politics: March 2006). But it is unlikely that a Conservative government would want to implement the Phillips report. Conservative party finances are now much healthier than those of the Labour party, so in part the problem has gone away. The obstacles to reaching inter-party agreement are still there. The Conservatives will not want to propose additional state funding at a time of public spending cuts. And re-opening the debate about party funding risks drawing attention to Conservative donors such as Lord Ashcroft which might not be welcome.

But there may need to be two minor reforms:

- Clarify candidate spending regulations. After 'triggering' was dropped from the original proposals, a new set of regulations was introduced for candidate spending. The new limits on candidate spending apply only to five year terms. There may need to be new provisions to clarify candidate spending regulations in a four-year parliament
- Require MPs and peers to be UK taxpayers. In December 2009 Cameron announced that a Conservative government would legislate to ensure that all MPs and peers 'had to be a full UK taxpayer or treated as a full UK taxpayer'. Such legislation would not necessarily bring into tax the offshore income of non-domiciled taxpayers such as Zac Goldsmith, whose non-dom status had prompted Cameron to make the pledge. The government tabled amendments in January to the Constitutional Reform and Governance Bill to ban people living in the UK but registered abroad for tax purposes from being MPs or peers. The Conservatives will have to decide in the washup whether to retain those provisions of the bill.



## 8 Human Rights

### Conservative commitments:

- Repeal Human Rights Act
- Replace it with a British bill of rights

### 8.1 Replace Human Rights Act with a British bill of rights

There can be no doubt of the Conservative commitment to repeal the Human Rights Act. In the 2005 Conservative manifesto the commitment was to conduct a review. David Cameron raised the stakes in a speech in June 2006 which was wholly devoted to a critique of the Human Rights Act, when he first pledged its repeal (Cameron 2006a). He has repeated the commitment in many speeches since (Cameron 2006b, 2007, 2008, 2009); as have his shadow Justice Secretaries Nick Herbert and Dominic Grieve (Herbert 2007, 2008; Grieve 2009, 2009a).

The Conservative critique of the Human Rights Act is that it has:

- Transferred power from elected politicians to unelected judges
- Developed a ‘rights culture’ which has distorted the priorities of public bodies and undermined public safety
- undermined the powers of the state to tackle terrorism, and to deport foreign nationals who threaten our security.

They point out that:

- Other countries have signed up with reservations that permit them to override certain articles of the ECHR
- France has reserved the right to derogate from the ECHR in times of emergency under the conditions laid down by the French constitution
- The Basic Law in Germany enables the European Court of Human Rights to defer to clearly defined domestic constitutional doctrine under the margin of appreciation.

Cameron’s solution is to repeal the Human Rights Act, and replace it with a British bill of rights which would give British public authorities greater latitude, and direct the courts to balance rights with responsibilities, and public safety. A British bill of rights is also the policy of the Labour government, and of the Liberal Democrats (JUSTICE, 2007). It is also the policy of Parliament, where the Joint Committee on Human Rights has strongly recommended the adoption of a British bill of rights, and appended a draft bill of rights to their report (JCHR 2008). But underneath this apparent agreement there are big differences of view between the political parties, and between individuals within the same party, about what a British bill of rights might contain, and how to get there. Most human rights lawyers and experts are content with the Human Rights Act, and fear putting it at risk, so that on this issue there is a big gulf between the political class and the legal establishment.

## 8.2 British bill of rights: Contents

### 8.2.1 ECHR plus or minus?

Labour and the Liberal Democrats are clear that a British bill of rights (BBOR) must build upon the ECHR rights as its floor: in human rights shorthand, it must be 'ECHR plus'. Within the Conservative party there is an unresolved debate as to whether it might be ECHR minus: whether it might be possible to restrict the application of some of the Convention rights by interpreting them through the limiting prism of a British bill of rights.

Human rights experts are agreed that a BBOR must be ECHR plus. After hearing evidence from these experts the JCHR concluded:

We agree that any UK Bill of Rights has to be 'ECHR plus'. It cannot detract in any way from the rights guaranteed by the ECHR (JCHR 2008 para 50).

Their reasoning was as follows:

even if a Bill of Rights were enacted, this would not change the existing ECHR caselaw, or lead to a watering down of ECHR rights, unless the UK withdrew from the ECHR. Withdrawing from the ECHR is not a realistic possibility, since being a signatory to the ECHR is now effectively a condition of membership of the EU (JCHR 2008, para 48).

In 2007 the Conservatives established a commission of lawyers to try to square this circle, but their work is still not complete. But in a speech in late 2009 Dominic Grieve gave some strong indications of their thinking. He argued that s2 of the Human Rights Act merely required our courts to 'take account of' the Strasbourg jurisprudence, but they had gone further. They should be encouraged to challenge and engage in dialogue with Strasbourg where the ECtHR failed to provide principles of general application, and should not go further than Strasbourg in developing home grown jurisprudence on matters such as restrictions on deportation, and privacy law.

Grieve outlined that a British bill of rights might:

- Reword s2 of the HRA, to emphasise the leeway of the UK courts to have regard to our national jurisprudence and traditions
- Through interpretation clauses give more detailed guidance on where the balance is to be struck between competing rights
- For example, clarify the balance between privacy law and freedom of expression within our national tradition, which has historically treated the right to freedom of expression as paramount.

In terms of additional rights, Grieve proposed as possible candidates:

- The right to trial by jury
- Limiting the power of the state to impose administrative sanctions

- Extending equality and sexual orientation law to include gender and sexual orientation
- But not to include any social or economic rights
- Nor to include any responsibilities, save possibly in a preamble.

In terms of the process to be followed, Grieve expected to consult widely by means of a Green Paper. It was important not to rush the process, because the objective was to develop popular ownership of the British bill of rights, something clearly lacking from the HRA (Grieve, 2009a).

### **8.2.2 Rights and Responsibilities**

Many advocates of a British bill of rights want it to include responsibilities, to challenge what they see as a selfish rights culture which asserts ‘my’ rights without acknowledging the rights of others. The government’s 2009 Green Paper had a separate chapter on responsibilities, but struggled to find any which were enforceable (Ministry of Justice 2009, ch 2). Where responsibilities have been included in bills of rights, they have generally been mentioned in the Preamble, as in the Victorian Charter of Rights and Responsibilities:

Human rights come with responsibilities, and must be exercised in a way that respects the human rights of others.

The JCHR report also inquired whether there was any place for responsibilities or duties in a bill of rights, and concluded

We are therefore strongly opposed to any UK Bill of Rights being called either a Bill of Rights and Duties or a Bill of Rights and Responsibilities. Rights should not be contingent on performing responsibilities, nor should a Bill of Rights impose enforceable duties on individuals or responsibilities which they are already required by the general law to discharge (JCHR 2008 para 274).

Dominic Grieve has come to the same conclusion:

While the scope for a preamble touching on the duties of citizenship may be helpful, I think that symbolic legislation should be avoided (Grieve, 2009a).

### **8.2.3 Additional legal and political rights**

The main Conservative suggestions for additional rights in a BBOR are the right to trial by jury, and the placing of strict limits on administrative penalties without due process of law (Grieve 2009a). Other possibilities which have come from the government are rights for victims, habeas corpus, equality before the law, and good administration (Ministry of Justice 2009, ch 3).

These possibilities echo the JCHR report, which also suggests the right to trial by jury, administrative justice, equality, and incorporating rights under other international conventions such as the UN Convention on the Rights of the Child, and the UN Convention on the Rights of Persons with Disabilities.

#### 8.2.4 Social and economic rights

There will be little enthusiasm from the Conservatives for the inclusion of social and economic rights in any British bill of rights. The JCHR report proposed that there should be such rights, but of a non-justiciable, aspirational kind (JCHR 2008 ch 5). Even if non-justiciable, the Treasury will be concerned that they will raise public expectations and put further pressure on public services. At a time of spending cuts they are a non-starter.

### 8.3 British bill of rights: Process

The process for developing a bill of rights is as important as the content. Dominic Grieve has stressed the importance of creating a document with greater public resonance than the Human Rights Act (Grieve 2009): one which can be owned by the British people. Both the JUSTICE inquiry and the JCHR report on a British bill of rights devoted a separate chapter to the process, drawing on overseas examples to illustrate how the public can be involved to develop wide public support and acceptance of the end product. In 2009 the government embarked on a public engagement exercise to consult about its proposals for a British bill of rights, but despite the cost (£1m) it appears to have generated very little publicity or interest (Ministry of Justice 2009a).

There is no single answer to how to engage effectively with the public in such a big constitutional exercise. The Australian state of Victoria did so through an expert four-person committee, which conducted an intensive six-month consultation based on the government's preferred model. The JCHR concluded that an independent body should lead the consultation process, to command public confidence. It might also be more imaginative and energetic than a government-led exercise (JCHR 2008, ch 9).

The process must involve all parts of the UK, and must also involve the devolved governments and assemblies. This could be a show-stopper. Dominic Grieve is well aware of this, and has said that a Conservative government would wish to respect the devolution settlements, and not impose changes against their will in respect of devolved matters (Grieve 2009a). The difficulty is that this may effectively grant the devolved governments a veto, since many human rights do impinge on devolved matters (education, health, social policy etc). In Scotland the SNP government does not see any need for a British bill of rights (MacAskill, 2008), which it regards as a retrograde step in devolution terms, and may well seek to exercise an opt-out or veto. In Northern Ireland a British bill of rights risks being divisive, welcomed by the unionists but opposed by the nationalists, who will stand by the commitment in the Belfast Agreement that Northern Ireland have its own Bill of Rights.

There is one other small aspect of process. Dominic Grieve has said it is:

important that Parliament should have a proper dialogue with the judiciary on issues of interpretation. The system in the HRA, by which a fast track procedure exists to amend offending legislation... is not satisfactory as it minimises the role of Parliament. One option would be to put in place a requirement for primary legislation (Grieve, 2009a).

This concern seems unfounded. Of the 15 declarations of incompatibility that had survived the appeals process down to 2008, only one was remedied using the fast track

procedure. Three were still awaiting a governmental and parliamentary response, but the remainder had been addressed using primary legislation (Leigh and Masterman, 2008).

#### 8.4 British bill of rights: Entrenchment

The HRA is not entrenched, save for the obligation to interpret all legislation, including future legislation, compatibly with Convention rights. It thus entrenches the ECHR rights against implied repeal, but leaves Parliament free to pass incompatible legislation if it makes clear that is its intention.

A British bill of rights will raise again the question of whether it should be more strongly entrenched than this. It is not easy to entrench legislation within the British system of parliamentary sovereignty, but there are four possible mechanisms:

- Requiring the consent of both Houses to any measure amending the bill of rights, by excepting amendments to the bill of rights from the terms of the Parliament Act 1911 (so the Commons could not overrule the Lords)
- Requiring special voting majorities, eg two thirds or three quarters, for any amendments to the bill of rights (as New Zealand requires for amendments to provisions of their Electoral Acts)
- A referendum requirement for any amendments
- A simple declaration against amendment.

When the Human Rights Act was introduced entrenchment was considered difficult if not impossible. Attitudes are changing; and the Conservatives are themselves proposing entrenchment for other measures (see chapter 6). If entrenchment is desired, the first mechanism is preferable for a strong form of entrenchment, and the fourth for a weak form. Special majorities are so far unknown in the UK; and a referendum seems too high a threshold for what may sometimes be minor amendment.

But a referendum should be considered as part of the process for adopting the bill of rights. It would do more to generate public interest and debate than any number of public meetings and consultation exercises. It would help promote the sense of popular ownership which Dominic Grieve is seeking, and strongly endorse the new bill of rights.

#### 8.5 Timetable for developing and adopting a British bill of rights

Both David Cameron and Dominic Grieve have emphasised the need for a very widespread process of public engagement, which must not be rushed. There is also the need to consult the devolved administrations. A possible timetable for a thorough and highly consultative process is set out below. If there was a desire to move faster, then publication of a White Paper (as well as a Green Paper), and publication of a draft bill for pre-legislative scrutiny could be dropped, saving about six months in each case.

Date	Stage in Process	Comments
2010		
	Cabinet Committee to develop policy	This allows 9 months. It took the Labour govt 18 months to produce their Green Paper

<b>2011</b>		
spring	Green Paper published	
summer	JCHR inquiry and report on Green Paper Devolved governments and assemblies are consulted	To establish the strength of parliamentary support for the Green Paper proposals, and of support or resistance from Scot, Wales and NI
autumn	White Paper published Expert Consultation Commission starts work, given 12 months for public consultation	The Commission in Victoria had 6 months to consult 5m population. UK population is 60m
<b>2012</b>		
autumn	Consultation Commission reports	
<b>2013</b>		
spring	Govt introduces draft British bill of rights to Parliament; referred to JCHR	To give the JCHR a second bite
summer	JCHR reports on pre-legislative scrutiny	
autumn	Bill of rights introduced to Parliament	
<b>2014</b>		
summer	Bill of rights passed	There was a 2 year period between passage and commencement of the Human Rights Act. Because of the 10 year experience of the HRA, one year's preparation should suffice for the BBOR
<b>2015</b>		
summer	Bill of rights implemented. If timetable slips, this could be target date for passage of the bill of rights	15 June is the 800 <sup>th</sup> anniversary of Magna Carta in 1215

## 9 The Judges

### Conservative commitments:

- Curb the growing power of the judges
- Recalibrate the relationship between the courts and Parliament

### 9.1 Growing power and independence of the judiciary

All advanced democracies have seen greater legalisation and judicialisation of politics in recent years (Stone Sweet, 2000). In the UK the increased power of the judges can be traced in particular to the growth of judicial review, accession to the EU and incorporation of the ECHR. Applications for judicial review have grown tenfold in the last 30 years (Bailey, Jones and Mowbray 2005 at 247-8), showing how much more closely the courts now supervise the actions of the executive. Accession to the EU and incorporation of the ECHR have given the courts greater power in constraining Parliament as well as the executive branch. Enforcing the supremacy of EU law, the courts have disapplied Acts of the UK Parliament (eg *Factortame* 1988). And under the Human Rights Act, the courts have declared Acts of Parliament incompatible with the ECHR, leading government and Parliament to repeal the offending provisions, although not strictly required to do so (eg the Prevention of Terrorism Act 2005, following the *Belmarsh* case).

The judges have also become more independent of government under the reforms introduced by the Constitutional Reform Act 2005. These made three big changes. The Lord Chancellor has been replaced as head of the judiciary in England and Wales by the Lord Chief Justice. The power to appoint judges has (effectively) been given to a Judicial Appointments Commission. And 2009 saw the birth of the new Supreme Court, separate from Westminster, which will be more high profile and possibly more assertive than the old Appellate Committee of the House of Lords.

### 9.2 Conservative policies to redress the balance

These changes have not gone unnoticed by politicians. Cameron has spoken several times of the need to curb the growing power of the judges. In June 2009 he spoke of reining in and reversing the regulation of our lives by unaccountable judges who are changing Britain's legal landscape with their judgments in the courtroom (Cameron 2009). Dominic Grieve has spoken of the need for a reconsideration and recalibration of the relationships of our national courts and Parliament (Grieve 2009b).

What do they have in mind, and how do they hope to achieve it? Primarily they hope to curb what they see as excessive enforcement of EU law and the ECHR by the British courts. Excessive enforcement of EU regulations could possibly be reined in by the Sovereignty Bill (if that is its objective: see chap 6.2). Excessive interpretation of the ECHR will be discouraged under the new British Bill of Rights, which will contain guidance to the British courts that they do not have to follow the case law from Strasbourg:

We should also, however, reconsider the duty in Clause 2 to “take into account” Strasbourg jurisprudence. As I have already said, it has been interpreted as requiring a degree of deference to Strasbourg that I believe was and should be neither required nor intended. We would want to reword it to emphasise the leeway of our national courts to have regard to our own national jurisprudence and traditions and to other common law precedents while still acknowledging the relevance of Strasbourg Court decisions (Grieve, 2009b).

In *R v Horncastle* the Supreme Court recently came to a similar conclusion. Lord Phillips noted that

The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. [In this case] the court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course [2009] UKSC 14, 11.

### **9.3 Issues which may create tensions with judiciary**

The judges will not like being told how to interpret the requirements of EU law or the ECHR. Some will regard it as a threat to their independence, and there are likely to be rumblings. Whether the rumblings turn into resistance will depend on how many other perceived attacks there are on judicial independence under the new government.

The first issue which will exacerbate tensions with the judiciary is public spending cuts. This could impinge in three ways. First, cuts to public services will lead to an increase in judicial review cases to challenge the cuts. Second, the budget of the Courts Service may be cut, and legal aid. Third, there may be direct or indirect cuts to the remuneration of the judges. Cuts to the budget of the Court Service or to judicial remuneration will lead to protests that judicial independence is being infringed.

In the past such protests would have been made mainly at a political level. Now there is also the possibility of a court challenge, based on the new statutory duty laid on the Lord Chancellor in s3 of the Constitutional Reform Act 2005 to uphold the continued independence of the judiciary. The provision was meant to be declaratory only, but not everyone feels bound by that (eg Arden 2007). Such court challenges have been mounted in Canada and Australia (albeit in systems which made such issues more readily justiciable). In Canada cases have come before the Supreme Court from provincial court judges about the erosion of their benefits and working conditions by austerity measures (McCormick 2004). The Chief Judge of British Columbia filed suit against the closure of provincial courthouses. In Australia, the introduction of a surcharge tax on superannuation which had implications for federal judges met with strong opposition from the Association of Australian Magistrates. Changes to the tax treatment of pensions have led to similar protests from judges in the UK: protests which led to them being granted special treatment.

The second issue which could exacerbate tensions with the judiciary is possible changes to the Judicial Appointments Commission. Its future could be called into question in any review of quangos, and it is vulnerable because it is perceived as unduly cumbersome,

bureaucratic and slow. It has not so far succeeded in its target of widening diversity (Justice Committee, 2008). But if the Lord Chancellor wanted to take judicial appointments back into his own hands there could be uproar from the judiciary. They would see any attempt to abolish the JAC or curtail its independence as a threat to their own independence. Although the judges initially resisted the reforms ushered in by the CRA 2005, they ended up with their independence greatly bolstered, and they can be expected stoutly to defend the new settlement.

The judges are likely to voice their disapproval in several different ways. They may criticise government policy in the course of judicial review cases (as they did over the stopping of welfare benefits for asylum seekers). They may give speeches which challenge the government's plans head on, as Lord Woolf did when Lord Chief Justice in 2004 (Woolf 2004). They may give evidence to parliamentary committees, which they have been willing to do with increasing frequency. The next two forms of challenge have not so far been seen in the UK, and may be regarded as nuclear options. The Lord Chief Justice may now formally make representations to Parliament under s5 of the Constitutional Reform Act 2005. Or the judges, collectively or individually, could mount their own court challenge, as their brethren have done in Canada and Australia.



## 10 Freedom of information and Privacy

### Conservative commitments

- Publish every item of government spending over £25k
- Create a new right to request government datasets
- Reduce 30 year rule to 20 years
- Review the role of the Information Commissioner
- Scrap the identity card scheme and ContactPoint database

### Other issues to address

- Extend FOI to wider range of public bodies
- Reconsider FOI fees regime

### 10.1 Publish every item of government spending over £25k

In his speech ‘Giving Power to the People’ Cameron made two commitments to increase government transparency. The first was

We will publish every item of government spending over £25,000.

It will all be there for an army of armchair auditors to go through, line by line, pound by pound, to hold wasterful government to account... And we’re going to publish online all poublic sector salaries over £150,000 (Cameron, 2009; 2009b).

This policy is based on similar initiatives in the US: the Federal Funding Accountability and Transparency Act 2006, which led on to state-level initiatives such as the Missouri Accountability Portal. The federal Act does not give a breakdown of all government spending. It simply brings together on one website ([www.USAspending.gov](http://www.USAspending.gov)) details of all federal contracts, grants and awards. The Missouri Accountability Portal (since emulated in seven other states) goes much further, giving details of all state spending, broken down by agency, category, contract or vendor ([mapyourtaxes.mo.gov/MAP/Portal](http://mapyourtaxes.mo.gov/MAP/Portal)). So it is possible to trace a break down of all the spending by a single department (eg Corrections), or all spending on a single category (e.g. buildings). It also gives individual details of the salaries of all state employees.

Both websites illustrate the two layers of difficulty involved in publishing such information. The first is the daunting task of pulling together huge amounts of financial information from many different places. The second is publishing it in an accessible way. The Missouri Portal is a lot more accessible than its federal equivalent. In developing user friendly websites, the government might want to seek advice from NGOs like the Open Knowledge Foundation which have sought to pioneer similar initiatives in the UK (see [wheredoesmymoneygo.org/prototype](http://wheredoesmymoneygo.org/prototype)); or to encourage Missouri officials to come on secondment to Whitehall.

Cameron hopes that greater transparency will lead to spending restraint and lower public expenditure (Cameron 2009b). There have been no evaluations of the American

initiatives, but the Texas state comptroller claims savings of \$2.3m (an amount which could well be less than the cost of creating the accountability portal). So there is no evidence that these initiatives can generate significant reductions in public expenditure. Nor will greater transparency necessarily help to increase trust. Because the cases that get publicised tend to be negative examples of inefficiency and waste, greater transparency can actually lead to a decrease in trust (Hazell, Worthy and Glover 2010).

## **10.2 Publish government datasets**

Cameron's second commitment also derives from American example: a commitment to publish government datasets.

In the first year of the next Conservative Government, we will find the most useful information in twenty different areas ranging from information about the NHS to information about schools and road traffic and publish it so people can use it.

This information will be published proactively and regularly - and in a standardised format so that it can be 'mashed up' and interacted with.

What's more, because there is no complete list that can tell us exactly what data the government collects, we will create a new 'right to data' so that further datasets can be requested by the public (Cameron 2009).

Here the American precedent is the new federal website [data.gov](http://data.gov), which lists government datasets by agency and by category. It was launched in May 2009, initially with 47 datasets, but claims now to have 118,000 datasets and to have received 47 million hits. It enables citizens to suggest new datasets. The British government followed suit in January 2010 with the launch of [data.gov.uk](http://data.gov.uk), advised by Sir Tim Berners-Lee and Prof Nigel Shadbolt. They have brought together an initial collection of over 2,500 datasets from across government which can be re-used by businesses and the public. It is a strong start. But the crucial decisions are whether to include Ordnance Survey data, which would cost the government £20m a year (out to consultation until April); and whether in future the government makes publication of data the rule rather than the exception (Crabtree and Chatfield, 2010).

## **10.3 30 year rule, and Cabinet records**

In January 2009 the Dacre review recommended that the 30 year rule for publication of public records by the National Archives be halved to 15 years, with a phasing in period of 15 years. The government agreed to reduce the 30 year rule to 20 years, but with extra protection for Cabinet papers and for Royal matters. The Conservatives have agreed to the reduction to 20 years (Grieve 2009c), and are likely to share the government's concern to protect Cabinet papers.

In his response to the first use of the veto, to prevent the release of Cabinet minutes on the war in Iraq, Dominic Grieve supported amending the FOI Act to exclude Cabinet papers:

The Code of Practice on access to Government information [the code that preceded the FOI Act 2000] introduced by the Major Government specifically and deliberately excluded minutes of Cabinet and Cabinet Committees...would it not be sensible to reintroduce that rule?

He cited the concern that the possibility of disclosure would inhibit the free discussion necessary in Cabinet:

I am forced to disagree with the Information Commissioner when he says that such requests will have little impact because they will be rare. Quite the opposite. Because Ministers will not know in advance whether it will be deemed in the public interest to release their discussions, all discussions will be treated as though they could be released...officials would feel unable to give impartial advice freely, and Ministers would feel unable to discuss matters candidly (Hansard 24 Feb 2009 col 157).

A class exemption for Cabinet papers would bring the UK FOI Act into line with the FOI regimes in Australia, Canada and Ireland, all of which have specific exemptions for Cabinet records. The difficulty is to find a watertight definition of 'Cabinet record': does it include briefing notes, correspondence between Ministers following a Cabinet discussion, etc? The definition may need to embrace these wider papers, if their disclosure would itself disclose the content of a Cabinet (or Cabinet Committee) discussion or paper.

#### **10.4 Extension of FOI**

Section 5 of the FOI Act allows the government to extend FOI to cover other bodies. In a speech to the Society of Editors, Dominic Grieve expressed support for an expansion of FOI:

A Conservative government will extend the march of FoI into other organisations, such as the Association of Chief Police Officers, Academies and the newly nationalised banks (Grieve 2009c).

ACPO and academy schools are currently in the process of being covered by FOI, following a government decision to expand FOI to a limited number of public bodies. The big decision is whether to extend the scope of FOI to private contractors who build and maintain hospitals, schools, prisons and leisure facilities. A government committed to a smaller state and less regulation will probably not wish to do so.

#### **10.5 Costs of FOI: fees and charges**

FOI requests are effectively free of charge. Public authorities can refuse to process a request if the costs involved would take them above the 'appropriate limit' of £600 for central government, and £450 for other public authorities. In practice they usually negotiate with requesters to keep the request within bounds. Only search and retrieval time and copying can count towards the costs.

In 2006 a review of the costs of FOI by Frontier Economics found that some 5% of requests accounted for 45% of the staff costs of FOI. To curb these burdensome

requests the government proposed amending the Fees Regulations to allow departments to count deliberation and consultation time as part of the total cost. But following a public and media outcry the government backed down, and FOI requests continue to be free of charge.

If there is a wider review of fees and charges across government, to tighten public finances, the government may want to revisit this issue. It could propose an application fee for all FOI requests, or a more robust charging regime, or both. There will be a strong adverse reaction; but the governments in Australia and Ireland have succeeded in introducing tougher charging regimes.

## **10.6 Reversing the Surveillance State**

In his 2009 speech ‘Giving Power to the People’ Cameron pledged to scrap the ID card scheme and ContactPoint database of children, and remove innocent people’s records from the DNA database. In September 2009 these headline policies were fleshed out in a report by Dominic Grieve and Eleanor Laing, *Reversing the Rise of the Surveillance State*. The report begins by setting out the following principles:

- Fewer – not more – giant central government databases
- Fewer personal details, accurately recorded and held only by specific authorities
- Greater checks on data-sharing between government departments, quangos and local councils
- Stronger duties on government to keep the private information it gathers safe

The report then sets out what this will mean in practice:

- Scrapping the National Identity Register and ContactPoint database
- Establishing clear principles for the use and retention of DNA on the National DNA Database, including ending prolonged retention of innocent people’s DNA
- Restricting local council access to personal communications data
- Strengthening the audit powers and independence of the Information Commissioner
- Requiring Privacy Impact Assessments on any proposals for new legislation or other measures that involve data collection or sharing. Require government to consult the Information Commissioner on the PIA and publish his findings
- Requiring new powers of data-sharing to be introduced into law by primary legislation, not by order
- Appointing a Minister and senior civil servant (at Director General level) in each government ministry with responsibility for departmental operational data security

## **10.7 New roles for the Information Commissioner**

Conservative policy envisages some new roles for the Information Commissioner, granting him stronger audit powers, and requiring him to review the adequacy of the government's Privacy Impact Assessments. The Conservatives have also said that the Information Commissioner should be appointed by, and made directly accountable to Parliament (Grieve and Laing, 2009). That is something the Commons Justice Committee has recommended for some time (CASC 2006, 2007) arguing that the Commissioner would be more independent and more effective if his office was not dependent on the MoJ for its budget and staffing plans.

There is a wider question, addressed in the next chapter, of which constitutional watchdogs should be directly accountable to Parliament. One likely consequence is that such watchdogs would be better funded. The Scottish Information Commissioner, who is directly sponsored by the Scottish Parliament, has an FOI budget which is twice the size per capita of his UK counterpart.



## 11 Constitutional Watchdogs

### Conservative commitments:

- Review all Quangos
- Abolish Standards Board for England
- Reduce unnecessary functions of Electoral Commission
- Information Commissioner to be appointed by Parliament

### 11.1 Review all Quangos

In a speech on ‘Cutting the Cost of Politics’ in September 2009 David Cameron promised a review of all quangos:

The existence of each and every quango must be justified by passing one of three tests we have set.

- Does it undertake a precise technical operation?
- Is it necessary for impartial decisions to be made about the distribution of taxpayers' money?
- Does it fulfil a need for facts to be transparently determined, independent of political interference?

If the answer is yes, it will stay. But if the quango in question does not pass any of these tests it will go, its function assumed by departments of state and we can save a huge amount of money (Cameron, 2009b).

Two months later Francis Maude modified the commitment to a programme of triennial reviews of the purpose and expenditure of each quango:

Last, we will lay out clearly what quangos do and how much they cost, and ensure that the Cabinet Office and Departments carry out a full review of the purpose and expenditure of each quango every three years. This review will include testing whether the quango meets one of the three criteria laid out by David Cameron for continued existence outside of departments, so they will need to demonstrate that they perform a function necessary for transparency, impartiality or perform a highly technical function in order to continue (Maude, 2009a).

In practice any review of quangos will probably form part of a much wider review of public spending, to see where savings can be made. Constitutional watchdogs are not exempt, but may be able to justify their existence against Cameron’s criteria of independence and impartiality. Francis Maude’s caution suggests awareness of the limited effectiveness of previous reviews of quangos, such as the 1980 Pliatzky report. He might draw more courage from the recent exercise in Scotland, where the Crerar review looked at all the government’s external scrutiny bodies (Crerar, 2007), leading to Scottish government plans to reduce external scrutiny bodies by 25%. A parallel review of six

constitutional watchdogs by the Scottish Parliament's Finance Committee led to no overall reduction in numbers, and illustrated the special difficulties of reviewing such bodies. First, there is the difficulty of exercising tight financial controls over watchdogs which need a high degree of constitutional independence; second, the particular difficulty that parliaments have little or no experience of sponsoring external bodies (Scottish Parliament Finance Committee 2006; Winetrobe, 2008; Page 2009).

## **11.2 Constitutional Watchdogs – a special kind of quango**

There is no precise definition of 'constitutional watchdog'. They are responsible for the proper conduct of public business, by ministers, officials and elected representatives, in public finance and areas such as public appointments, elections, and freedom of information (Gay and Winetrobe 2008, 11). They usually have a high degree of independence from Government, greater than that enjoyed by the typical quango.

'Independence' is not a pure or singular characteristic. All bodies are, or should be, dependent on some other body, if only for pay and rations. All bodies are, or should be, accountable to some other body, for their operational and institutional performance, forward planning etc. Independence and accountability are not zero-sum alternatives. Whether a watchdog is 'dependent upon', 'independent of' and 'accountable to' government, Parliament, or some other external body lies at the heart of institutional design for constitutional watchdogs. The more a watchdog's functions are akin to the functions of a parliament – scrutiny of government, representation of the people, redress of grievances – the greater the argument for a close relationship with Parliament (through the 'officer of parliament' model) rather than with government (Gay and Winetrobe 2003; 2008).

Many operational and institutional issues will be similar for quangos and for constitutional watchdogs, but care has to be taken not simply to lump them together. The differences between them (and between specific watchdogs) are often fundamental, which makes like-for-like treatment not only inappropriate, but positively detrimental.

## **11.3 Problems with specific Constitutional Watchdogs**

Constitutional watchdogs have proliferated in recent years. In addition to the NAO, Parliamentary Ombudsman and Audit Commission, there are now the Parliamentary Commissioner for Standards and the Independent Parliamentary Standards Authority; the Committee on Standards in Public Life, the Standards Board for England and the Independent Adviser on Ministers' Interests; the Civil Service Commissioners, Commissioner for Public Appointments, House of Lords Appointment Commission, Judicial Appointments Commission, and Advisory Committee on Business Appointments; the Electoral Commission, the Information Commissioner, and the Commission for Equality and Human Rights.

The Conservatives have supported this proliferation, which has proceeded on all party basis (eg the cross-party support for IPSA). The risk is that, under the usual political pressures, they will follow the practice of previous governments, and create as many quangos, including constitutional watchdogs, as they abolish/merge, each designed to meet a particular demand. In different speeches the Conservatives have given specific commitments about particular watchdogs as follows:

- Abolish the Standards Board for England (Cameron, 2009b)
- Reduce unnecessary functions of the Electoral Commission (Cameron, 2009b)
- Strengthen the Information Commissioner and make him appointable by Parliament (Grieve and Laing, 2009)
- Create an independent Office for Budget Responsibility (Osborne, 2009)
- Put the Civil Service Commissioners on a statutory basis (Maude, 2009a)

Most of these commitments will require legislation. The Standards Board for England was created by the Local Government Act 2000. An excessively centralised approach led to calls for a more proportionate balance between local self regulation and national oversight. Since the 2007 Local Government Act the vast majority of complaints are dealt with by local standards committees. The Standards Board monitors their performance, gives them support and guidance, and deals with the most serious complaints. That central function could be dropped, or passed to another body.

The Electoral Commission illustrates the difficulty of making constitutional watchdogs directly accountable to Parliament. It has grown rapidly since its creation in 2000, with a budget rising to £24m in 2009-10, and a staff of 156 people (Cameron, 2009b). It has become deeply unpopular with politicians. Cameron would like to streamline it, but may find that difficult to achieve, because the Commission is accountable not to government but to Parliament. In Parliament it has been accountable to a committee chaired by the Speaker, which has been particularly weak in its scrutiny of the Electoral Commission. But Parliament has little capacity or experience of sponsoring external bodies; the Public Accounts Commission is little better, as demonstrated by the recent difficulties with the supposed 'gold standard' of parliamentary-focused constitutional watchdogs, the NAO/C&AG.

This provides a salutary context for the proposal that the Information Commissioner be appointed by Parliament. Parliament has little experience of making external public appointments, but gained some from the recent IPSA recruitment exercise, with help from the Commissioner for Public Appointments. If the government felt nervous about Parliament's capacity, the recruitment exercise could still be run by the MoJ, but the appointment made subject to approval by Parliament: either by the relevant Select Committee (PASC), or in consultation with the leaders of the opposition parties. The government might want to pause before going the further step of giving Parliament responsibility for funding the Information Commissioner, as urged by the Justice Committee (CASC 2006, 2007).

The new Office for Budgetary Responsibility is also to be accountable to Parliament. In practice it will be accountable to the Treasury Select Committee. But in all other respects it seems to be envisaged that it will be appointed by and supported by the Treasury. The appointment procedure will be as for the independent members of the Monetary Policy Committee. The OBR will be funded by the Treasury, and initially many of the staff will come from the Treasury. Its main task will be to provide independent fiscal forecasts. It will be composed of a small number of experts, appointed for single non-renewable terms.

The Civil Service Commissioners are to be put on a statutory basis in the current Constitutional Reform and Governance Bill. The Conservatives will support that part of the bill being passed if it goes into the wash up at the end of the session (Maude, 2009a).

## 11.4 General review of constitutional watchdogs?

The Conservatives are pursuing a piecemeal approach, identifying problems with individual watchdogs, but not attempting to view the system as a whole. The risk is that constitutional watchdogs will continue to proliferate; that each watchdog will have a different constitutional design; and that no lessons will be learnt across the system as a whole. This is not just an issue of bureaucratic tidiness. Ill-thought-out watchdog design is likely to be inefficient, ineffective and uneconomic, satisfying neither those being regulated, nor the public. The existence and operation of constitutional watchdogs are crucial to maintaining public trust and legitimacy. Yet their very activity – by revealing failings or improper conduct – can serve to erode, rather than enhance, public trust. As the 2007 PASC Report correctly put it: “the primary purpose of the ethical regulatory system is to ensure that standards of public conduct remain high, rather than to seek to promote trust in public life as a whole.”

What scope is there for a more holistic approach? In 2007 PASC issued a report in which they stated that it was unacceptable for ethical regulators to be appointed by government and funded by government (PASC, 2007). The government disagreed, asserting that no one questioned the independence of the current regulators. Unfortunately PASC did not spell out by whom constitutional watchdogs should be appointed and funded, if not by government. They wanted to see a closer relationship between the watchdogs and Parliament, but did not explain how Parliament might properly exercise the sponsorship function. Nor did PASC address the tensions which have arisen in the Scottish Parliament. Subsequent difficulties at Westminster have made it harder for Parliament to propose taking on new functions, especially if they involve managing public money.

Absent a scandal involving one of the regulators, the new government is not going to have any incentive to sort out the current muddle. Its prime concern will be to minimise costs. But as a modest reform, it could try to build up within government a central source of expertise about the design of constitutional watchdogs. The Propriety and Ethics division of the Cabinet Office should be encouraged to advise, whenever a new watchdog is proposed, on the design fundamentals, set out in para 49 of the PASC 2007 report. They should also consider whether a new body is necessary (could the function be added to an existing watchdog?); whether it should be a collegiate body or single office holder; and appointed for a single term, or subject to renewal. In this work, it should act closely with the parliamentary authorities (which need to develop their own in-house expertise), and examine relevant models within the UK and overseas (especially New Zealand: see Buchanan 2008). It would be a more modest approach; but over time a more consistent set of watchdogs might emerge.

## 12 The Monarchy

### Issues to be prepared for:

- Diamond Jubilee in 2012
- Possible Regency
- Accession of King Charles III
- Review of Civil List
- Ending gender and religious discrimination in laws of succession

### 12.1 Diamond Jubilee

Although the monarchy may seem one of the few fixed points in the constitution, there are contingencies for which the new government should be prepared. The first are two celebratory events. In 2012 the Queen will celebrate 60 years on the throne, her Diamond Jubilee. If she is still on the throne in February 2015, she will be able to celebrate the longest reign in British history. The government will need to prepare for nationwide celebrations to mark both events.

Lord Mandelson, as lead minister, made a preliminary announcement on 5 January about diamond jubilee arrangements. These will include the postponement until 4 June 2012 of the late May Bank Holiday that year and the addition of a further Bank Holiday on 5 June to create a four day period for the principal Jubilee celebrations. These will no doubt include a parade, a service of thanksgiving, and a series of events similar to those for the Queen's golden jubilee in 2002. Settling on dates in early June will help to distinguish the jubilee from the London Olympics, due to start on 27 July. The lead department will be the DCMS. Granted the great deal of detailed planning that jubilees require, the new government will wish to review responsibilities for co-ordination at ministerial and official levels. In 2000 the fact that the DCMS Secretary of State was responsible for both the jubilee and the Commonwealth Games clearly helped the planning process.

### 12.2 Possible Regency

On a sadder note, the Queen may become increasingly infirm, and one day will die. She will be 84 in May 2010. She has started to delegate some investitures to Prince Charles, and may want to delegate more. It is only prudent to be aware of the rules on delegation, and demise of the Crown. This section deals with incapacity; the next with the demise of the Crown and succession of her heir.

Although it is a long time since there was a Regency, the rules are reasonably clear. The monarch's functions may be formally delegated in only two ways, one for temporary purposes and one more permanently. Under the Regency Acts of 1937 and 1953, Counsellors of State may be appointed for temporary purposes, for example should the Queen be incapacitated by a passing illness or be out of the country. The Counsellors of State consist of the heir and the next four in line of succession. The Counsellors have to act jointly, and cannot without the sovereign's express permission consent to a dissolution of parliament.

A more permanent regency may occur if the sovereign becomes incapable of performing royal duties through infirmity of mind or body. Incapacity must be declared on medical evidence by any three of the sovereign's spouse, the Lord Chancellor, the Commons Speaker, the Lord Chief Justice of England and the Master of the Rolls. Prince Charles would then become regent. The regent acquires all the powers of the sovereign except that he may not assent to any Bill changing the line of succession or the position of the Church of Scotland.

There are therefore limits to what an heir may undertake without a regency; but a regency may occur only as a result of the sovereign's incapacity. Short of a regency, the heir could not appoint prime ministers or bishops, give assent to legislation, confer honours or grant dissolutions. But he could take on a wide range of public and ceremonial functions, from reading the Queen's speech, leading attendance on Remembrance Day, fronting diplomatic and Commonwealth occasions, and presiding over the presentation of honours. Attending the Prime Minister's audiences with the sovereign might also be sensible.

If the sovereign suffers prolonged ill-health short of incapacity, such a limbo life could continue for a long time. There might then be a case for a new kind of regency which gave full powers to the regent but took none away from the sovereign (Brazier 1999, at 204).

### **12.3 Accession of Charles III**

There is no question but that Prince Charles would immediately succeed. Talk of leapfrogging to Prince William is empty speculation: it would require legislation like the Abdication Act 1936 and the willing consent of the fifteen Commonwealth countries that are monarchies to change the line of succession. But the government of the day would need to take early decisions on a number of other questions:

- The regnal names of the monarch and his spouse
- the nature of the accession and coronation ceremonies
- The size and management of the Civil List
- The conventions governing the public utterances of the new monarch
- Whether the religious tests and male primogeniture should remain.

#### **12.3.1 Regnal names and accession ceremonies**

Although the monarch's regnal name may be left within reason to his personal preference, the styling of Camilla, Duchess of Cornwall is another matter. The customary expectation is that the spouse would automatically become Queen though – following the advice of the judiciary in 1820 – without any right of actual coronation. But a former Conservative Prime Minister has suggested that 'Princess Consort' would be preferable to Queen.

Decisions on these matters and the conduct of the accession and coronation ceremonies (especially the cost of the latter) would need to be taken. The pattern of 1952-3 could not automatically be repeated. There will be time to plan for the coronation: 16 months elapsed between the present Queen's succession and coronation. Ministers will want to familiarise themselves with the contingency plans in place for the accession: how the new

king should be presented to his people, which people, where and how arrayed. Positions need to be taken before media speculation fills any vacuum.

## **12.4 Review of Civil List**

A decennial review under the Civil List Act 1972 is due in 2010. After the last review in 2000 no increase was recommended by the Royal Trustees (the Prime Minister, Chancellor of the Exchequer and Household Treasurer: HC Deb 04 July 2000 vol 353 cc161-9). Thanks to reduced inflation the civil list had accumulated a substantial surplus. Depending on the state of the royal finances, the new government may come to a similar conclusion. Under the 1972 Act it cannot reduce the size of the civil list (only increase it); nor can it pocket any surplus, which is carried forward.

A completely new Civil List Act will be necessary to determine the size of taxpayers' annual subvention to the new sovereign. The existing provision will last only until the end of six months into the new reign. In the past the quantum has been determined by a Commons select committee chaired by the Chancellor of the Exchequer. However, more than quantum will be at issue, since questions will be raised about the auditing of expenditure and its control. The government will need to be prepared for such questions, including whether audit should be undertaken by the Comptroller and Auditor General rather than the Treasury, and whether management of voted expenditure should be vested in a new Civil Service run office accountable to ministers, or left with the household accountable only to the sovereign.

### **12.4.1 Behavioural conventions**

The Prince of Wales has incurred controversy through his habit of corresponding with ministers and speaking out about his own policy interests and preferences. Although the discussion may be best kept private, the Cabinet will need to secure a clear understanding from the new monarch that such behaviour is not appropriate in the sovereign. The forthright advice from Asquith to King George V in 1913 provides a good statement of the doctrine that the sovereign should act always and only on the advice of ministers (for the text of the letters see McLean 2008).

## **12.5 Ending religious tests and male primogeniture**

Few would now defend the discrimination in the laws of succession, whereby the Crown passes to male heirs ahead of females; and cannot be held by anyone who is, or is married to, a Roman Catholic or who is otherwise not in communion with the Church of England. In recent years several private member's bills have been introduced to remove these discriminatory provisions, including by Conservatives. The Blair government did not seek to defend the discrimination, but said that changing the law would be complex and controversial, and it had other legislative priorities.

Under Gordon Brown the position has changed. In spring 2009 Downing Street said they had been in discussion with Buckingham Palace about amending primogeniture rules and ending the ban on Catholics. David Cameron expressed support for the proposed changes, and the Queen was said to have agreed in principle (Independent 28 March 2009). In November 2009 Brown discussed the changes with Commonwealth governments at the Commonwealth Heads of Government Meeting. The Commonwealth governments need to be consulted because the sovereign is head of state

in 15 other Commonwealth countries (the 'realms'). Several of the realms would not welcome opening up a debate about changes to the monarchy because of the legal and political complexities. In some there is uncertainty whether local legislative change is needed; in federations there is the added complication of obtaining the consent of all the constituent parts; and in some countries there is concern at opening up the wider debate about the future of the monarchy which will inevitably ensue (Twomey 2009).

Leaving aside these Commonwealth complications, ending male primogeniture is probably easier than abolishing the religious tests. These tests (which date from the late 17<sup>th</sup> century) prevent any person succeeding to the throne who is a Roman Catholic or married to one, or who is not 'in communion' with the Church of England. There are eight different pieces of legislation which would need to be amended or repealed. The government says it would like to retain the position of the Queen as head of the Church of England (HC deb 27 March 2009 col 620). In practice it may be difficult to abolish the religious tests without affecting the position of the established church (the reason for the government's sensitivity). If they go, it might be thought anomalous for the sovereign to remain as 'Supreme Governor' of the Church of England – at least on anything like the present basis where, for example, the sovereign appoints the most senior clergy. Establishment is not an all-or-nothing set of relationships, as some in the Church like to maintain, but there is no doubt that this would raise wider issues about the relations between church and state, and indeed between the state and religions of all kinds.

## 13 Direct Democracy

### Conservative commitments:

- Referendums on future EU Treaties
- Petitions to require Parliament to debate issues
- Referendums on elected mayors
- Referendums to veto council tax rises
- Power to instigate referendums on local issues
- Elected police commissioners

Scattered through the Conservatives' proposals are quite a lot of plans for the increased use of referendums. This chapter draws these proposals together, and considers the implications of more frequent referendums for the balance between direct and representative democracy. It considers first the plans for referendums and citizens' initiatives at national level, and then at local level. The plans for referendums at local level are more extensive.

### 13.1 Direct democracy at national level

#### 13.1.1 Referendums on EU Treaties

The only plans for referendums at national level are the proposals to prohibit, by law, further transfers of power to the EU without a referendum. The legal and constitutional difficulties are discussed in chapter 6. This chapter considers how significant an extension this would be of direct democracy in the UK's traditional political arrangements.

The answer is that it would probably not be that significant, for two reasons. First, because of doubts about the efficacy of the new law, which would at most create a strong political expectation that a referendum would be held (see 6.1.2). Second, because of the relative infrequency of future Treaties which might require a referendum. This second reason is inevitably speculative, but is based on a sense that across Europe there is growing resistance to further integration, shared by European governments who will want to avoid any repeat performance of the difficulties of ratifying the Lisbon Treaty for as long as possible.

So there will be a lot of sound and fury about the new referendum requirement (which may be what the Conservatives want), but in practical terms it may not make much difference to the way we are governed, because referendums on EU Treaties will be rare events. UK governments will be anxious to avoid them, because of the cost, the political time and energy displaced into the referendum campaign, and the risk of losing. So future governments may seek to ignore the referendum requirement, or to portray any new Treaty as not requiring a referendum under the new policy. But to the extent that the Conservatives create a presumption that in future a referendum will be required, to that extent the Conservative policy will have succeeded: it will create a further brake on future Treaties transferring new powers to the EU.

### 13.1.2 Public initiation of parliamentary debates and laws

The Conservatives have two proposals to enable the public directly to influence the parliamentary agenda:

- A petition signed by a set number of voters (say 100,000) would trigger a formal debate in Parliament on the topic
- A petition of one million electors could require Parliament to consider a bill. (Cameron and Herbert, 2008; Cameron, 2009a).

This is not the same as a referendum; this is a right of citizens' initiative. A referendum is held at the government's initiative, before legislation is passed or implemented, and it allows the people to say No. A citizens' initiative is the reverse: it allows the people to invite the government or Parliament to pass a law, and Parliament is entitled to say No. In states like California citizens can make laws directly, bypassing the legislature, but that is not what is proposed here. The Conservatives are proposing a right for people to put items on the parliamentary agenda; but Parliament retains the right to reject what people propose.

There are many different models of citizens' initiative around the world, from California (and 23 other states in the USA) to Switzerland as world leaders, with strong forms of initiative, regularly used; to Austria, Italy, Hungary, Latvia, Lithuania, Slovakia, Slovenia and the Ukraine, with weaker forms, less frequently used. The closest models to the Conservative proposals are the citizens' initiatives in New Zealand and British Columbia, both Westminster parliaments which have experimented in recent years with citizens' initiatives.

In British Columbia any voter can apply to the Chief Electoral Officer to have a petition issued in support of a legislative proposal. Six petitions have been initiated since the law was first passed in 1995: four in 1996, one in 2000 and one in 2002. The subjects ranged from balancing the budget to introducing a PR voting system, and banning the hunting of bears. The procedure requires proponents to collect signatures from 10% of the registered electors in each electoral district within 90 days. The first three petitions were abandoned at an early stage; the last three failed to collect the required number of signatures. The PR petition came closest, with 4000 canvassers on the job; but even they failed to collect half the required number.

In New Zealand the Citizens Initiated Referenda Act 1993 allows people not just to propose a new law, but to put it to referendum. The referendum is not binding on the Parliament. 33 petitions have been initiated since 1993, but only three have been put to referendum, since all the other proposals failed to gain enough signatures. Proponents must file an application with the Clerk of the Parliament, who formally determines the wording of the question. They then have 12 months to collect signatures on their petition from 10% of all registered electors. If they are successful, the referendum must be held within 12 months unless 75% of MPs vote to delay the poll for one year. There is a \$50,000 spending limit on promoting the petition.

The topics of the three referendums were: not reducing the number of professional fire-fighters (organised by their union); reducing the size of Parliament from 120 to 99 members; and imposing minimum sentences and hard labour for all serious violent offences. The second was passed by 80%, and the third by 90%, but both were ignored

by Parliament. In 2008 the Clerk declared that a petition to reverse an ‘anti-smacking’ law had reached the requisite number of signatures; but when inspected by officials, a sample of 30,000 signatures revealed too many inconsistencies.

This brief account suggests that there are a number of procedural issues to resolve:

- Who should be in charge of the process: Parliament, or the Electoral Commission?
- Who determines the wording of the petition?
- What is the minimum number of signatures required?
- Who verifies the signatures, and how?
- Should there be spending limits on promoting the petition?
- Is the result advisory, or mandatory?
- What is the relationship with the existing procedure for petitioning Parliament (currently under review), and e-petitions to No 10?

The Conservatives propose a threshold of one million signatures, which is about 2 per cent of registered electors. A successful petition would require Parliament to consider the issue, but not be binding: as in British Columbia and New Zealand. This must be right, if direct democracy is not to override representative democracy; but it risks raising expectations about the prospects of a petition leading to a change in the law. Cameron has said ‘We’ll create a right of initiative nationally, where if you collect enough signatures you can get your proposals debated in the House of Commons and become law’ (Cameron 2009a). It is worth recalling that in British Columbia and New Zealand not a single petition has become law.

### **13.2 Direct Democracy at Local Level**

The Conservatives have made a series of commitments to strengthen and revive local democracy, which are brought together in their policy document *Control Shift: Returning Power to Local Communities* (Conservative party, 2009). These policy commitments include:

- Referendums on elected mayors in large cities
- Referendums to veto council tax rises
- Power to instigate referendums on local issues
- Elected police commissioners.

The purpose of holding referendums on elected mayors in large cities is to relaunch the policy on elected mayors, which has had limited take up since it was first launched in the *Local Government Act 2000*. Referendums are initiated by a petition of 5 per cent of local electors. To force the pace the Conservatives now propose holding simultaneous referendums in 12 large cities (Birmingham, Leeds, Sheffield, Bradford, Manchester, Liverpool, Bristol, Wakefield, Coventry, Leicester, Nottingham, Newcastle upon Tyne). They will need to legislate to require the holding of local referendums (since this is no longer a bottom up policy, but driven from the top down); and to prescribe their policy presumption that “a mayoral system will be established unless voters reject that change”. Holding all the referendums on the same date should generate a lively national debate on the issue; and on whether elected mayors should have greater powers over a wider array of local services, as proposed by their advocates (New Local Government Network, 2009).

The next two policies, on referendums to veto Council tax rises, and a power to instigate referendums on local issues, will both be resisted by local authorities. The latter proposal is to

- Give power to residents to hold local referendums on any local issue by legislating to ensure that a referendum is held in a local authority area if 5 per cent of local citizens sign a petition in favour within a six month period.
- To minimise the cost of any such referendum, the poll would be held at the time of the next ballot in the locality ... unless the council wished to finance the poll at an earlier date. The local Electoral Returning Officer would ensure the wording of the referendum question was fair and balanced, if necessary by obtaining the advice of the Electoral Commission.

The key question is whether such referendums would be advisory or mandatory. If they are mandatory, there is a risk that councils will be burdened with policy or spending commitments which they cannot deliver, because the petition proposers do not provide the necessary resources. This is what has happened in California, where people have repeatedly voted for reductions in taxes, whilst supporting other referendum propositions which require increased spending. To avoid that difficulty, local authorities will argue that petitions should be advisory, and will point to the contrast with the Conservative proposals for central government, where petitioners can do no more than put an item on the parliamentary agenda (see 13.1.2). If that model is followed, then a successful petition would give the proponents the right to have their proposals debated and voted on at a full council meeting: but the council would retain the right to reject the proposals. If the policy went further than this, representative government could be bypassed, because a referendum result would override the policy or decisions of the council.

## 14 Making it Happen: Legislative Programme

### Conservatives' main legislative priorities:

- Bill to reduce size of House of Commons
- EU Treaties (Referendums) Bill
- Sovereignty Bill
- British bill of rights

This final chapter sets out a timetable for those policies which require legislation or some other form of parliamentary approval. It should be read alongside the Summary of Decisions at the front of the report (pp 4-7), and the separate timetables for reducing the size of the House of Commons in chapter 5, and the British bill of rights in chapter 8.

### 14.1 Timetable for policies which require legislation or parliamentary approval

Date	Green or White Paper And Consultation	Legislation or parliamentary approval	Implementation
<b>2010</b>			
May		Approve new Ministerial Code	
June	Emergency budget statement	Lay Welsh referendum Orders	
July	White Paper on reducing size of House of Commons	Votes on Welsh Orders	
Aug			
Sept			
Oct		Refer English votes on English laws to Procedure Committee	Civil Service Act
Nov	White Paper on greater powers for Scotland (Calman), and devolution finance	Introduce bill to reduce size of House of Commons	Referendum on Welsh primary powers
Dec			
<b>2011</b>			
Jan			
Feb			
Mar			
April	Green Paper on British bill of rights (BBOR)	JCHR inquiry starts on British bill of rights	
May	Consult devolved governments and		

	assemblies on BBOR		
June	White Paper on Surveillance State, strengthening Information Commissioner		
July	White Paper on referendum bill on EU powers, and Sovereignty Bill	Royal Assent for bill to reduce size of House of Commons. JCHR report on BBOR	
Aug			
Sept			Boundary Commissions start reviews
Oct	White Paper on British Bill of Rights		
Nov	Expert Commission starts 12 month consultation on British Bill of Rights	Introduce EU Treaties Referendums Bill, and Sovereignty Bill	
Dec		Bill to strengthen Information Commissioner	
<b>2012</b>			
Jan			
Feb			
Mar			
April			
May			
June			
July			
Aug			
Sept			
Oct			
Nov	Expert Commission reports results of BBOR consultation		
Dec		Boundary Commission reports laid before Parliament	
<b>2013</b>			
Jan			
Feb			
Mar		Draft BBOR published, referred to JCHR for pre- legislative scrutiny	
April			
May			
June			
July		JCHR reports on BBOR	
Aug			

Sept			
Oct			
Nov		BBOR introduced	
Dec			
<b>2014</b>			
Jan			
Feb			
Mar			
April			
May			Next general election under new boundaries?
June			
July		BBOR passed	
Aug			
Sept			
Oct			
Nov			
Dec			
<b>2015</b>			
Jan			
Feb			
Mar			
April			
May	White Paper on elected second chamber?		
June		BBOR comes into force	



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