

Delivering Constitutional Reform

The Constitution Unit

The Independent Inquiry into the
Implementation of Constitutional Reform



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Executive Summary

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Planning Ahead

There is currently a real prospect of constitutional reform in the UK. As the general election nears, the Labour Party and Liberal Democrats include the same key elements in their programmes of reform - although they do not agree on the detail of how best to tackle them. These include:

- devolution to Scotland and Wales.
- reform of the House of Lords.
- freedom of information legislation.
- incorporation of the European Convention on Human Rights and development of a domestic Bill of Rights.
- regional government in England.
- reform of parliamentary procedures.
- (at least a referendum on) electoral reform.

The Conservative Party, although opposed to the far-reaching reform package proposed by the Opposition parties, acknowledges the value of gradual reform and is engaged in the constitutional debate.

Debate about constitutional reform has tended to focus on the substance of reform rather than the means of achieving it. But if it is to be successful, it is vital that serious thinking about how to implement reform is begun well in advance. This is particularly true in respect of the far-reaching programmes of reform proposed by the current Opposition parties which, if implemented, will represent change at a pace and of a significance unprecedented in British constitutional history. If the next Government intends to pursue constitutional reform, it needs to start thinking about how it is going to do so now.

Whitehall

The success or otherwise of wide-ranging constitutional reform will depend to a significant degree on the effectiveness of Whitehall - Ministers and civil servants - in tackling the policy agenda prescribed by a reforming Government. A new party entering government will be faced with many important decisions that will have to be taken almost immediately: the design of the legislative programme for the first year; the restructuring of Whitehall departments and Cabinet committees to meet the objectives and priorities of the incoming government; and the appointment of Cabinet and other Ministers.

Planning the Legislative Programme

In planning the legislative programme constitutional bills will have to compete with other programme bills - the main constraint is the amount of parliamentary time available for the Government's main programme bills.

There will be political and practical pressures to proceed at different speeds for different items on the constitutional reform agenda. This will depend on: the level of political commitment to a particular measure (and whether clear public commitments on timing have been made); the amount of preparation necessary; and the inter-relation with other measures.

A Minister in Charge of Constitutional Reform

Within the current Whitehall structures there is no one minister with responsibility for constitutional matters. But reform programmes of the size and complexity proposed by Labour and the Liberal Democrats would need central strategic leadership from a senior Cabinet Minister, possibly a Deputy Prime Minister, the Lord President or Lord Privy Seal.

The title is unimportant, what is key is that the Minister commands the support of the Cabinet as a whole, and has no other policy responsibilities that would require legislation, so that his or her sole priority in the bidding process would be to secure a place for constitutional reform measures.

The provision of central strategic leadership need not supplant the responsibility of departmental Ministers for taking some of the individual measures through Parliament, particularly in the case of piecemeal legislation. The essential point here is to ensure a Minister and a body of officials have an overview of the whole programme, and recognise the inter-relations between constitutional reform measures, rather than simply providing a tactical response unit when specific measures run into difficulties.

Co-ordination and the Machinery of Whitehall

Government must also establish machinery which ensures high level coordination of policy input by all interested departments; and that the process of preparing for and legislating on constitutional reform are kept at the front of the Government's priorities. The structure of Whitehall and Cabinet committees may need to be reshaped to give the reform programme effect. Within Cabinet, this may be by means of a Strategic Policy Committee or by the creation of a new committee responsible specifically for co-ordination of constitutional matters.

Westminster

The time taken by constitutional measures to pass through Parliament tends to be greater than for other bills - in part because of their complexity and the controversy they may attract and in part because of the use of the committee of the whole House.

A Committee of the Whole House

At least five of the measures listed above are likely to be considered 'first class constitutional issues'. By convention such measures are considered on the floor of the House at committee stage. Most other public bills which have been read a second time are automatically committed to a standing committee. Taking the committee stage on the floor of the House allows all Members to take part in the debate and is intended to allow for full debate of particularly significant bills. However, a committee of the whole House is potentially a major pressure point for constitutional bills.

Firstly, it brings out the confrontational and party political characteristics of parliamentary debate. The main weapon of the Opposition - and other opponents of a bill - is to delay progress through raising points of order, filibustering, and tabling numerous amendments. The size of a committee of the whole House offers considerable potential for delay in this manner.

The other reason why a committee of the whole House is such a pressure point is that time on the floor of the House is at a premium. In a typical session a Government has between 50 and 60 programme bills. The amount of legislative time any Government has on the floor of the House to deal with all these bills is around 400 hours in each session. Previous major constitutional bills have taken as long as 100-200 hours on the floor of the House. Assuming a desire to have a significant

legislative programme of non-constitutional measures, under the current system of parliamentary time allocation, there is likely to be time for two constitutional bills per session at the most.

Use of the Guillotine

Of course a government could decide to introduce a guillotine motion to limit time spent on a constitutional bill. However, guillotine motions generate considerable resentment in the House - they mean that large sections of a bill may receive little, or no, scrutiny - and have to be used with caution. Although there are precedents for the use of the guillotine on constitutional bills, opposition to a guillotine motion on an issue of constitutional importance will be particularly fierce. The use of a guillotine could damage the democratic credentials of a reforming Government, and serve to undermine the legitimacy and durability of the constitutional reforms themselves. Indeed, the only occasion since the Second World War when a Government has lost a guillotine motion was over a constitutional bill - the Scotland and Wales Bill 1977.

Changes to Procedure

Serious consideration therefore needs to be given to changes in parliamentary procedure. The key is to ensure that enough time is given for parliamentary consideration and that this time is effectively used for the scrutiny of the legislation. There are essentially two different areas in which alternative procedures, or reform of existing procedures, could ease the passage of a constitutional bill whilst meeting demands for adequate scrutiny:

- to take some stages of a bill off the floor of the House by using another committee forum.
- to alter the control of time, either by limiting the amount of time which can be spent on a bill or by removing some of the constraints on time.

Three proposals which would achieve these aims are:

- partial referral of bills to a standing committee; which would reduce the amount of time that a bill takes on the floor of the House, but allow full debate in a standing committee.
- advance timetabling of all bills; which would ensure that all parts of a bill were looked at and minimise incentives for filibustering.
- selective use of carry over; which would mean that the time spent debating a bill in one session would not be wasted if the bill did not complete its passage in that session.

Part of a Package of Parliamentary Reform

Changing parliamentary procedure simply to facilitate or enhance the quality of a constitutional reform programme is potentially a high risk strategy. The political nature of parliamentary procedure means that changing the rules that govern the game is fraught with controversy. Any Government initiating procedural change must be content to live with those changes when in Opposition. It is important that changes in parliamentary procedure are part of a wider process of parliamentary reform which is coherent and desirable in its own right. Reform of parliamentary procedure has a relevance which goes beyond constitutional bills and there is no shortage of suggestions for ways in which the workings of Parliament could be improved. The desire to secure the passage of a large legislative programme should therefore be seized as an opportunity to implement wider parliamentary reforms.

Consultation, Consensus and Inquiry

There is a strong expectation that constitutional reform be based on broad public and cross-party consultation. If there is the necessary political will, and party unity can be assumed or manufactured, there is every reason to regard the Whitehall-Cabinet Committee route as the most efficient way of developing policy. But getting legislation on the statute book is not all. 'Efficiency' also includes making constitutional reforms endure beyond the lifetime of a particular government: coherence and legitimacy are equally important.

Benefits of Consultation

Those interested in embarking on constitutional reform in the UK this century have nearly always attempted to engage with other political parties and consult outside of political elites. The benefits of consultation can be that it:

- produces more widely acceptable policy and technically accurate legislation.
- allows for the strength and nature of opposition to be assessed.
- provides a means for building support for a measure.
- educates the public and MPs about the issues involved.
- lends weight and authority to the position the government takes.

Mixed Success

However, history also shows that few attempts at consultation have resulted in legislation which had cross-party support. In some cases failed efforts to achieve consensus may even have hindered the passage of the legislation. This can be because consultation:

- is usually entered into as a defensive act, resorted to only when the usual political channels fail.
- produces compromises which are unworkable in legislation.
- identifies and entrenches opposing views.
- forces a government onto the defensive.
- provides a focus for opposition to a measure.
- makes the government look indecisive and directionless.

Mechanisms

The absence of any fixed procedure for constitutional amendment means that there is a range of vehicles that might be used. There are essentially three categories of consultation:

- building political consensus e.g. inter-party talks, an approach which is particularly suited to tackling issues where the balance of political power is at issue.
- calling in the experts e.g. a constitutional commission, a forum appropriate for dealing with measures which require technical expertise and where there is no firm policy commitments to detail.
- public consultation e.g. referendums, desirable where a clear demonstration of wide electoral support is needed to secure the legitimacy of a measure, or as means of providing a degree of entrenchment.

The key determinant of success in choosing a vehicle for consultation or inquiry is to have clearly identified and feasible objectives.

The need for preparation

Successful implementation of a constitutional reform programme will be difficult, but it can be done. Tackling the volume and complexity of the legislation whilst ensuring coherence and adequate consultation will require political will, as well as careful and innovative thought. This is not an argument against embarking on constitutional reform, it merely underlines the value of identifying the practical problems and seeking solutions to them at the earliest possible point.

Introduction

“The huge obstacles impeding constitutional reform in this country are well understood...by anyone who remembers the political shambles of previous attempts to modernise the British Constitution. The obstacles could be overcome, but only by a very rare combination of political commitment, imagination, broad-mindedness, acumen and good luck.”

Anthony Lester, 'Can We Achieve a New Constitutional Settlement?', *Reinventing Collective Action*, 1995

Chapter 1

- 1 There is currently a real prospect of constitutional reform in the UK. As the general election nears, the Labour Party and Liberal Democrats include the same key elements in their programmes of reform - although they do not agree on the detail of how best to tackle them. Both parties make proposals for devolution to Scotland and Wales; reform of the House of Lords; freedom of information legislation; incorporation of the European Convention on Human Rights and development of a UK Bill of Rights; regional government in England; reform of parliamentary procedures; and (at least a referendum on) electoral reform. The Conservative Party, although opposed to the far-reaching reform package proposed by the Opposition parties, acknowledges the value of gradual reform and is engaged in the constitutional debate. This level of interest in constitutional change has brought it into mainstream political debate.
- 2 The Constitution Unit is an independent research project, conducting a technical inquiry into the implementation of constitutional reform. The Unit aims to identify the practical steps involved in putting constitutional reforms in place and to seek solutions to the difficulties a reforming government may face. Our starting point is the policy agendas set out by the main political parties.
- 3 The implementation of specific reforms - devolution to Scotland and Wales, regional government in England, reform of the House of Lords, the introduction of human rights legislation - will be considered in detail in separate Constitution Unit reports. This report sets the scene for those issue-based reports by considering the constitutional, political and historical context in which constitutional reform will take place - and the procedure and processes for achieving such reform. Debate about constitutional reform has tended to focus on the substance of reform rather than the means of achieving it. As Professor Rodney Brazier argues "no political party or any other group has stopped to think about the appropriate methodology of constitutional reform".¹
- 4 The report starts from the position that such thinking is vital well in advance of the implementation of constitutional reform if it is to be successful. This is particularly true in respect of the far-reaching programmes of reform proposed by the current Opposition parties. In advising on the best ways to secure effective, coherent and legitimate constitutional reform, the report's notional audience is the members of any Government intent on implementing constitutional reform, and their advisers. Such a Government would certainly need to be committed and determined. However, if there is a single message of this report it is that if the next government intends to pursue constitutional reform, it needs to start seriously thinking about how it is going to do so now.
- 5 The report looks ahead to the process of implementing constitutional reform - in Whitehall, Westminster and beyond. It looks first at the forces which will drive and shape the reform process: the historical and constitutional framework for reform (Chapter 2). The report then considers how well Whitehall is equipped to deal with a significant number of constitutional reform measures, and what changes might be needed to enable the system to deal more effectively with such a programme (Chapter 3). Drawing on the experience of constitutional change in the UK this century, the report next examines the parliamentary passage of constitutional bills (Chapter 4) and considers what changes to parliamentary procedure might provide for more constructive and efficient consideration of constitutional measures. Finally, the report considers the mechanisms that might be used to build consensus or ensure consultation around constitutional reform, looking at UK and international experience (Chapter 5).

- 6 The appendices have a more historical focus. Appendix A provides a reference guide to the preparation and parliamentary passage of key constitutional measures during the twentieth century, set out in table form. The history of constitutional reform in Britain will inform any future attempts at reform - not least because of the failure of the last Labour Governments to secure reform of the House of Lords and devolution to Scotland and Wales. The absence of a written constitution also means that historical precedent and constitutional conventions weigh heavily in preparing and legislating for constitutional reform. Throughout the report, the history of constitutional reform is therefore examined in relation to specific proposals; in drawing on this past experience of constitutional reform, potential obstacles are identified and suggestions made for ways of overcoming them. These tables provide a quick reference guide in a form not available elsewhere. The second part of the historical analysis is an account of previous attempts at reforming parliamentary procedure (Appendix B). This is included because the report identifies the need for changes in procedures as one of the essential preconditions for successful constitutional reform. But changes to procedure can be almost as difficult to action as substantive constitutional change: here too it is vital to learn the lessons from past successes and failures and to plan ahead.

Constitutional Change in the UK

“All constitutions are in essence political. They are born of political purpose, they describe political facts, and they depend upon political acceptance.”

Robert Blackburn, *Human Rights for the 1990s*, 1989

Chapter 2

Introduction

- 7 If implemented, the packages of reforms proposed by the Labour Party and Liberal Democrats will represent change at a pace and of a significance unprecedented in British constitutional history. The existing legislative process has never had to cope with such a transformation; nor do we have any entrenched institutional or procedural mechanisms for handling constitutional change on this scale. Successful implementation will therefore need careful and innovative thought to accommodate the volume and complexity of the legislation whilst ensuring coherence and adequate consultation. This chapter examines the constitutional context in which reforms will take place and considers the historical forces which will shape the process.
- 8 Unlike most modern states, the UK lacks an identifiable constitutional document or group of documents setting out the basic principles and institutions of its system of government.² An amalgam of statute and common law, conventions and tradition, the UK's 'unwritten' constitution is infuriatingly difficult to pin down. Moreover, having avoided both invasion and full-scale revolution for several centuries, constitutional change in the UK has tended to be an ongoing and evolutionary process, typified as much by creeping changes in practice and convention as by statutory provision.
- 9 The proposed programme of reform breaks with this tradition, setting out to reform the many central tenets of our constitution if not in one fell swoop, certainly in a decade or less. This raises the questions of how a Government could, and (more importantly) how it will be expected to, go about implementing change on this scale. The flexibility of the British constitution means that there are few unquestioned rules about how to go about implementing constitutional reform, but in practice the process will be shaped by constitutional conventions, historical precedents and political pressures.

Constitutional Principles

- 10 Not only does the UK lack a written constitution, but it is also near impossible to identify a coherent set of principles on which the UK's constitution is founded. Even where principles can be identified, there may be little consensus over their continuing relevance or value.
- 11 The essence of traditional liberal constitutionalism has generally been regarded as "a system of legal limitations on governmental power"³, predicated on the importance of the protection of individual rights. This has applied in the UK as much as in those countries with written constitutions, but whereas the UK has relied on the force of common law and convention to secure both limitation and protection, others have developed sets of constitutional rules and structures to perform the same role - layers of representation, federalism, separation of powers, checks and balances. The absence of political and public familiarity with concepts such as these reflect what Nevil Johnson described as "the atrophy of any language in which we can talk of constitutional issues, of rules or of the principles of public law.....we are left floundering in a world of pure pragmatism."⁴
- 12 Nevertheless, each of the three main political parties has articulated its own set of constitutional principles, with varying degrees of specificity.

Conservative Party

- 13 The Conservative Party reaffirmed earlier this year their commitment to the maintenance of the Union: "We stand four square for the Union. For the monarchy. For the independence and strength of Britain. In Disraeli's immortal phrase, the programme of the Conservative Party is to maintain the Constitution of our Country".⁵ Despite rejecting the Opposition parties' proposals for devolved governance in Scotland, Wales and the English regions, the Conservative Party has introduced limited changes to institutional structures - both through legislation e.g. the Single European Act and the Maastricht Treaty; the abolition of the GLC and metropolitan counties in the 1980s, and the more recent reorganisation of local government in England, Scotland and Wales, and by administrative means e.g. the establishment of Next Steps Agencies and the Government Offices for the Regions, and the recent commitment to make greater use of the Scottish and Welsh Grand Committees. Nor is the Conservative Party opposed in principle to constitutional innovation, as the process of talks, and recent proposals for elections, in Northern Ireland have demonstrated.

Labour Party

- 14 The Labour Party declares in the new Clause 4 of its own constitution that "we work for...an open democracy, in which government is held to account by the people; decisions are taken as far as practicable by the communities they affect; and where fundamental human rights are guaranteed". The 1993 Conference Paper *A New Agenda for Democracy* gives the fullest account of the Labour Party's specific proposals for constitutional change identifying a new constitutional settlement "which establishes a just relationship between society and the individual, one which above all, fundamentally redresses power in favour of the citizen from the state". Earlier this year in the John Smith Memorial Lecture, Tony Blair reaffirmed the Labour Party's commitment to a wide-ranging constitutional reform programme.

Liberal Democrats

- 15 The Liberal Democrats have stated their goals as "empowering individual citizens, limiting executive dominance and enhancing governmental effectiveness". They also question long-standing constitutional doctrines: "The mechanical reassertion of the Sovereignty of Parliament remains the stock-in-trade of most politicians. Yet this concept is ever more outdated and irrelevant... Similarly, the rule of law as set out by Dicey is primarily concerned with the supremacy of the legal order. Few question the need for such supremacy within a democracy. Yet after generations of increasing executive power, it is the nature of that order...that ought to be at the forefront of the debate on constitutional government."⁶ The Liberal Democrats have long supported a comprehensive programme of constitutional reform, which includes more detailed and, in some cases, more radical commitments than those proposed by the Labour Party. These commitments are included in the 1993 Federal White Paper *Here We Stand*. Unlike the Labour Party, the Liberal Democrats aim at the eventual production of a written constitution codifying the changes.
- 16 In addition to advocating conformity to a set of principles or ideals, many constitutional reformers lay emphasis on the means by which constitutional change is achieved, stressing the importance of internal coherence between various reform measures; cross-party and public consultation; and for long-term objectives to take precedence over short-term party political advantage. All these factors reflect the belief that stable and sustainable reform can be secured

only by means which are both legitimate, and are not regarded as procedurally oppressive. The history of constitutional change this century reveals that there have been repeated attempts to achieve cross-party agreement on constitutional issues before legislation, and there will certainly be pressure in the future to build support for constitutional change outside of the party of government. As Tony Wright MP argues, "there could scarcely be a starker indictment of the British version of adversarial politics than the failure to construct a cross-party consensus around the transparent need to reform the political system itself, or even to develop the kind of mechanisms whereby such reform could be advanced."⁷

- 17 It is the Liberal Democrats who, of the main political parties, come closest to subscribing to this approach, with their commitment to the use of advisory referendums and the creation of a Constituent Assembly to draft a written constitution. Both the Labour Party (with its proposed referendum on the electoral system for the House of Commons) and the Conservatives (in planning for a referendum on the future of Northern Ireland) also acknowledge the utility of referendums as a means of establishing consent for major constitutional change.

The Political Constitution

- 18 The short answer to 'how could a Government go about implementing constitutional reform?' is that it could do so in the same way as it implements any other government decision - through changes in legislation, practice and convention - provided only that it secured a simple majority in each House of Parliament in support of any legislative measures introduced. The doctrine of parliamentary sovereignty which has dominated constitutional thinking in Britain holds that Parliament can enact any law it chooses confident that it cannot be challenged in the courts. This means constitutional laws have the same status as any other legislation and are passed by the Houses of Parliament in the same way. The House of Lords could in theory be abolished, or adult males disenfranchised, by the same means as legislation to introduce dog licenses.
- 19 Parliamentary sovereignty could of course be swept aside if the political will to do so existed; and the establishment of the supremacy of European over domestic legislation - and to a lesser extent the operation of the European Convention on Human Rights - have to some commentators already made the overthrow of parliamentary sovereignty a reality. But in practice and in political mythology, the force of the doctrine remains and will inevitably surface in any debate about constitutional reform.
- 20 There are two important effects that result from this: because neither executive nor legislature are required to pass over special procedural hurdles to enact constitutional legislation, all a Government requires is a simple parliamentary majority; however, because it cannot bind itself, or any future Parliament, to the decisions it makes, Parliament has no established means of entrenching constitutional legislation and safeguarding it against future change. Any check on constitutional change (and hence any safeguards against change and then reversal of change) is primarily political rather than procedural.
- 21 This lack of procedural restraints is in contrast to those countries with a written constitution, where legislating for constitutional change has to conform with specific formal procedures - although some would hold that the political restraints in the UK are no less binding than the restraints imposed by written constitutional provision. Such provisions generally stipulate that

the passage of constitutional legislation requires some form of special majority - either in the legislature (as in France and Germany), or in some federal states from the individual states belonging to the federation (as in the USA and Canada) - or change may require ratification by the electorate, either at a general election or in a referendum (as in Belgium, Australia and Eire). What these procedures have in common is that they require constitutional change to be endorsed by a wider constituency than the political party temporarily in power and, as far as possible, ensure there is consensus supporting the change.

- 22 Establishing a fixed, formal procedure for constitutional change involving a requirement for super-majorities, multiple approvals or referendums provides an important safeguard against partisan revision of the fundamental elements of the constitution.⁸ But one effect of formal procedures for constitutional change can be inflexibility. In the USA, for example, the Constitution provides for the initiation of proposals for constitutional amendment by a two-thirds vote of both houses of Congress and then ratification by majority votes in the legislatures of three-quarters of the states (or by popular conventions in three quarters of the member states). An alternative step for initiation of proposals for amendment is by way of a constitutional convention, which can be convoked by Congress on the demand of the legislatures of two-thirds of the states. The difficulties in building such extraordinary legislative majorities in Congress at the initiation stage have meant that amendments to the Constitution have been rare. Moreover, the agreement of the states has been difficult to obtain in recent years - for example on the Equal Rights Amendment ratifications stalled at 35 states, three short of the necessary 75%.
- 23 In Britain, constitutional history suggests that the absence of formal mechanisms for determining constitutional change has enabled a degree of innovation that is not available to other countries more fettered by formal rules on constitutional amendment. The scope for flexibility and adaptability inherent in the British system of government is best displayed by the variety of mechanisms used to generate consensus building and conciliation in Northern Ireland - from the border poll of 1973, through the Constitutional Convention of 1975, the Atkins Constitutional Conference of 1980, and the more recent moves towards inter-party talks, bilaterals and the proposal earlier this year from the Prime Minister for an elected all-party assembly.
- 24 On the other hand, the theoretical flexibility of the British constitution is not always reflected in practice. The implicit assumption of the UK constitution is that proposed legislation to change the constitution is illegitimate unless the political elite as a whole is agreed on it (although in fact almost every successful constitutional reform measure this century has been passed by Parliament in the face of some opposition). This assumed need for consensus is seen most clearly in the repeated, abortive attempts since the turn of the century to resolve through inter-party talks the question of the appropriate composition and powers of the House of Lords.
- 25 In addition, there is an innate conservatism in British politics which means that any attempt at change will be resisted by at least some members of Parliament and sections of the media and electorate on the grounds that there is no need to tamper with a constitution that has "served us well". Defined procedure for constitutional reform would at least acknowledge the legitimacy of broaching the question of constitutional change. Furthermore, the process of defining such a procedure - and so defining what is 'constitutional' - would start to remove the mystique (and lack of awareness) surrounding the UK's 'unwritten' constitution which discourages informed constitutional debate.

- 26 This leaves the question of how a Government will be expected to go about constitutional reform. Although there are no formal procedures with which constitutional measures have to conform in the UK, there are precedents that will inform and political pressures that will be brought to bear. Historically, therefore, constitutional measures have been regarded as distinct from ordinary legislation. There are two main reasons for this: the political environment and constitutional conventions.
- 27 The specific political factors are difficult to control or predict. What is certain is that it will not be possible to isolate the constitutional reform programme from wider political debates and there will be trade-offs within the programme as well as across into other policy areas.⁹ Some of the key factors are considered below:
- 28 **The size of the Government's majority and the actions of the smaller parties.** If the Labour Party were to win the next general election the size of its majority will obviously dictate its room for manoeuvre. The Liberal Democrats may prove to be useful allies for the Labour Party, whether as partners in a coalition government or through more informal agreements. However, they will want to extract a price for their support, most probably on the question of endorsing proportional representation. Given the Liberal Democrats' commitment to the preparation of a written constitution by a Constituent Assembly and enthusiasm for advisory referendums and citizens' initiatives, they are also likely to push for a fuller package of reform and wider consultation than the Labour Party may feel comfortable with. Paddy Ashdown has also insisted that "these changes should not be seen as piecemeal, but as a comprehensive programme, hanging together as a whole - the centrepiece of which should be a modern Great Reform Bill"¹⁰ - an approach which appears to have been rejected by Tony Blair.¹¹ The difficulties of maintaining united back-bench support for a programme of reform may be exacerbated by tensions within both parties about co-operation.
- 29 **The political will behind constitutional reform.** In terms of political handling, there may be temptations to avoid confronting some constitutional shibboleths, such as the doctrine of parliamentary sovereignty, by introducing minimalist reforms e.g. incorporating the European Convention on Human Rights but not providing for it to be judicially protected. And with any government, thoughts will not stray for long from the prospect of future electoral success. Five years to the next general election will not seem that long and there are local government and the European Parliament elections to consider too. The Labour Party's collective memory of the failure of attempts to introduce devolution in the seventies and to reform the House of Lords in the sixties may provoke a cautious approach to constitutional reform, and not all members of the Parliamentary Labour Party are fully committed to the reform programme - one of the reasons for proposing a referendum on proportional representation, for example, was to avoid splits within the party.
- 30 **The strength of the Opposition (official and back-bench).** History reveals how difficult it is to achieve support for constitutional measures within a single party, let alone a broader consensus across the parties and with the wider public. Past attempts at constitutional reform have more than once been undermined by the Government's own back-benchers and on occasion the political pressures associated with constitutional measures have caused traditional party discipline to collapse and forced Governments to adopt novel procedures such as the referendums on membership of the Common Market and devolution for Scotland and Wales in the 1970s. This 'political' dimension demands delicate handling - failure to contain intra-party

disputes will certainly harm the Government and may put constitutional reform on hold indefinitely.

- 31 Constitutional conventions, are, by their very nature, usually more predictable. Described as “a whole code of political maxims, universally acknowledged in theory and universally carried out in practice”, which reflect a “positive political morality”,¹² conventions exert a powerful influence. This makes them difficult to disregard even where the Government has the numerical strength to do so: for example, convention dictates that constitutional change requires legislation in order that Parliament is able to have its say – even where in theory changes could be introduced by use of the royal prerogative e.g. removal of hereditary peers’ rights to attend the House of Lords. Subsequent chapters attempt to identify these conventions and to assess their continuing force.

Public Opinion

- 32 In addition to the political environment and constitutional conventions, public opinion will also be an important factor shaping the process of constitutional reform.
- 33 There is certainly growing public interest in what are undoubtedly constitutional issues, and dissatisfaction with current political arrangements (as last year’s Joseph Rowntree Reform Trust & MORI *State of the Nation* survey demonstrated), but neither is generally expressed in explicitly constitutional terms. The obvious exception to this is Scotland where the debate about devolution is rarely out of the press and few members of the public remain ignorant about it.
- 34 There is also a degree of confusion over exactly what is meant by some apparently popular constitutional measures. For example, the Joseph Rowntree Reform Trust & MORI survey suggested that a Bill of Rights was supported by 79% of the population, but when asked to rank in order of preference the rights that should be protected, the preservation of defendants’ right to silence (protected under most human rights charters, including the ECHR) won favour from only 32%, whilst the overwhelming “winner” was the right to hospital treatment on the NHS within a reasonable time, with 88%. Constitutional reform is dense and complex stuff, with few outside the political elite interested in following every twist and turn. A process of public education (with little immediate prospect of electoral reward) is therefore likely to be necessary if the public is to feel a sense of ‘ownership’ of the reforms.

Historical Precedents

- 35 The constitutional history of the UK and other countries will inform and may even circumscribe future attempts at reform. Banting and Simeon make this point forcefully: “History and tradition play a central role in guiding the process. Each country seems to have developed its own language and style of constitution-making which often have an astonishing continuity over long periods of time.”¹³
- 36 The role of history in the debate on constitutional reform in the UK is twofold. First, the relative stability of our constitutional arrangements suggests to some that there is an historical

inevitability about evolutionary reform and that more radical shifts are inherently likely to fail. Moreover, the very longevity of certain institutions or arrangements is seen by some as a reason to preserve them. As the Chairman of the Conservative Party explained earlier this year, “Conservative opposition to radical constitutional reform is not an arcane attachment to the archaic. It is recognition that the experience of generations; the accumulation of wisdom and practice over the centuries is a better and safer way of safeguarding liberty than the trendy theories and instant modern solutions of lawyers, academics or even...politicians.”¹⁴ Second, the history of constitutional reform (and in particular the failed attempts at reform) are seen as providing compelling precedents and cautionary warnings for would-be reformers. It is this second point that particularly concerns us here.

- 37 As Roy Foster has pointed out, in the context of the evolution of Anglo-Irish relations, “those who quote history do so because they believe history - or their version of it - is on their side.”¹⁵ Politics is, of course, inextricably bound up with the assessment of historical evidence and there is every reason to expect that historical analogies or precedents will be brought up to defend or reject particular constitutional reform proposals. Throughout the report, historical precedents are referred to illustrate the backdrop to reform and to assist in identifying the conventions that govern the passage of constitutional reform measures. Appendix A offers a factual summary of the key features of 17 key constitutional reform measures this century. The factors identified in each case include:

- manifesto commitment;
- the nature of any pre-legislative consultation or inquiry;
- the Government’s parliamentary majority and date of the general election;
- the Minister responsible for the Bill;
- the parliamentary procedure adopted;
- the parliamentary time taken;
- the use of a referendum.

- 38 The measures are chosen as representing the high points of constitutional reform and as broadly illustrative of the variety of ways in which constitutional reform has been initiated and secured - or not.

They are:

- | | |
|--|---|
| ● Parliament Act 1911 | ● Scotland and Wales Bill 1977 |
| ● Representation of the People Act 1918 | ● Wales Act 1978 |
| ● Government of Ireland Act 1920 | ● Scotland Act 1978 |
| ● Parliament Act 1949 | ● European Assembly Elections Act 1978 |
| ● Life Peerages Act 1958 | ● Local Government Act 1985 |
| ● Peerage Act 1963 | ● European Communities (Amendment) Act 1986 |
| ● Parliament (No.2) Bill 1968-69 | ● European Communities (Amendment) Act 1993 |
| ● European Communities Act 1972 | |
| ● Northern Ireland Constitution Act 1973 | |
| ● Referendum Act 1975 | |

Conclusion

- 39 In approaching the task of constitutional reform it is vital to understand the interplay between the political, practical and constitutional frameworks. Adherence to a set of constitutional principles and commitment to democratic means of decision making can never on their own deliver the comprehensive constitutional reform proposed by the Opposition parties. The argument made here, and in subsequent chapters, is that the political and practical frameworks (and the hurdles to reform inherent in the parliamentary process) must be acknowledged and addressed. As Ferdinand Mount has pointed out, "It is the political struggle rather than the pursuit of good government which ultimately decides rulers and ruling classes whether or not to drive through or give in to proposals for reform."¹⁶
- 40 Finally, whilst the inability of our current political and constitutional arrangements and attitudes to accommodate rational debate and constructive co-operation is one of the strongest arguments behind constitutional reform, the process of implementing that reform is going to have to take place within that failing system. This was recognised by the late John Smith, when Leader of the Labour Party, in his 1993 lecture *A Citizen's Democracy*: "it's very hard to make a constitution change when you're living in the constitution at the moment...when you're actually carrying on the process of government under one set of norms and institutions and trying to change into another." Constitutional reform may be difficult, but it can be done. That constitutional reform is difficult is not an argument against embarking on it, but it certainly underlines the importance of identifying the practical problems and seeking solutions to them at the earliest possible stage.

Whitehall

"A reform minded prime minister once elected must take the lead in making change happen and keep at it until change is achieved. Unless that is done, little of serious value will result. The lesson of history, here at least, is uncontestable. From Gladstone through Lloyd George via Wilson and Heath to Thatcher, the message is plain: unless the individual in No. 10 wants it and presses for it, Whitehall will adapt but it will not shift."

Peter Hennessy, *Whitehall*, 1989

Introduction

- 41 The success or otherwise of wide-ranging constitutional reform will depend to a significant degree on the effectiveness of Whitehall - Ministers and civil servants - in tackling the policy agenda prescribed by a reforming Government. A new party entering government will be faced with many important decisions that will have to be taken almost immediately: the design of the legislative programme for the first year; any restructuring of Whitehall departments and Cabinet committees to meet the objectives and priorities of the incoming Government; and the appointment of Cabinet and other Ministers. This chapter highlights the ways in which the machinery of Whitehall can be designed to serve the interests of a Government committed to constitutional reform; it also explores the process of drafting constitutional legislation and how bills can be constructed to ensure that parliamentary proceedings are both efficient and effective.

The Form of Legislation

Comprehensive or Piecemeal Legislation

- 42 In the UK, constitutional reform has traditionally been undertaken in a piecemeal fashion, with the single limited exception of the Scotland and Wales Bill 1976-7. Tony Blair has indicated that the Labour Party does not intend to deviate from this approach: "The ambition and the extent of the programme I have set out will not be achieved in one bill, but over a period of time."¹⁷
- 43 However, not all reformers envisage constitutional change being implemented in this way. The Liberal Democrats promise a Great Reform Bill incorporating the main features of their constitutional reform programme - reform of the House of Commons and House of Lords, devolution to Scotland and Wales, establishment of English regional assemblies, reform of quango appointments - alongside a smaller Declaration of Rights Bill incorporating the ECHR and introducing a Bill of Rights. (It should be noted that the namesake of the Liberal Democrats' Bill, the Great Reform Bill of 1832, did not attempt multi-institutional reform but was concerned only with the extension of the electoral franchise, resulting in an increase in the total number of voters from 500,000 to 800,000 and the redistribution of seats.)
- 44 There are conceptual attractions in the approach advocated by the Liberal Democrats, in that it allows all measures to be considered together and their inter-relationships to be fully taken into account. Such a 'big bang' approach might have the potential to capture the imagination of the public and MPs alike, establishing a commitment to the package as a whole and serving to maintain momentum for the process of reform. The legislative process for a Great Reform Bill would be identical to that applied to more piecemeal constitutional measures, and would have the benefit of limiting the time taken up during a Parliament on securing parliamentary approval for constitutional legislation.
- 45 But it would take some time for a bill to be prepared, if the inter-relationships between the different reforms are to be fully explored in the legislation and sufficient detail were to be included to satisfy Parliament, for example, the arrangements for the reformed electoral systems of the House of Commons and House of Lords proposed by the Liberal Democrats. Politically it would be a considerable feat to achieve all this at once. It would require a consensus supporting

reform within the party or parties of government, and arguably with parties outside government, which at the moment does not exist. Past experience shows that even single issue constitutional bills take up a considerable amount of parliamentary time; a Great Reform Bill might reduce the overall time needed to introduce all the various measures, but would require the best part of the time available on the floor of the House of Commons in one parliamentary session to see it through all stages of consideration, squeezing out most other programme bills. Particularly difficult would be limiting opposition to such a bill. Different groupings of Government backbenchers and official Opposition parties opposed to individual elements could work together to confound a wide-ranging constitutional bill, even if there were elements which they supported, as happened in the case of the Scotland and Wales Bill in 1977-78, and the Maastricht Bill (the handling difficulties are illustrated at paragraphs 80-85).

- 46 A 'big bang' programme of reform - such as the Great Reform Bill proposed by the Liberal Democrats - would require changes to the procedures and structures that underpin the legislative process, and both Whitehall and Westminster would expect legislation of this sort to be drafted in detail, not broad declaratory terms. It is not impossible, but such an approach would need an effective and co-ordinated Cabinet which understood and supported the change; an accommodating Parliament; and a strong political player to push the whole thing through.
- 47 A variant on this 'big bang' legislation approach is Charter 88's proposal for a paving motion to be passed at the beginning of a reforming Parliament: "Such a motion simply sets out what the House of Commons intends to do. The promise could include three things: a set of principles for establishing a framework of reform; the legislation to be passed in the subsequent four years; and the intention to establish a special *Constitutional Grand Committee* to oversee the legislation."¹⁸ Such an approach could similarly serve the purpose of establishing the strength of commitment and a momentum for reform, and would be procedurally feasible. It would also provide a clear statement on intent. But there are limitations to the effectiveness of this approach. The passage of such a 'paving motion' would itself take up parliamentary time and is likely to be controversial if it is seen in any way to undermine parliamentary sovereignty by attempting to bind Parliament to future action i.e. a commitment to legislate for the constitutional reform agenda. In addition, the only way such a motion could bind Parliament would be in a political sense.

The Level of Detail

- 48 A further question on the form of legislation is the level of detail required in constitutional legislation. The Government of Ireland Act 1920 and the Scotland Act 1978 present two very different approaches to drafting constitutional legislation - the first essentially a framework enabling document which identified the powers that would be retained at Westminster; the latter a detailed text which enumerated all the powers devolved to the proposed Scottish Parliament and exceptions to these powers. There are no immutable rules governing the style of legislative drafting; decisions on how detailed legislation is to be will depend on the length of time available for preparation, the likely political backdrop against which the legislation will be considered and the style of legislation which is most likely to ease its operation in practice.
- 49 Consideration could even be given to whether a new style of drafting might be deployed, drawing on the European style of legislation which is concerned with establishing the principles of policy in legislation, leaving the wider questions of detail to judicial interpretation. But even if this appeals as a concept, it is highly unlikely to prove politically acceptable or practicable for

constitutional legislation in the immediate future, given that it would represent a major shift in the role of Parliament. Whether such a shift proves politically acceptable or practicable depends on the commitment a Government attaches to the issue and the parliamentary majority (and wider support) available to it.

Influencing the Draft Bill

- 50 Legislation is drafted in such a way as to limit - but not avoid - parliamentary opposition; in Lord Thring's aphorism "Bills are made to pass, as razors are made to sell". As the Renton Committee Report on the Preparation of Legislation noted, "If there are conventions of drafting which are thought to limit discussion and increase the chance of getting Bills passed they will be used."¹⁹ The longer a bill and the greater the length of individual clauses, the more likelihood there is of effective opposition, so bills will usually be kept to the minimum length possible where any controversy is anticipated. Parliamentary Counsel will also always aim to draft legislation in such a way as to limit the possible range of amendments (paying attention to the parliamentary rules governing the admissibility of amendments - which have to be relevant to the specific purpose of the bill.)
- 51 But these procedures are directed only at the efficiency of the process from the Government's perspective, not at enhancing the effectiveness of parliamentary scrutiny. An additional means of potentially limiting parliamentary opposition to constitutional bills, whilst simultaneously offering greater opportunities for scrutiny, would be to publish bills in draft. Objections and queries could be raised at this stage and amendments made where the Government accepted the force of the argument; where it did not, the planning of the parliamentary passage might be facilitated by forewarning of where objections were likely to be most vociferous. The Law Commission could be invited to give technical consideration to draft bills and Parliament would be able to conduct a pre-legislative review of proposed legislation. This would, however, add to the length of time before the formal introduction of a bill.
- 52 Parliamentary pre-legislative inquiries could take two forms: the consideration of a draft bill prior to introduction into Parliament or as the first stage of a parliamentary procedure after formal introduction. The Hansard Society Commission on the Legislative Process, for example, proposed the establishment of committees of around 12 members for all bills which would consider evidence and agree a report which would "draw attention to ambiguities in meaning, apparent problems in application or implementation, possible consequences and other practical, technical or drafting points".²⁰ In addition to powers to call for individuals, first reading committees might usefully have powers to call for papers and records, like select committees.
- 53 One example of a detailed pre-legislative investigation is the select committee which examined the issue of direct elections for the European Parliament. This might be a way of handling an issue in the session before it is planned to introduce legislation - especially in relation to a measure that is not subject to clear party political divisions e.g. the content of a UK Bill of Rights, where the issue of principle was already resolved.
- 54 Pre-legislative parliamentary committees are a means of focusing consultation on building parliamentary support. However, the key potential problem with pre-legislative committees is that they could become the focus for party politics and split along predictable lines with little scope for accommodation or compromise. The particular benefit of allowing examination of a draft bill is that it

is still at a stage where it could be revised within Whitehall, rather than having to make the necessary amendments as part of the parliamentary process. This process has been used with the Environment Act 1995 and was felt to provide a useful forum for discussion. There is however a considerable lead time required if a draft bill is going to be changed before formal introduction and in some cases it may be difficult for a draft bill to be prepared one session in advance of introduction (not to mention that it would delay the commencement of a new Government's legislative programme).

Planning the Legislative Programme

- 55 After a general election, the planning of the legislative programme (which normally starts at the end of the year prior to the next parliamentary session) has to be telescoped into a much shorter period of time than usually available to a Government. An incoming Government will have to decide quickly which measures it can prepare in time for its first session, and refer to in the Queen's Speech without giving any hostages to fortune. In planning the legislative programme, departments put in bids for bills to be included in the programme and constitutional bills will have to compete with other programme bills - the main constraint is that there only around 60 days available for the Government's main programme bills on the floor of the House of Commons (see paragraph 87-92 below). In choosing which bills are to be included, consideration will be given to their length and complexity, state of preparedness, the controversy they are likely to cause and the balance of the programme as a whole.
- 56 There will be a few non-constitutional bills categorised as essential in every session - principally Money Bills and bills required to meet international obligations. In the first session of the next Parliament, contingency arrangements will need to be made for accommodating any legislation which may result from the current Inter-Governmental Conference and the discussions on the future of Northern Ireland, both of which would need to be given priority over main programme bills. Each of these would be a major constitutional bill. Any programme also has to be sufficiently flexible to include unforeseen bills, for example to remedy serious deficiencies revealed by judgements in the courts.
- 57 In terms of its overall legislative programme, an incoming Government will have wide-ranging expectations to meet. It is going to be looking ahead to the assessments of its first year in government and will want to be able to show action on key issues such as employment, law and order, education and health. Even if these are only indications of the approach to be taken, paving the way for more substantial future change. Whatever the political hue of the Government and their level of commitment to constitutional reform, such measures will be one set of policy commitments amongst many. Constraints on what can be fitted into the legislative programme mean that constitutional reform measures will have to compete with these other policy commitments. Lord Irvine of Lairg, Shadow Lord Chancellor, cautions that, "the danger of constitutional overload of the parliamentary timetable has to be recognised and resisted....There are those whose affection for constitutional change in general or their own hobby horses in particular is so great that they are blind to all the demands for legislation across every area of policy that a Labour government will face."²¹
- 58 All of these factors mean that under the current system of parliamentary time allocation there is likely to be time for at the most two constitutional bills per session.

- 59 There will be political and practical pressures to proceed at different speeds for different items on the constitutional reform agenda. This will depend on: the level of political commitment to a particular measure (and whether clear public commitments on timing have been made); the amount of preparation necessary; and the inter-relation with other measures. In addition to commitments to specific measures, and on timing, political priorities may be determined by the perceived need to address institutional bias against the party or its political interests. Reform may be pursued because it is a prerequisite to, or integral part of, a broader political agenda. For example, one of the reasons driving reform of the House of Lords in 1949 was that the Government wanted to get iron and steel nationalisation through before the end of the Parliament. Political priorities may also encourage a Government to confine the reform agenda as far as possible to a piecemeal and minimalist approach, tackling what can be done, when it can be done.
- 60 Scottish and Welsh devolution are an example of where a clear public commitment has been made by the Labour Party on timing - promising legislation within a year of entering office - and, especially in the case of Scotland, there has been significant preparatory work. There is the work of the Scottish Constitutional Convention to draw upon and an incoming Government could be in a position to publish an early White Paper on this subject. However, the experience of the 1970s shows how long it can take to settle the details of the policy and to draft a bill (with a dedicated team of 30 civil servants it took two years and nine months in the case of the Scotland and Wales Bill). For other measures, such as electoral reform or a UK Bill of Rights, where no political commitment has been made to detail or to the timing of implementation, and where there is no one clear model advocated by those in favour of change, a more open consultation process, with greater independence from Government, might be appropriate.
- 61 The Liberal Democrats have also offered some illustrative legislative timetables in their policy papers which indicate that implementation of the reforms set out in their Great Reform Bill would be phased, but in a recent speech Paddy Ashdown argued that "these changes should not be seen as piecemeal, but as a comprehensive programme, hanging together as a whole - the centrepiece of which should be a modern Great Reform Bill."²²
- 62 There is nothing sacred about the existing process for planning the legislative programme. However, it would require an enormous amount of political will, strategic input and innovative thinking to plan and implement the legislative programme in anything but the normal way of picking off each item on the agenda one by one and balancing competing interests.
- 63 Moreover, bringing in the whole programme of constitutional reforms at once risks bringing normal government activity to a grinding halt. This is unlikely to be a price worth paying unless an immediate crisis undermines the authority and legitimacy of the constitutional status quo to such an extent that sweeping and immediate change becomes unavoidable. Even a "gradualist" approach to reform will require careful consideration of the knock on effects of a particular reform. For example, reforming the House of Lords to create a more credible second chamber (whether through nomination or election) could have a significant effect on the second chamber's willingness to observe a self-denying ordinance in terms of its powers to delay subsequent legislation. It may also be difficult to predict the behaviour of the existing House of Lords once it knows it is going to face reform. On the other hand, creating a Scottish or Welsh Parliament with legislative powers **should** reduce the workload in Westminster - but the beneficial effects will take a while to work through, and the quantum reduction may be small.

The Cabinet and Machinery of Government

- 64 Whether the programme of reform is introduced by way of 'big bang' or through a series of more limited measures, the personal standing of individual Cabinet Ministers and levels of support within the party can have a significant part to play in securing space for legislative measures in the main programme. There is at present no one department to bid for constitutional bills. If the current arrangements are preserved, responsibility for policy on key constitutional matters would be spread between a range of Ministers - the Scottish and Welsh Secretaries (devolution), the Environment Secretary (English regional government), the Chancellor of the Duchy of Lancaster (freedom of information).
- 65 The Home Secretary has policy responsibility for the largest number of constitutional issues (domestic human rights policy, electoral matters, royal matters and reform of the House of Lords) and following restructuring in the Home Office, a new Constitutional Unit has been created to take charge of these issues as part of a new Constitutional and Community Policy Directorate. However, any Home Secretary is likely to want to introduce legislation in one or more of the many policy areas the Home Office covers - criminal justice, prisons, immigration - and will have to balance these with the demands of constitutional reform measures.
- 66 Given the capacity for internal tensions inherent in the spread of constitutional matters across different departments, and the significant degree of coherence between measures that will be required for the reforms to be effective, it is clear that the structure of Whitehall (and Cabinet committees) may need to be reshaped to give effect to the reform programme. Within Cabinet, this may be by means of a Strategic Policy Committee of the sort proposed by Peter Hennessy²³ or by the creation of a new committee responsible specifically for co-ordination of constitutional matters. The reform programme might be made the special responsibility of a senior Minister such as a Deputy Prime Minister, the Lord President or Lord Privy Seal. The title is unimportant, what is key is that the Minister commands the support of the cabinet as a whole, and has no other policy responsibilities that would require legislation, so that his or her sole priority in the bidding process would be to secure a place for constitutional reform measures.
- 67 The provision of central strategic leadership need not supplant the responsibility of departmental Ministers for taking some of the individual measures through Parliament, particularly in the case of piecemeal legislation. The essential point here is to ensure an overview of the whole programme, recognising the inter-relations between constitutional reform measures, not simply to provide a tactical response unit for when specific measures run into difficulties.
- 68 Decisions about which Minister should lead on a given bill may have a significant impact on the success of a measure. Conversely, the transfer of a Minister to other responsibilities can have a negative impact (as with Richard Crossman's replacement by James Callaghan as lead Minister on the Parliament No. 2 Bill to reform the House of Lords); and the personal standing and authority of an individual will have greater bearing on his or her ability to steer the bill through Parliament than any formal title or Cabinet rank. Almost without exception, the lead Minister on constitutional reform measures this century has been the Prime Minister or a senior Cabinet Minister in the House of Commons; although there is no reason in principle why a Cabinet Minister in the House of Lords should not take on the responsibility, it is usually considered preferable that the lead policy Minister is in the Commons to handle what are usually more difficult parliamentary proceedings.²⁴

- 69 Harold Wilson, when Prime Minister, insisted that "It is in accordance with precedent...that any major legislative proposals involving major constitutional change, reform of our parliamentary system, the constitution and powers of another place, should be presented to the House by the Prime Minister of the day". But although the Prime Minister's name may appear on the First Reading statement, in practice, the Prime Minister more often takes on a supportive role in the parliamentary passage of constitutional measures. In the 17 major constitutional bills analysed in Appendix A the Prime Minister led in two bills, and played a supportive role in nine. The lead policy Minister is normally the Minister to introduce the measure at second reading, supported by a junior Minister from the same department or Cabinet Minister from another department directly involved.
- 70 In Whitehall, the creation of a central agency under the co-ordinating Minister will be critical. At the time of the Labour Government's devolution reforms in the 1970s, a Cabinet Office Unit of around 30 staff was used to support the policy making and legislative processes. The Home Office Constitutional Unit might appear an attractive base on which to build; but as outlined above, the Home Office's other policy responsibilities mean that a Home Secretary may not be best placed to bid for constitutional legislation. An alternative to a discrete unit within an existing Whitehall department would be the creation of a new department that took on constitutional reform - perhaps as part of the Ministry of Justice proposed by the Liberal Democrats. The creation of a new department would however take time to set up and it to establish its authority and identity within Whitehall.
- 71 Another key limitation will be the limited resources of the 36-strong Parliamentary Counsel, who draft all primary legislation - even if this number were supplemented it would take time for newcomers to develop the necessary expertise. The comments made by the Renton Committee Report on The Preparation of Legislation (now over 20 years old) remain valid: "The legislative process is the main instrument of political change in our rapidly changing democracy, but it has for many years been incapable of efficiently meeting the demands placed upon it. Serious defects of the process include the shortage of Parliamentary Draftsmen and the resulting pressure imposed upon them. Until that shortage is overcome and the pressure reduced, the instrument will become ever more inadequate and ineffective, and political change will continue to be made under stress, in some confusion and with unwelcome results."²⁵

Conclusion

- 72 The effectiveness of Whitehall - both Ministers and civil servants - will be a key determinant in the success of a constitutional reform programme. A new party entering government will have to take a series of important decisions very quickly and unless prior thought is given to these issues there may not be time at that point to devise arrangements to accommodate the volume and complexity of the legislation required.
- 73 Constitutional measures will have to compete for a place in a wider legislative programme and the time available in Parliament will be severely limited. A major reform programme will therefore need central strategic leadership from a senior cabinet Minister. Such a Minister must command the support of the Cabinet as a whole and his or her priority must be to secure a place for constitutional reform measures in the legislative programme. In addition, a central unit or department in Whitehall responsible for co-ordination will be critical to give effect to the reform programme.

Chapter 4

Westminster

"...major constitutional measures which affect the whole balance of power in the State, the balance of power between different interests in the country, are matters that are resolved only by party Governments who know their own minds and are determined to carry through their leading reforms without conceding to oppositions of the day the requirements they may press. The whole history of this great country supports my view..."

Michael Foot MP, House of Commons, *Official Report*,
3 February 1969, col.85

Introduction

- 74 This chapter reviews the rules and precedents that govern the parliamentary passage of constitutional bills. Looking in turn at the House of Commons and House of Lords, it considers alternative ways in which a Government intent on constitutional reform can best ensure the safe passage of constitutional reform measures through Parliament whilst having regard to:
- the importance of public and cross party consultation.
 - constitutional and parliamentary conventions.
 - the desirability of informed parliamentary scrutiny and debate.
 - the need for legislation to be workable and durable.
 - competing legislative priorities.

The key to achieving this objective is to ensure that enough time is given for parliamentary consideration and that this time is effectively used for scrutiny of the legislation, not filibuster.

Procedure in the House of Commons: Standard Procedures

- 75 Bills may be introduced into either House, but the controversial nature of constitutional bills means that they are likely to originate in the House of Commons.²⁶ One factor underlying this convention is that the Parliament Acts do not apply to legislation introduced in the House of Lords and the House of Lords would therefore be able to operate a veto on any legislation introduced there; Governments have accordingly tended to protect their position by introducing constitutional measures in the House of Commons.
- 76 Most public bills which have been read a second time are automatically committed to a standing committee unless the House decides otherwise.²⁷ The House may decide to commit a bill to either: a committee of the whole House; a select committee; a special standing committee; or a joint committee of both Houses.²⁸ Alternatively, the Member in charge of a bill may move that parts of it be committed to a committee of the whole House with the rest being considered by a standing committee.²⁹ By convention, 'first class constitutional issues' are committed to a committee of the whole House.³⁰

Committee of the Whole House

- 77 Referring a bill to a committee of the whole House is intended to allow for full debate of particularly significant bills and a broader form of discussion than a standing committee is perceived to offer. A committee of the whole House is also used for non-controversial bills which attract little or no debate, and for the speedy passage of bills required urgently. Taking the committee stage on the floor of the House allows all Members to take part in the debate.
- 78 A committee of the whole House is potentially a hostile arena for constitutional bills. It brings out the confrontational and party political characteristics of parliamentary debate and the Opposition will exploit any controversy surrounding a bill. Controversy itself does not normally endanger Government legislation. In most cases a Government will get its bills through, but it may nonetheless be damaging. The price the Opposition extracts is the loss of parliamentary time which the Government could have used to get other legislation through. The main weapon of the Opposition - and other opponents of a bill - is to delay progress through raising points of order, making lengthy speeches ('filibustering'), and tabling numerous amendments. The size of a committee of the whole House offers considerable potential for delay in this manner. If a bill is unamended in a committee of the whole House there is no report stage and the bill goes directly to a third reading.³¹ As this reduces the time spent on a bill and the potential for damaging defeats, it is in the Government's interests not to make or accept amendments in a committee of the whole House.

- 79 A further problem the Government may face in a committee of the whole House is controlling Opposition from its own back-benches. The nature and significance of constitutional changes mean that the Government may not be able to rely on the whips' normal powers of persuasion to keep its back-benchers in line. Even if some degree of cross-party consensus were achieved there is the danger that a cross-party alliance will be built amongst those back-benchers who oppose any constitutional change and possibly with those who see proposed changes as not going far enough (as happened with House of Lords reform in 1968-69). The problems of containing back-bench dissent are essentially political rather than procedural. In the event of back-bench Opposition, the role of the smaller parties will be crucial. In terms of parliamentary procedure it may be enough that they support the principle of a bill, as opposed to its detail.
- 80 A recent indication of this role was seen during the passage of the European Communities (Amendment) Bill 1994 (more commonly referred to as the 'Maastricht Bill'). The Liberal Democrats supported the Bill in principle and whilst they voted against the Government on specific amendments, they supported procedural votes allowing the Government on several occasions to extend debate after 10 p.m. and to move the closure. The struggle to get the Maastricht Bill through Parliament is a good example of the tactics which can be used when a bill is taken in a committee of the whole House.³² The Bill itself was very short - three clauses amended to eight - but the passage of the Bill stretched over 15 months and inflicted considerable damage on the Government. The Government suffered one outright defeat and was forced to accept other amendments and to avoid procedural motions which it did not dare put to the vote.
- 81 The Conservative rebels first sought to delay the Bill as a bargaining chip and in the hope that external events, such as a negative referendum result elsewhere in Europe, would overtake the debate. Second, they tried to force a referendum, in the hope that public opinion would be on their side. Third, they tried to force amendments which would render the Bill unacceptable to the Government and, they hoped, cause the Government to abandon the Maastricht Treaty.
- 82 It was this third tactic which produced the possibility of the Opposition parties combining with the rebels to defeat the Government. This alliance was based on the two sides believing that their actions would have different effects. Although the Opposition parties wanted to see the Treaty ratified, they wanted to reverse the Government's opt-out from the Social Chapter.³³ The Conservative rebels hoped that inclusion of the Social Chapter would make the Treaty unratifiable either on technical grounds (because it would contradict the Protocol which the UK Government had agreed on the Treaty)³⁴, or because the Treaty would no longer be acceptable to the Government. The Labour Party wanted to reverse the Social Chapter opt-out on principle and believed that inclusion would not prevent the Government ratifying the Treaty. The Government managed to get round this in the end by accepting a Labour Party amendment requiring a vote on the Social Chapter before ratification, but delaying the vote until after the Bill had been passed.
- 83 Although unwilling to destroy the Bill completely, the Labour Party was determined not to miss a chance to inflict political damage on the Government. The passage of the Maastricht Bill was therefore slow and difficult; only being completed after 185 hours of debate and over 600 selected amendments (more were put forward). The Conservative back-bench rebellion gathered strength as the Bill moved through the House (32 Conservatives abstained or voted against the government on the 'paving motion' compared to 46 at the third reading). The Government relied on Opposition votes to defeat key motions, such as the one proposing a referendum, and at times relied on the Liberal Democrats to win procedural votes e.g. to sit through the night.

- 84 In the Lords, the Government faced further Opposition from a group of senior ex-cabinet rebels led by Baroness Thatcher. The Government took the unusual step of imposing a three line whip for a vote on a referendum - the issue on which Opposition in the Lords had focused.
- 85 Once the Maastricht Bill had finally completed its passage through Parliament, the government still had to win the vote on the Social Chapter. This was in fact two votes; one on a Labour Party amendment preventing ratification without the Social Chapter and the second on a motion to 'note' the Government's opt-out. The Government won the first vote 317-316, but lost the second 324-316. The Prime Minister then turned the policy on the Social Chapter into a question of confidence. The Government won this vote 339-299 (with only one Government abstention).³⁵
- 86 The theoretical justification for taking a bill in a committee of the whole House is that it allows all Members to participate; thus it is a more appropriate forum in which to deal with particularly significant measures. It is debatable how far this reflects reality. In practice, attention is focused on broader political questions (effectively providing a continuation of the second reading debate by other means) and there is little opportunity to consider details or more practical questions. Debate tends to be dominated by a small minority of Members, although the debate on the floor of the House ensures that a greater number of Members become aware of the issues being debated. The proceedings have a high public profile, but the Government is unlikely to make concessions unless there is a real possibility of defeat. The Opposition is left with the weapon of delay; but this is only really effective if the Government is facing Opposition from its own back-benchers. Without such Opposition, the Government is likely to impose a guillotine, possibly leaving large sections of the bill undebated and further compounding the lack of scrutiny.

Time Constraints and the Use of the Guillotine

- 87 In the House of Commons in particular, the time available for legislation imposes a major constraint on the government. In any one session a Government normally introduces between 50 and 60 measures of greatly varying complexity and length (constitutional and non-constitutional). The amount of time any Government has to deal with these programme bills on the floor of the House of Commons is limited to around sixty days in every session, given that time also has to be set aside for Opposition Days, Estimates Days, Service Debates, and so on. As the figures in Table 1 show, this means that in each session the Government has around 400 hours to get its main programme bills through Second Reading, committee stages taken on the floor of the House, report and Lords amendments.

Table 1 Average amount of time spent on Government Bills on the floor of the House of Commons

	1988-89	1989-90	1990-91	1991-92	1992-93
total hours of sitting	1 582	1 468	1 374	696	1 934
hours on Government Bills	465	373	338	189	613
% time on Government Bills	29.4	25.4	24.6	27.1	31.7

Source: *Sittings Reform and the Jopling Report*, House of Commons Research Paper 94/96, 8 September 1994. 1991-2 was a short session and 1992-3 a long session because of the election in April 1992.

- 88 The estimate of parliamentary time is a crucial factor in determining the place of a measure in the legislative programme, but it is difficult to predict with any accuracy. The use of filibustering and delaying tactics mean that the length of time taken is not necessarily a useful indicator of the complexity of a measure, but rather of the extent of controversy surrounding an issue. The focus of controversy may not always be readily apparent to the Cabinet or to Whitehall in advance, and may also be instigated by the media rather than by parliamentarians. The time taken by constitutional measures tends to be greater than for other bills (in part because of the levels of controversy and in part because of the use of the committee of the whole House) and can affect the introduction and passage of other legislation.
- 89 Analysis of the time taken to get major constitutional bills through the House of Commons (Table 2) illustrates how a major constitutional bill can dominate a parliamentary session and severely limit the amount of other legislation the Government can deal with. As is also clear from this table, in cases where the Government believes progress on a major bill is being unnecessarily delayed it may decide to introduce a "guillotine motion" (formally, an allocation of time motion) to curtail debate.

Table 2 Time spent in consideration of previous constitutional bills on the floor of the House of Commons

Constitutional Measure	Hours spent on the floor of the House
Parliament Act 1911	169 (guillotined)
Representation of the People Act 1918	220 (not guillotined)
Parliament Act 1949	20 in 1947; 11 in 1949 (passed under Parliament Act 1911)
Parliament (No 2) Bill 1969	85 (abandoned after 79 hours in committee)
European Communities Act 1972	223 (guillotined)
Scotland and Wales Bill 1976	124 (abandoned after 93 hours in committee)
Scotland Act 1978	158 (guillotined)
Wales Act 1978	107 (guillotined)
Local Government Act 1985	42 (176 hours in standing committee) (guillotined in standing committee)
European Communities (Amendment) Act 1993	185 (not guillotined)

Source: Hansard. See Appendix A for further details

- 90 Guillotine motions generate considerable resentment in the House and have to be used with caution. This is because one consequence of a guillotine motion is that large sections of a bill may receive little, or no, scrutiny. It is important that the Government is not perceived to have stifled proper democratic debate and a Government promising "wider democracy: better government"³⁶ would be particularly vulnerable to criticism of this sort. The price could be damage to the democratic credentials of a reforming Government, and serve to undermine the legitimacy and durability of the constitutional reforms themselves.
- 91 Although there are precedents for the use of the guillotine on constitutional bills, Opposition to a guillotine motion on an issue of constitutional importance will be particularly fierce. Indeed, the only occasion since the Second World War when a Government has lost a guillotine motion was over a constitutional bill. After 94 hours of debate in a committee of the whole House the Government tried

to guillotine the original Scotland and Wales Bill 1977. Once the motion was defeated the Leader of the House concluded that there was no prospect of the Bill reaching the statute book in reasonable time and abandoned the Bill. In the subsequent separate bills for devolution to Wales and Scotland in 1978, the Government successfully moved guillotine motions after just one day's debate, an unprecedented step to take at such an early stage of a major constitutional bill.³⁷ This was possible partly because of the Lib-Lab pact, but also because by then the rebel back-benchers had realised that defeat over devolution could bring the Government down.

- 92 Since December 1994 and the formal agreement to adopt voluntary timetabling as a regular practice under the Jopling reforms, there have been no guillotine motions. However, the effectiveness of these voluntary arrangements is widely held to be the result of the uncontroversial legislation introduced during this period. In previous years, there has been a significant level of advance agreement through the 'usual channels', avoiding the situation in Australia where most bills face a guillotine. But the prospect of significant constitutional legislation after the next general election and the adversarial positions already adopted by the Conservatives on the one hand and the Opposition parties on the other, means that both voluntary timetabling and agreement through the usual channels are likely to be impossible over constitutional measures. The guillotine is therefore likely to be used with greater frequency and the quality of scrutiny decreased, unless alternative mechanisms for controlling time can be agreed upon.

Procedure in the House of Commons: Alternative Procedures

- 93 There are essentially two different areas in which alternative procedures, or reform of existing procedures, could ease the passage of a constitutional bill whilst meeting demands for adequate scrutiny. The first is to take some stages of a bill off the floor of the House by using another committee forum. The consideration of constitutional measures in a committee of the whole House is a constitutional convention and is not part of Standing Orders. In theory, therefore, alternative scrutiny procedures might be adopted. The second is to alter the control of time, either by limiting the amount of time which can be spent on a bill or by removing some of the constraints on time. Although these alternative procedures and reforms will be considered primarily in relation to constitutional bills, some are already used for other public bills and our recommendations have a relevance which goes beyond constitutional bills.
- 94 It is possible to argue that it is precisely for such significant bills that alternative parliamentary procedures should be used. But in practice, the ability of a Government to introduce new procedures (whether through changing conventions or standing orders) will be circumscribed by the need to carry the opinion of the House with them, not least because of the desire to maintain goodwill on the merits of the bill.
- 95 The next section outlines some of the alternative procedures which could be used and considers their advantages and disadvantages. The options covered are:

<p>Committee Procedures Referral to a standing committee Partial referral to a standing committee Scottish and Welsh Committees Special Standing Committees Other options</p>	<p>Control of Time Increased use of closure Time limits on most, or all, speeches Attendance requirement Remove the sessional cut-off Advanced timetabling for all bills</p>
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Committee Procedures

Standing Committees

- 96 In theory, the Government could break with convention and have a constitutional bill sent to a standing committee. Nearly all bills are sent automatically to a standing committee, unless the House decides otherwise. Therefore, the Government could just choose not to put forward a motion that a bill be referred to a committee of the whole House. However, such a motion can be made by any Member and the Government might face Opposition. Given the convention that 'first class constitutional issues' are considered on the floor of the House, the Government might not be able to rely on its back-benchers for support. This was the case in 1968 when the Government considered sending the Parliament (No 2) Bill upstairs, but concluded that it would not be able to win a division.³⁸ More recently, the Local Government Acts (Scotland) and (Wales) 1995, were sent to standing committees although as they dealt with the creation of unitary authorities they could well be argued to have been constitutional measures.
- 97 It is questionable whether a bill is likely to receive better scrutiny in a standing committee. Standing committees use the same procedures as committees of the whole House and although not as publicly visible, are just as partisan. More of a bill tends to be considered in a standing committee, but this does not necessarily mean greater attention is paid to detail. The scope of amendments which could undermine the coherence of a bill is also likely to be wider in a standing committee. (Formally the scope for amendments is the same in standing committees as in a committee of the whole House, but in practice greater flexibility is exercised by the Chairman in admitting amendments in standing committees.)
- 98 The composition of standing committees reflects the representation the parties have in the House as a whole. Members of a standing committee are selected by the Committee of Selection, but are, in effect, nominated by the Whips.³⁹ To some extent this allows the Whips to ensure that supporters of their front-benches are in place and makes coalitions from different ends of the political spectrum much more difficult. However, the Committee of Selection will note Members who have indicated an interest, perhaps by speaking on second reading, including those who may not support their party's line. The Committee of Selection has tended to avoid involvement in internal party disagreements, but at the same time tries to ensure standing committees accurately reflect the composition of the Commons.
- 99 On the plus side, with up to eight committees running at the same time, the use of standing committees saves parliamentary time and allows the Government to deal with more legislation. Standing committees also tend to attract less public and media attention than committees of the whole House - so defeats and concessions are perceived as less damaging to the Government, and there is a greater willingness to meet critics half way. From a Government point of view it is not certain that there would be a net gain from sending a controversial constitutional bill to a standing committee. Although the Government continues to have a majority in a standing committee, because of the smaller numbers involved, the rebellion of a single Member has greater significance. In addition, as in committees of the whole House, opponents will attempt to prolong debate as much as possible and the Government is therefore just as likely to face a dilemma over guillotining the measure.

Partial Referral to Standing Committee

- 100 An alternative which might be less controversial and more effective, would be to follow the practice adopted for finance bills where most parts of the bill are referred to a standing

committee, leaving key issues to be debated in committee of the whole House. This procedure has also been adopted for other legislation e.g. the Sunday Trading Act 1994.

- 101 Procedurally, this would require the Government to move a motion to this effect immediately after the second reading. In the case of finance bills, the choice of which matters should go to the standing committee and which should be debated on the floor of the House is effectively left to the Opposition. In addition to the clauses selected by the Opposition to be debated on the floor of the House, the Government will also select clauses it wishes to debate. This means that the Opposition may have to reduce the number of clauses which it has selected and-or negotiate the order in which the clauses are taken, in order to achieve maximum coverage of the points it wishes to make.⁴⁰ When the bill is reported from the standing committee, the whole bill is considered on the floor of the House, normally at two sittings. Third reading may be taken at the same time or left to a separate day of debate.
- 102 The question of whether it would be possible to treat constitutional bills in this way was raised with the then Clerk of the House in a 1946 Procedure Committee Report.⁴¹ In his view it was 'theoretically possible; the machinery part could go upstairs and questions of principle could remain on the floor of the House'. If the Government does intend to split a bill in this way, this would have to be reflected in the drafting of the bill to allow for core issues and detail to be divided up easily (although drafting in anticipation is unlikely to prove an easy task).
- 103 The only previous example of a constitutional measure handled in this way is the Local Government Act 1985, which abolished the GLC and the metropolitan counties. In this case, the first clause of the Bill was taken on the floor of the House, with the rest of the Bill being considered in a standing committee. This reduced the time spent on the bill on the floor of the House considerably: 41 hours were spent on stages taken on the floor of the House and 176 hours were taken in standing committee.
- 104 There are two further features which it is important to note. Firstly, the standing committee was exceptionally large: made up of 50 members (essentially a 'London Grand Committee'). Second, the bulk of the Bill was taken off the floor of the House and debated after the first clause had been agreed in a committee of the whole House. This is significant because if a bill is split between a committee of the whole House and a standing committee, the timing of the two debates will be important in relation to the scope of amendments allowed in the two debates. If, as would normally be the case, the committee of the whole House stage was taken first, amendments moved in the standing committee which were incompatible with what had been already agreed in a committee of the whole House, would not be ruled in order.

Scottish Grand Committee

- 105 The Scottish Grand Committee is made up of all MPs from Scottish constituencies. If, in the opinion of the Speaker, a bill relates exclusively to Scotland, the Speaker gives a certificate to that effect and a Minister may then move a motion to refer the bill to the Scottish Grand Committee for consideration of the principle of the bill, in effect its second reading. A bill considered in principle by the Scottish Grand Committee will go to the Scottish Standing Committee for its committee stage and may be referred back to the Grand Committee for the report stage. Referral back to the Grand Committee on report can be blocked by twenty Members objecting to the motion. This means that bills cannot be referred on report to the Scottish Grand Committee without the support of the Opposition. Recent changes to Standing Orders mean that

bills taken in the Scottish Grand Committee at the Report stage are returned to the Scottish Grand Committee for 'further consideration', in effect a third reading.

It might be argued that the Scottish Grand Committee would be an appropriate forum for a Scottish devolution bill. However, the Speaker is very unlikely to consider a devolution bill as relating exclusively to Scotland and give it the necessary certificate to be considered by the Scottish Grand Committee. In addition, given the existing majority for the Labour Party in the Scottish Grand Committee and very limited representation of the Conservative Party, the referral of a devolution bill to the Committee would almost certainly be fiercely attacked (particularly by the SNP and the Conservative Party) as preventing proper debate.

Welsh Grand Committee

The Welsh Grand Committee can have bills referred to it for consideration of their principle and at the report stage in a similar way to its Scottish equivalent (the most significant difference being that use of the Committee at the second reading stage can be blocked by the objections of 20 Members). The Welsh Committee is made up of all Welsh Members plus up to five others.⁴² The Committee has not built up the same profile as the Scottish Committee, as there are very few purely Welsh bills, and it has the same limitations in respect of constitutional bills. Only two bills have been referred to the Welsh Grand Committee since it was first permitted to debate bills in 1974.

Scottish Standing Committee

The committee stage of bills relating to Scotland may be referred to the Scottish Standing Committee. The Committee must include 16 Scottish Members, but this membership is supplemented by Members from outside Scotland so that the representation of the parties is similar to that in the House as a whole. This is really a Scottish variation of a standard standing committee and has the same advantages and disadvantages as discussed in relation to standing committees above.

It might at first glance seem appropriate to split a bill relating to Scottish devolution between a committee of the whole House and the Scottish Standing Committee with questions of principle discussed by the House as a whole, and the details of how a devolved Scottish Parliament organises itself debated by the Scottish Standing Committee. There is no technical reason why this could not be done. However, it is unlikely to be acceptable politically. The dominance of Scottish MPs will be sensitive given that one of the sticking points on devolution in the past has been the question of the representation of Scotland in Westminster - to commit a bill on devolution to a committee dominated by Scottish MPs may not be regarded as sufficiently balanced in terms of representing the other parts of the UK, and is unlikely to prove politically acceptable.

Special Standing Committees

Special standing committees were formally established in Standing Orders in 1986, but had been used occasionally in previous sessions since their first introduction in 1980. After second reading, bills may be referred to a special standing committee which is essentially a mixture between a select committee and a standing committee. It can take oral and written evidence, holding not more than three morning sittings in public and one in private during the 28 days after the committal of a bill. Once its deliberations are complete the committee reverts to working like any other standing committee. To date, there has been very limited use of special standing committees and none has been used for a controversial measure.

- 111 From the, albeit limited, experience of special standing committees they appear to demonstrate the valuable role of consultation and informed scrutiny in improving the quality of legislation, and engaging politicians' interest. A survey of MPs who served on the first three special standing committees in the 1980s found that, of 37 respondents, 28 felt that the experiment had been "very worthwhile" and only one said it made no difference.⁴³ The other point worth noting is the extent to which the process flies in the face of traditional partisan politics, which is not designed to be constructive nor to encourage independence of thought.
- 112 Sir Patrick Mayhew, who claimed more experience with the special standing committee procedure than any other Minister, has offered the view that "it has certainly proved its worth", although he added the caveat that "the new procedure would be difficult to operate fruitfully in a Bill engendering Party controversy. There would be a strong temptation to treat the Committee as an arena into which party protagonists were propelled, to fight the party fight before their respective supporters. I do not think that, in these days, party discipline would be too strong, however, to deprive the procedure of all its beneficial effect, even in such a Bill."
- 113 In relation to constitutional measures, the real advantage of special standing committees is that through the evidence sessions, they allow for some direct input from concerned individuals and organisations to the legislative process. However, it is doubtful that a special standing committee would be an appropriate or successful means of easing the passage of a constitutional bill through the House, without making changes to the rules governing their operation. In particular, the strict time limits on taking evidence would certainly require an extension and the evidence sessions would need to be carefully structured to provide a range of representative views and assist the committee in tackling the key substantive issues. (Previous special standing committees have concentrated more on exposing weaknesses and inconsistencies in the drafting of a measure). Special standing committees may be desirable in terms of improving the way the House legislates, but as Government reluctance to make use of them indicates, from the point of view of managing Government business they do not generally facilitate the speedier, or easier, passage of a bill.

Select Committee or Joint Committee of both Houses

- 114 One means of allowing more detailed examination of provisions than is possible in a committee of the whole House is to commit a bill to either a select committee or a joint committee of both Houses. This either House can do at any time in between the Second and Third Readings. This could be done for part or all of the bill, and would probably go to a specially created committee on constitutional matters rather than one of the existing Departmental Select Committees. For controversial bills, the use of select or joint committees may be limited by *realpolitik*. For example, referral to a select committee was suggested by the Government in 1977 when the Scotland and Wales Bill floundered. It was presented as a last attempt to achieve consensus, but was perceived to be more about keeping the Scotland and Wales Bill alive and hence maintaining the Nationalists' support. The Government insisted on a proviso that the Committee should consider the Bill within the general framework and principle which had been approved in granting the Bill a second reading. The Opposition wanted wider consultation and the Nationalists refused even to discuss the idea.
- 115 The advantage of such committees is that they provide opportunities for more thorough scrutiny and examination of the proposed measures and because of the traditional attempts to maintain a non-partisan atmosphere as far as possible, they are probably less likely than special standing committees to split along party lines. However, referring a bill to such a committee is in effect

putting it on hold. This is unlikely to be attractive to a Government with a tight timetable for reform. (But it would be possible for a Government to send only part of a bill to a select committee or joint committee, especially if the bill were drafted in such a way as to facilitate the splitting of clauses in this way). There is also a tendency, perhaps quite rightly, for these committees to go back to examining the principles underlying a bill which a Government with a clear manifesto commitment to the principle of the legislation may wish to avoid.

Control of Time

- 116 One of the main objections to the use of the guillotine is that it may restrict debate on important parts of a bill. Other time control mechanisms - automatic timetabling of bills, changes to the length of parliamentary sessions and a provision to carry measures over from one session to another - are potentially more effective in serving both the Government's desire to get legislation through and demands for adequate and effective debate.

Increased Use of Closure

- 117 On the floor of the House, the closure requires a majority in favour and, if there is a division, not fewer than 100 members in the majority. In a standing committee the minimum number required to support a closure is the quorum of the committee (17 members or one third of the committee, whichever is less). The acceptance of a closure motion lies within the discretion of the Chair who may refuse if "it shall appear...that such a motion is an abuse of the rules of the House or an infringement of the rights of the minority." Although closure was for many years a controversial weapon in the Government's armoury for controlling business, and its imposition was often opposed, it is far less rigorous a restriction of debate than the guillotine. Its use is now regarded as generally fair, but any extension may well be resisted, not least because its application could look draconian, and may involve the Speaker in controversy. It would not be effective, in any case, without more rigorous enforcement of time limits on speeches.

Time Limits on Most, or All, Speeches

- 118 Since December 1994, the Speaker has had the power to announce at the commencement of proceedings on any motion or order of the day that she intends to call Members to speak for not more than ten minutes in the debate, or between certain hours during that debate.⁴⁴ Front-benchers have also been asked to strive to limit opening speeches to 30 minutes and their closing speeches to 20 minutes. There is no technical reason why time limits should not be imposed in respect of debates on constitutional matters in the committee of the whole House, although it might be difficult to impose limits on the whole debate and similarly difficult to predict the timing of the least controversial issues and therefore specify certain hours. It might also be advantageous to introduce rules limiting the number of times which an individual may speak in any given debate - thus preventing filibustering. In the US House of Representatives and in New Zealand far greater use is made of limits on speeches as a means of controlling time.

Attendance Requirement

- 119 It has been suggested that parliamentary time could be used more effectively if MPs were required either to attend a debate from the beginning of the clause or section on which they wished to speak, or even register in advance their intention to speak. But this would almost certainly be met with a hostile reaction from MPs and prove to be unworkable "on the ground". Moreover, the discipline gained through the move would not necessarily be matched by any increase in the quality of output or any reduction in the total time taken up.

Remove the Sessional Cut-Off

- 120 As all public bills which have not been passed by the end of a session fall, the length of sessions is also an important factor. There are two ways in which this could be changed: by lengthening sessions; or by allowing public bills to be carried over from one session to another.
- 121 Lengthening sessions. There is no set length to a parliamentary session. However, by convention, sessions last roughly a year starting in October-November, with recesses over Christmas, Easter, Whitsun and the Summer. The main exceptions to this are a new Government's first session and the last session before an election, which depend on when the election has been called. For example, if, as in 1992, the election is called in April, the last session of the old Parliament is unusually short and the first session of the new Parliament lasts from May until October of the following year. In theory, one way of ensuring the passage of a large legislative programme would be to ignore the conventions governing the length of the parliamentary session. Other Commonwealth countries, such as Canada, conduct business in sessions which carry on for several years.
- 122 One consequence of lengthening sessions is that the proportion of parliamentary time allocated to Opposition days will be reduced, as this is set at an agreed number of days per session; similarly the number of opportunities for Private Members' Bills would decrease, as under current rules there is only one ballot per session. Such changes would undoubtedly provoke a hostile reaction, but could be dealt with as consequential amendments to Standing Orders reinstating the effect of previous practice. There is also the more important danger that without the discipline of the sessional cut off, bills will get so bogged down that opponents will win a war of attrition. On the other hand there is less to be gained from filibustering if there is no automatic cut off.
- 123 Carry-over of bills between sessions. Carrying-over public bills from one session to another was recommended by *Making the Law*, the Hansard Society Commission's report on the legislative process, with qualified support in evidence from, amongst others, the First Division Association of senior civil servants, the Study of Parliament Group and the Law Society.⁴⁵ The implementation of this change would reduce the pressure on the Government's timetable, but would not directly speed up the passage of individual bills.
- 124 The key argument in support of a motion to enable the carry-over of public bills is that the constraints of time and congestion are inimical to the production of good legislation. Allowing for the carry-over of bills from one session to another already happens in a number of other comparable parliamentary systems and in respect of private bills in the UK Parliament. It would almost certainly be essential to allow for pre-legislative inquiries on published bills or more regular use of special standing committees. But it could also assist in securing the passage of potentially complex constitutional legislation.
- 125 The principal justifications for the present cut off are:
- that it imposes a useful discipline on the government.
 - that the Opposition can *in extremis* use delay to ensure bad legislation does not get to the statute book.
 - there are some parliamentary procedures designed assuming an annual session, e.g. the supply procedure.

- 126 All of these points can, however, be addressed. Although a degree of discipline is certainly useful, the results of the present arrangements are to compress the opportunities for scrutiny and to produce flawed legislation. If more detailed timetabling were introduced, that would provide a substitute discipline. The discipline argument might also be met by ensuring that carry over would only be permitted where certain criteria were fulfilled. The second point has less force, as history demonstrates that this simply does not happen; the guillotine is invariably imposed well before the possibility of delaying a bill into oblivion is reached. Accommodating measures which assume an annual session would be a technical matter, which would have to be addressed, but it should not in itself represent an insuperable obstacle.
- 127 If carry-over is to be introduced, there are a number of ways in which it might be achieved:
- An ad hoc Government motion at the end of a parliamentary session. The likelihood of securing agreement from the Opposition would depend on the level of controversy the bill had attracted. The Government would plan to ensure that more "political" bills were introduced early in the session.
 - Automatic lapsing of bills twelve months after introduction.
 - Legislation which dies on the Order Paper may be revived in the following session either by unanimous consent or simply on a motion of the Government, as in Canada.
 - Certain categories of bill may be exempted from the prohibition on carrying over (this would require a clear definition of such bills and a mechanism for applying the provision, e.g. certification by the Speaker).

Allocation of Time in Advance

- 128 Most bills go through the House with an overt or tacit agreement as to their broad time schedules. Formal advance timetabling has been advocated by repeated Procedure Committee reports, Opposition parties and external bodies.⁴⁶ There is also widespread acceptance that the voluntary timetabling arrangements in operation since agreement on Jopling in December 1994 have proved a success. So why not move beyond this and, in the Leader of the House's phrase, "attempt to agree in a prescribed way, a systematic scheduling of the stages of a Bill to ensure organised debate and effective scrutiny" thus avoiding the prospect (however distant) of voluntary agreements breaking down? The answer lies partly in the perceived relationship between timetabling and wider reform of the legislative process.
- 129 Timetabling is closely linked to sitting hours reform and the parliamentary calendar: the 1977-78 Procedure committee rejected the possibility of imposing a fixed hour of rising, agreeing with Enoch Powell's assessment that "a fixed hour of rising is the equivalent of living under a permanent guillotine." It is clear that any substantial changes to the parliamentary day, week or year would need to avoid the stigma of operating as a guillotine, and ideally should be settled ahead of any scheme for advance timetabling of business. In terms of winning support, if nothing else, it is undoubtedly preferable to take a holistic approach and produce a set of measures that aim to please "most of the people most of the time".
- 130 Perhaps the most often voiced objection is a concern that more formal timetabling would tip the balance of power away from the Opposition, and in favour of the Government. This objection takes two forms: first, concern that formal timetabling would remove opportunities for scrutiny and debate from the Opposition and especially from back-benchers on both sides of the House (which is in part a product of the negative associations of the word timetabling with regular guillotines and enhanced executive power). Second, concern that the Opposition's only means of

forcing the Government to accept changes to bills is through filibustering, which would be impossible within the constraints of formal timetabling.

- 131 The first concern is perhaps easier to assuage than the second. Timetabling can facilitate improvements in the way legislation is considered - better use of committee time for proper scrutiny of bills can be secured if there is agreement about what the main issues are and how time should be allocated to different parts of the bill; deliberate time-wasting would no longer have tactical advantages for the Opposition (and Government back-benchers who did so with Government encouragement could more easily be condemned); report stage would not take so long if bills were adequately considered during committee. In addition, time that may be freed up by advance timetabling might be used to provide an extra day for private member's business.
- 132 As to the second concern, it is undeniable that one purpose of timetabling is to ensure that the Government can plan its legislative programme with a degree of certainty by removing the possibility of filibuster and delay being used as tactics of Opposition. So those who treasure the "unpredictability of timing" as the key weapon in the Opposition's armoury will not be appeased. But timetabling can enable the provision of alternative, more constructive mechanisms for resistance (pre-legislative scrutiny, special standing committees) providing more opportunities for amendment, at earlier stages; and can prevent the situation where whole sections and even parts of bills go unconsidered because a guillotine is imposed as the Government's "hidden" deadline nears. Nevertheless, the judgement as to the balance of advantage will remain an individual one. The viability of advance timetabling can only be determined through trying it. In terms of wider public interest and debate, the public is likely to assume that all parts of a bill are considered as a matter of course - and will see little sense in a power of delay as an alternative to this.
- 133 The introduction of automatic timetabling could be done formally through changing the Standing Orders of the House, which would require the consent of the House and could be difficult given past Opposition to timetabling. An alternative would be for the Government to outline publicly an intended timetable for a bill making it clear that a guillotine will be used if the bill overruns. Such a timetable could be kept to by the regular use of closure and by limiting the length of speeches. This would be harder to enforce than formally agreed timetabling, and limiting speeches would require the cooperation of the Speaker, but it could reduce the incentives for causing delay and make it easier to move for a guillotine if the declared timetable were ignored. As long as the timetable was generous enough the Government could argue that it had given the Opposition the opportunity to debate all parts of the bill and that it was up to the Opposition to make the best use of that time.
- 134 What would advance timetabling cover? Advance timetabling could involve making decisions at the start of the bill's passage through parliament (or at any point thereafter) as to any combination of:
- ⊗ the date for report stage (probably most important).
 - ⊗ the date for commencement and conclusion of all stages.
 - ⊗ a clause by clause timetable for committee proceedings.
- 135 Of course, this sort of approach is fairly regimented. The flexibility inherent in maintaining voluntary arrangements for timetabling, negotiated through the usual channels, has advantages: it is not always possible to predict how much time a bill or a particular stage will need and precise arrangements fixed at the outset may not be appropriate a few months down the line.

But if the value of flexibility is recognised, it should be possible to provide for this in whatever alternative arrangements are developed - for example, through reassessing a timetable on a motion to review.

- 136 Who would have control of the process? It would be possible to formalise the current voluntary arrangements to secure the role of the usual channels - in fact, the only real difference there need be between the current arrangements and any more formal scheme would be in the degree of publicity given to the arrangements and the establishment of more prescribed mechanisms for the decision making process. But it is unlikely that such a scheme would secure the support of back-benchers, or that the usual channels would wish to straightjacket themselves in this way.
- 137 The alternative would be to devise some new machinery which was more transparent, more accountable and where the division of responsibilities might secure an effective and widely acceptable outcome. Different stages might be controlled by different individuals or bodies: for instance, the date for report might be set by the Government or through the usual channels at the outset; and the more detailed timetable determined by a Business Committee (either one generic committee, or a sub-committee of each standing committee), on which the Government need not even have a majority. The initial decision could be subject to some sort of affirmation procedure at a higher level i.e. a sub-committee would report to the standing committee and their agreement would be required. Of course, any confirmation procedure inevitably runs counter to the aim of saving time; but it would ensure that the process is not hijacked by an unrepresentative minority, and could provide an opportunity for the Whips to flex their muscles (thus reducing some fears about loss of control which are likely to be raised by the use of timetabling).
- 138 Timetabling of selected bills. The application of time management procedures to certain categories of bills may prove to be more acceptable than automatic timetabling of all bills. For example, the Procedure Committee report of 1985-86 recommended that bills need only be subject to timetabling procedures where they were expected to take more than 25 hours in committee - and that timetabling for Report and Third Reading would take place only where the Whips could not agree. This sort of fallback scheme has some attractions, in that it allows the "normal procedures" to be tried in the first instance, and provides for an alternative to a Government imposed guillotine if they fail.

Changing Parliamentary Procedure

- 139 If existing parliamentary procedures might be used or adapted to assist in the development and passage of effective constitutional legislation, and reform of procedures to assist in the passage of constitutional measures is best introduced as part of a wider package of reform to the legislative process, how achievable is this? Debate about reform of Westminster procedures is constrained by institutional conservatism, and by a host of factors inhibiting reform. Moreover, reform of parliamentary procedures is unlikely to be a vote winner with the public, because the procedures are understood by relatively few, and the impact of change on the quality of output would be difficult to measure.

Party Policies

- 140 Over the last sixteen years of Conservative Government, successive Leaders of the House have acknowledged the scope for improving practice and procedure, although there has been no radical change since the 1979 Select Committee reforms, and no over-riding vision of the goals of parliamentary scrutiny has ever been put forward. Caution and incrementalism mark out the approach. In November 1995, procedural changes were announced extending the use of Scottish and Welsh Grand Committees as a counter-attack to the Opposition parties' proposals for devolution. No further specific changes (except possibly on scrutiny of European legislation) are expected as a Government initiative this side of the general election.
- 141 The Labour Party has no up-to-date agreed statement of policy in respect of reform of the Commons procedures - the last comprehensive statement was in 1989 in the report of the Policy Review: *Meet the Challenge, Make the Change*. The 1993 *A New Agenda for Democracy* promised a further review of possible reforms, but this has not yet materialized. The Labour Party has nevertheless already made a number of commitments on procedural reform: in the justice field, for example, promises of a new Select Committee on Judicial and Legal Affairs. Tony Blair also recently indicated that the Labour Party would be looking more widely at reform of the House of Commons: "We still need to update our legislative procedures to improve the effectiveness of Parliament. There is also a case for effective consultation to produce better quality legislation".⁴⁷
- 142 The Liberal Democrats included a number of commitments in their 1993 policy paper *Here We Stand* which were designed to tackle five "main weaknesses" they identified in the House of Commons: it is too large; too partisan; its membership too mediocre; the workload too heavy; and there is an unhealthy degree of Government dominance. They also proposed the creation of an elected second chamber which would have new functions necessitating procedural reforms. In addition, the Liberal Democrats have this year embarked on a consultation exercise which is expected to identify a range of specific procedural changes that could be made in advance of any wider constitutional settlement.

Factors Inhibiting Reform

- 143 There are a number of factors inhibiting the implementation of ideas for reform:
- in-built conflict between the interests of the Whips, front-benchers and back-benchers, as well as between political parties wanting to score points off each other.
 - views differ on the proper role and powers of Parliament - which in turn, makes it difficult to reach agreement about what should be done to improve its effectiveness.
 - those who have managed to get into Government - and sometimes those who aspire to it - are unlikely to change a system that is largely designed to assist in the Government's exercise of power.
 - the nature of the Commons - "essentially a closed corporation, adept at socializing new classes of membership and defining its role in terms of internally developed rules and conventions"⁴⁸ restricts the ability of (even a new) Government to win the support of MPs for change.
 - resistance to change arises partly because of the difficulty of determining in advance the likely impact of procedural changes: as with special standing committees, which were designed to assist in increasing the time available on the floor, but are perceived to cause "delay" in the system.
 - the recommendations of even the most rigorous and respectable of reports, such as those of the Hansard Society Commission on the Legislative Process, are not routinely implemented. Even

the Procedure Committee felt moved, in 1987, to express frustration at the lack of progress even in discussing some of their proposals: "Our final recommendation of this Parliament is that if a committee of Members is appointed by the House and spends much time deliberating in considerable depth on aspects of the current procedure of the House, which affect all Members, then time must be found by the Government for the specific proposals contained in its reports to be considered and, if thought fit, adopted by the House."⁴⁹

- 144 It is also the case that those with an immediate interest in the proceedings of parliament are most likely to be in a position to frustrate attempts at change. This perhaps best demonstrated by the fate of special standing committees, in his 1990 speech to the Statute Law Society, Sir Patrick Mayhew suggested that the reason the Special Standing Committee Procedure had not been used since 1983-84 was "that it has not found favour with the departments or business managers". He elaborated:

"the Special Standing committee procedure...was much feared by Government business managers at its introduction, because it has the dire effect of informing their backbench members on the Standing Committee of any Bill to which it applied just what the Bill is about, what it is intended to remedy, and how the remedy is to be achieved. This of course, gets them interested, and may lead them to make speeches. All this adds up to loss of control, which to any Whip is what the loss of the Crown Jewels would be to the Governor of the Tower of London."

Factors Stimulating Reform

- 145 There are two motors that can drive procedural reform. The first is public and parliamentary recognition of a major defect in the present arrangements, as happened over the allegations of "sleaze" that prompted the establishment of the Nolan Committee on Standards in Public Life and the adoption of its recommendations and the continued existence of an independent external body that would monitor the implementation of proposals. The second motor for procedural reform is recognition within Parliament that specific procedural reforms would bring mutual benefit to Government and Opposition, or front-benchers and back-benchers (as with the Departmental Select Committees in 1979, the recent Jopling reforms, and the procedures for scrutiny of Deregulation Orders introduced in 1993). Success has usually been secured where the objectives are limited, and the interests of different groupings within the House of Commons are balanced. Agreement between the frontbenches is a prerequisite.
- 146 Reviewing the history of procedural reform, a number of other factors also stand out as important in securing reform:
- prior consideration of the issues by the Procedure Committee or other Select Committee,
 - giving an opportunity to flush out objections and resolve potential difficulties.
 - timing - in particular, reforms have been particularly well received soon after a general election.
 - forward planning in relation to the impact on the resources available to support reforms; and
 - back-bench pressure for change.
- 147 In this context, it is perhaps the attractions of procedural reform to facilitate the passage of a large package of constitutional reforms that will be the spur necessary to prompt a Government to institute wider procedural reform.

Procedure in the House of Lords

- 148 The beginning of this chapter indicated that it was not usual for constitutional bills to be introduced in the House of Lords. However, it is possible to do so, and in theory it would be possible to deal with constitutional measures in this way. Indeed, this was done with the Life Peerages Act 1958 on the basis that it was relatively uncontroversial, being the product of agreement reached in inter-party talks, and was such a limited change that it did not affect the House of Commons. The extent to which the House of Lords can be used to introduce constitutional bills will be essentially a political judgement about the likely reaction of the House of Commons and House of Lords to a given measure; the principal advantage of introducing bills in the House of Lords is that this frees up time in the House of Commons at the beginning of a session, allowing more bills to be introduced than would otherwise be the case.

Committee Procedure

- 149 Once a bill has passed through the House of Commons it moves to the House of Lords and passes through the same stages as ordinary legislation in the House of Lords (essentially the same as the stages in the Commons). The committee stage in the House of Lords for constitutional bills is taken on the floor of the House, in a committee of the whole House, as are most other public bills. The main legislative role of the House of Lords is revision. Most of the amendments made in the House of Lords are moved by Ministers: Governments regularly use this stage to tidy up or add to bills introduced at speed dictated by political considerations. Thus the Local Government Act 1972 was 349 pages long on introduction and 449 when passed, largely thanks to 722 Lords Amendments, almost all from the Government.
- 150 There have been moves recently to use standing committees and special standing committees for some limited categories of bills. However, it is both unlikely that the House of Lords would welcome an extension of these innovations to constitutional measures (in large part because the House is made up of individuals rather than party interests, so that committees can never be representative of the wider House), and unnecessary, given that the time constraints are less significant than in the House of Commons.

Control of Time

- 151 The most important difference between the two Houses in terms of constitutional measures is that no closure or guillotine is used in the House of Lords. Opposition cannot therefore be restricted by resort to timetabling.
- 152 To what extent the second chamber would oppose constitutional measures coming from a Labour or Liberal Democrat Government is unclear. Certainly, the possibility of hostility from the House of Lords to a Labour Government has historical resonance. During the 1970s the House of Lords showed greater confidence in exercising its delaying and amending powers, but this was in the context of a minority Labour Government. To a lesser extent, the House of Lords' assertiveness has continued under a Conservative Government, the difference being that the Conservatives can seek to call on a comfortable majority in the House of Lords if pushed to do so.

153 The attitude of the House of Lords to constitutional legislation will depend on a number of factors. First, the detail of any manifesto commitment. Since 1945 the House of Lords has observed The 'Salisbury convention', as explained by Lord Carrington:

*"Cranborne (Conservative Leader of the House of Lords, later Lord Salisbury) reckoned that it was not the duty of the House of Lords to make our system of Government inoperable. Nor, he considered, was it justified that the Opposition peers should use their voting strength to wreck any measure which the Government had made plain at a General Election they proposed to introduce. He thus evolved guidelines, now unofficially known as the Salisbury Rules, which meant that the Lords should, if they saw fit, amend, but should not destroy or alter beyond recognition, any Bill on which the country had, by implication, given its verdict. The Lords in other words, should not frustrate the declared will of the people. I doubt if this amounted to a formal constitutional doctrine but as a way of behaving it seemed to be very sensible... by and large the Salisbury strategy worked"*⁵⁰

154 The convention assumes that measures included in a Government's manifesto are *de facto* approved by the public at large. This convention does not, however, prevent the Lords from amending a bill, and there is a delicate balance between an Opposition Party expressing its dissatisfaction and presenting a menace to the security of the Government. In the 1970s, for example, Labour Governments suffered substantial amendments to some bills which implemented manifesto commitments, including the Scotland and Wales Bills, and in total suffered some 355 defeats during the 1974-79 Parliament.⁵¹ Although bills introduced by Conservative Governments are not so susceptible to amendment on the floor of the House, they are not entirely exempt (the Conservative Government experienced some 156 defeats in the House of Lords between 1979 and 1990⁵²) and some bills have involved considerable behind the scenes negotiation with Ministers to secure changes.

155 The reaction of the House of Lords may also depend on where a bill is introduced. The House of Lords may be less willing to oppose a measure that had been passed by a clear majority in the Commons, than one that was first introduced in the Lords.

156 In addition, the House of Lords tends to regard itself a guardian of constitutional propriety and members are more likely to oppose the view of the House of Commons if they feel democratic principles have been ignored. For example, the House of Lords rejected interim arrangements ending elections to the GLC in the run up to its abolition, on the basis that there was no guarantee that the abolition legislation would be passed. Questions over the legitimacy of the Government's mandate may also provide a focus for opposition in the House of Lords. This was a problem the minority Labour Government experienced in the 1970s. More recently, those in the Lords opposed to the Maastricht Bill claimed that because all parties had supported its ratification in the 1992 elections, the electorate had been given no choice. On controversial issues, evidence of adequate consultation or a commitment to a referendum would reduce the potential for opposition from the House of Lords. It is, however, difficult for an unelected chamber to sustain the argument that it represents the true voice of the electorate for long.

157 Finally, possible reform of the House of Lords itself may also have a knock on effect on the Lords' consideration of other constitutional measures. It is difficult to predict how a threat or promise to reform the House of Lords would affect their behaviour. In 1910, after the Lords refused to pass Lloyd George's budget, there was a threat to use the Royal Prerogative to create enough sympathetic peers to pass the Bill. In the end this was not necessary to get the Finance Bill through, but the

threat had to be reiterated in order to pass the Parliament Act 1911. Under a Labour or Liberal Democrat Government, an unreformed House of Lords might take the attitude that it had nothing to lose by opposing a Government's constitutional reform plans, given that reform of their own institution was inevitable anyway; whilst a reformed House (whether nominated or elected) would have greater credibility in opposing the wishes of the Government and House of Commons.

House of Lords Amendments

- 158 If the Government is defeated in the House of Lords it must then spend further time in the House of Commons dealing with Lords' amendments. Decisions are referred back and forth between the two Houses until agreement, or disagreement is reached. Ultimately, the Government can bring the Parliament Acts 1911 and 1949 into play, which allow a bill which has been passed in two successive sessions by the House of Commons, but rejected by the House of Lords, to be presented for Royal Assent.⁵³ (This procedure has only ever been used to secure the passage of the War Crimes Bill; but the 1949 Act and also the Government of Ireland Act 1914 and Welsh Church Act 1914 were passed under the 1911 procedures.) Fighting the House of Lords step by step would be very debilitating for a Government. In terms of parliamentary procedure the Government, particularly a Labour Government, has only limited powers to influence and control proceedings in the House of Lords.

Queen's Consent

- 159 If a Bill affects royal interests or the Royal Prerogative, the Queen's (or Prince of Wales') Consent will be required at some point. The Clerks of Public Bills in the two Houses (after consulting the Government's Parliamentary Counsel) advise the Speaker on the question of whether or not a bill requires Queen's Consent. This is usually done at the third reading, but if Royal interests or prerogatives are fundamental, Queen's Consent may be required prior to second reading - this is provided routinely by the Government.

Conclusion

- 160 In the House of Commons in particular, the time available for legislation imposes a major constraint on the Government. The time taken by constitutional measures tends to be greater than for other bills - in part because of the complexity and the controversy they tend to attract and in part because of the use of the committee of the whole House. Assuming a desire to have a significant legislative programme of non-constitutional measures, under the current system of parliamentary time allocation, there is likely to be time for at the most two constitutional bills per session.
- 161 There are essentially two different areas in which alternative procedures, or reform of existing procedures, could ease the passage of a major constitutional reform programme whilst meeting demands for adequate scrutiny:
- to take some stages of a bill off the floor of the House by using another committee forum.
 - to alter the control of time, either by limiting the amount of time which can be spent on a bill or by removing some of the constraints on time.

162 The discussion above has identified three proposals which may meet these criteria and ease the passage of constitutional bills.

- partial referral of bills to a standing committee; which would reduce the amount of time that a bill takes on the floor of the House, but allow full debate in a standing committee.
- automatic advance timetabling of all bills; which would ensure that all parts of a bill were looked at and minimise incentives for filibustering.
- selective use of carry-over; which would mean that the time spent debating a bill in one session would not be wasted if the bill did not complete its passage in that session.

163 Changing parliamentary procedure simply to facilitate or enhance the quality of a constitutional reform programme is potentially a high risk strategy. The political nature of parliamentary procedure means that changing the rules that govern the game is fraught with controversy. It is important that changes in parliamentary procedure are part of a wider process of parliamentary reform which is coherent and desirable in its own right. Reform of parliamentary procedure has a relevance which goes beyond constitutional bills and there is no shortage of suggestions for ways in which the workings of Parliament could be improved.⁵⁴ Any procedural change is likely to be better accepted if introduced as part of a wider reform of the legislative process, aimed at balancing the interests of interests of different groupings within the House of Commons. Such reform is likely to be welcomed by a wide range of experts and outside interests, from the Hansard Society to the CBI. The desire to secure the passage of a large legislative programme should therefore be seized as an opportunity to implement wider parliamentary reforms.

Inquiry, Consultation and Consensus

Charles Pannell MP: *" May I ask my right hon. Friend whether the lesson of this fiasco is not that in future, rather than striving for all party agreement, we should seek to impose a proper settlement based on the promises which we made at the last General Election."*

The Prime Minister: *"I would regret drawing from this episode of constitutional history the same conclusions as my right hon. Friend. In a major constitutional measure...it is desirable, if possible, to proceed by agreement not only between the parties but between the Houses."*

House of Commons, *Official Report*, 17 April 1969, col. 1341
Exchange following the announcement of the withdrawal of the Parliament No. 2 Bill.

Introduction

- 164 So far, this report has considered the implementation process of an agreed policy. But there is often a prior stage of inquiry or consultation. In fact, determining the best way to attempt constitutional reform has repeatedly taxed governments. One of the key issues has been the need for reform to build on political consensus rather than to be derived from partisan policies.
- 165 There is a strong expectation that constitutional reform be based on broad public and cross-party consultation. In recent speeches this has been reaffirmed by all three main political parties. This is not because it is necessarily the most efficient or productive way of making and implementing policy. If there is political will, and party unity can be assumed or manufactured, the most efficient way of developing policy is the standard process of Whitehall deliberation followed by a Cabinet Committee recommendation to the whole Cabinet.
- 166 But getting legislation on the statute book is not all 'Efficiency' also includes making constitutional reforms endure beyond the lifetime of a particular Government: coherence and legitimacy are equally important. Those interested in embarking on constitutional reform in the UK this century have nearly always attempted to engage with other political parties and consult outside of political elites, even if these attempts are subsequently abandoned, although (as the exchange above illustrates) there is no agreement as to the rules that should be followed. Moreover, the absence of any fixed procedure for constitutional amendment means that where a Government does not have definitive plans for reform or chooses to consult on its proposals before implementation, there is a range of vehicles that it might use.
- 167 This chapter examines the various consultation mechanisms that might be used and their strengths and weaknesses. The analysis draws on the past experience of handling constitutional measures which provides a backdrop that will be difficult to ignore, and also identifies relevant and useful experience from overseas.

Mode of Policy Development

- 168 In developing constitutional policy there are advantages for the Government in using existing standard procedures, rather than adopting procedural innovations or devising new systems of consultation. As Banting and Simeon comment: "Incumbents are likely to try to keep constitutional discussions within existing channels - to make them as similar as possible to 'normal' processes in order to control the agenda and alternatives".⁵⁵
- 169 There are political and practical limitations to the extent to which consultation is viable in practice; and careful decisions are needed about who needs to be engaged in the debate and what signals the Government wants to send. Three categories of consultation are considered:
- **building political consensus:** usually regarded as important in relation to issues where reform is likely to impact on the party system or balance of political interests.
 - **calling in the experts:** regarded as advantageous where an issue appears intractable in a party political sense, but a solution needs to be found and be able to claim legitimacy.
 - **public consultation:** in the most basic sense takes place at a general election, but additional consultation may be undertaken where a reform needs public support if it is to succeed.

Building Political Consensus

Cross-Party Talks

- 170 During the twentieth century there have been repeated attempts to secure consensus on constitutional measures through cross-party talks. These have been held under various titles and include both private talks at a Privy Councillor level and more public and formal inter-party talks.
- 171 There are issues on which inter-party talks have been repeatedly attempted. There have for example been several attempts to secure reform of the House of Lords through inter-party talks. Any reform of the House of Lords is likely to affect the balance of power in Parliament and especially party political balance and for these reasons it has been considered appropriate to engage in inter-party talks.
- 172 In 1909, the Lords' refusal to pass Lloyd George's Finance Bill prompted moves to curtail their legislative powers, eventually resulting in the Parliament Act 1911. Although initial efforts to get the Bill through the House of Lords relied on a threat to use the Royal Prerogative to create up to 300 sympathetic peers, the death of the King in May 1910 produced pressure for a more consensual approach and Asquith proposed a two-party constitutional conference.⁵⁶ The Conference broke down because the Opposition insisted that constitutional changes, such as Home Rule, should be submitted to a referendum, a provision to which the Government would not have been able to secure its own supporters' agreement.⁵⁷ Inter-party talks do not preclude other forms of consultation: in this instance proposals for reform were also submitted for the popular approval, as the question of reform of the House of Lords dominated the second general election in 1910.
- 173 A later attempt at inter-party talks on the Lords was marginally more successful. These talks took place when the second reading of what became the Parliament Act 1949 was adjourned for talks on powers and composition. The talks broke down after seven meetings but agreement was reached on a set of principles relating to composition. In 1951 the Conservatives tried to restart the talks, but the Labour Party refused to participate; the Life Peerages Act 1958 built on the agreement on composition reached in the talks ten years earlier. Crossman's failed attempt to reform the House of Lords in the 1960s is also a useful case study.⁵⁸ Moves were made very early on to achieve cross-party support and to involve the Lords in the process. What emerged was an inter-party conference made up of key members of the three main parties drawn from both the Commons and the Lords.⁵⁹ In practice, much of the work of the inter-party conference was done by a sub-committee made up of the party Leaders in the Lords, together with Crossman and a small secretariat.
- 174 By the time the conference had agreed on a draft White Paper, Conservative members' enthusiasm for agreed reform was fading. Matters came to a head when Conservative Peers defeated the Southern Rhodesia (United Nations Sanctions) Order. Infuriated, Wilson made an announcement to the Commons promising comprehensive and radical legislation and broke off the inter-party conference. However, even after the inter-party talks had broken down, the Government continued to base its legislation on the limited agreements which had been reached. As a consequence the Parliament No. 2 Bill was designed to be passed as a cross-party measure, and was too large and unwieldy to cope with the sustained Opposition it faced. After a particularly embarrassing failure to secure closure, the Government decided to abandon the Bill.
- 175 With hindsight, it is doubtful that cross-party agreement could ever have been achieved. Very early on, the Conservatives made it clear that they wanted implementation of any reform delayed until after the

next election. This was always going to be unacceptable to the Labour Party which was concerned about the Lords disrupting their legislation in the last two years of the Parliament. This was one of the issues cited by the Conservatives when they pulled out of the inter-party talks (although there were wider issues behind the breakdown). A further weakness was that the tactics throughout had been to keep the detailed work of the inter-party conference and later Cabinet Committee quiet. Few attempts were made to engage back-benchers in the process which meant that the objections of MPs to proposed schemes were not fully taken into account, leaving back-benchers feeling excluded and without any understanding of why certain compromises had been made. The officials working on the Bill were similarly isolated. Once the 'usual channels' had broken down the Government persisted with a large and complex Bill which was drafted on the basis of cross-party agreement.

- 176 The option of inter-party talks will inevitably be raised in the context of future constitutional reform. It is obvious that, given the different constitutional views and political interests of the parties, it is never going to be easy to reach cross-party agreement on constitutional issues. Yet the success of such an approach requires the politics of consensus to prevail. If it does not, the consequential reforms are likely to be either piecemeal - introduced on the basis of whatever agreement was reached, not the comprehensive reforms originally intended - or rejected by the Opposition parties. There is significant scope for tactical manoeuvring by Opposition parties during the talks, or even for frustrating the very establishment of talks by non-participation. There is also a danger that the party leaders may not be representative of the party at large, and may not be willing or able to whip their back-benchers into line during subsequent parliamentary proceedings.
- 177 The process of inter-party talks therefore needs to engage back-benchers in the consultation process as far as is possible. Even if formal involvement is not practicable, there is value in keeping back-benchers up to date with the progress of discussions and the reasons for any apparent compromises made. Equally, debate and agreement within the Cabinet on the Government's own stance is a crucial pre-requisite to successful negotiations in any cross-party forum. Where talks break down, any decision to proceed with the measure should recognise that it can no longer expect support across the House and the bill should be framed accordingly. It is also important that those taking part in the negotiations are in a position within their own parties to ensure that the decisions reached are accepted. Otherwise, even where agreements are reached, they may not be sustained through the parliamentary passage of resulting legislation.
- 178 The keys to success are likely to be ensuring sufficiently high level political engagement whilst avoiding the danger of establishing an inward looking clique, over immersed in the detail of the issues and unconcerned with the wider political ramifications (as happened in 1969). The principal advantages are that the concerns and preferences of the parties can be teased out in negotiations which enable suitable solutions to be developed at an early stage - especially if the talks are focused on principles rather than the detail. Moreover, if successful in reaching a conclusion, they should smooth the passage of legislation. This approach does not preclude the commissioning of research to assist in deliberations nor the publication of consultative papers (or the use of other consultative mechanisms e.g. polling) to discover public opinion.
- 179 A further form of inter-party consultation is discussions held on Privy Councillor terms i.e. confidential. These tend to be on areas outside strictly party politics, and are essentially about sharing information rather than consensus building, although they may also be used to explain to the Leader of the Opposition the background to a decision taken by the Government where immediate public disclosure of all the facts would damage the national interest. Examples of discussions held on Privy

Councillor terms include Asquith's meetings with Bonar Law on the Ulster crisis in 1913 - which were not a success; Baldwin's talks with MacDonalld in 1927 on the composition of the Simon Commission which considered the future Government of India, his consultation of Attlee and Sinclair (the Leader of the Liberals) on the abdication crisis in 1936, and talks since the early 1970s between various Prime Ministers and Opposition Leaders on Northern Ireland.⁶⁰

Speaker's Conferences

- 180 Speaker's Conferences consider and recommend changes in electoral law and are primarily concerned with the technical aspects of such measures, for example: Speaker's Conferences on Electoral Law were held in 1965-68; 1972-74; and 1977-78. Called on the invitation of the Prime Minister (with the prior agreement of the Speaker) a Speaker's Conference has been described as "a frail advisory mechanism, at the mercy of the Government of the day".⁶¹ A total of around 30 MPs usually participate, appointed by the Speaker on the basis of nominations from the parties. Speaker's Conferences sit in private and do not publish proceedings. They have the power of recommendation only. They are served by a joint secretariat from the Clerk's Department and the Civil Service.
- 181 A Speaker's Conference was last used in 1977-78 to recommend the level of representation Northern Ireland MPs should have in the House of Commons. Since then the role of a Speaker's Conference appears to have been taken over by select committees. For example, the Home Affairs Committee reported on the redistribution of Commons seats in 1987, which would traditionally have been the role of a Speaker's Conference.⁶² The advantage of select committee proceedings is that their openness arguably provides a more desirable forum for the discussion of constitutional reform measures.
- 182 The future use of a Speaker's Conference depends whether it is judged appropriate for a particular issue to be considered in this way. For example, the use of a Speaker's Conference to decide on levels of Scottish representation in Westminster was raised by the Opposition during attempts at devolution in the 1970s. The Labour Government resisted this suggestion on the grounds that the involvement of the Speaker in such a potentially controversial debate would considerably weaken the position of the Speaker. As explored by David Butler in *Modifying Electoral Arrangements*, there is evidence of reluctance on the part of previous Speakers to become involved in controversial electoral issues. The extent to which this would be the case in respect of any of the current proposals for reform would depend on how controversial the issue was - and especially the degree of specifically party political controversy. Where an informal agreement had already been reached between parties, a Speaker's Conference could be used to formalize the outcome. However, it is difficult to see which of the measures on the current reform agenda might be appropriate to refer to such a forum. As David Butler notes "although Speaker's Conferences seem to have become established as parts of the Constitution, their record is not very impressive either in achieving consensus on controversial matters or in seeing their recommendations translated into law."⁶³

Constituent Assembly

- 183 There is no clear precedent in British history for a constituent assembly of the sort proposed by the Liberal Democrats. The various consultative models in Northern Ireland have come closest - indeed, the proposal for an elected multi-party body, recently announced by John Major, might in some senses be regarded as a constituent assembly. However, other countries have deployed constituent assemblies to a greater extent.

- 184 As McWhinney suggests, "the constituent assembly - albeit a constituent assembly elected by direct, popular vote and therefore having its own direct political mandate and claims to political, as well as constitutional legitimation - ...represents the culmination of the constitutional thinking of the Age of Enlightenment".⁶⁴ The concept of a constituent assembly has its origins in the revolutionary Constituent Assemblies in France in 1789-91 and in 1848 (the Constitutional Convention held in Philadelphia in 1787 to produce the American Constitution was also a constituent assembly in all but name). In Russia, the demand for a constituent assembly (derived from the French experience) emerged in 1879, and became a core element of the programme of all Russian populist organisations.
- 185 More recently, there was a surge in the use of constituent assemblies following the Second World War e.g. the All-India Constituent Assembly of 1946 and the parliamentary council of Germany which produced the 1949 Bonn Constitution. In Israel, a Provisional Council of State was created with the main task of preparing elections to a Constituent Assembly following the establishment of the Jewish state in 1948. No date was set for the completion of the Constituent Assembly's work and it was assumed that when the formulation of the constitution was complete, elections would be held. However, the members of the Constituent Assembly were divided over the need for a written constitution, and even advocates found that there was little convergence between their views on the specifics. As a result the Constituent Assembly simply passed the Transition Law; which determined Government arrangements and a resolution to the effect that the constitution would be determined in stages through a series of "basic laws", which would in due course be codified. As soon as it had thus deferred the task of writing a constitution, the Constituent Assembly changed its name to the First Knesset (House of Representatives).⁶⁵
- 186 The managed transition to democracy in South Africa has also involved a constituent assembly, charged with creating a written constitution. But this was instituted as part of a longer process of negotiation - first, the existing Tricameral Parliament enacted an interim Constitution and provisional Bill of Rights drafted by a multi-party conference (MPNP); a transitional executive council (or multi-party Cabinet committee) oversaw the Government during the election campaign for a Constituent Assembly, charged with drawing up and adopting a new Constitution. The results of the elections to the Assembly determined the proportional representation of Cabinet members in an interim Government; and elections under the new Constitution are intended to take place no more than five years from the elections to the Constituent Assembly. There had been several prior rounds of multi-party talks and specifically two democratic Conventions which had laid the ground for the Constitution and had agreed the process of reaching a final constitutional settlement. The whole process was one of negotiation and pact making, with several breakdowns in communication along the way. There was a particular disagreement about whether the constituent assembly should come before or after the drafting (through negotiation) of a new constitution. This process is not finished - the provisional Constitution is being revised and will be submitted to the Parliament convened as a Constituent Assembly.
- 187 Historically, therefore, constituent assemblies have been used where a new state has been created - either geographically or metaphorically i.e. where previously disenfranchised sections of society (class in France and Russia; race in South Africa) are to have a voice in the body politic and existing institutions of the state are discredited. The experiences of both South Africa and Northern Ireland also suggest that the role, functions and timeframe of a constituent assembly are issues that require negotiation rather than imposition. Experience shows that the use of a constituent assembly can be time consuming and does not guarantee the acceptance or durability of any

agreement reached. Ultimately, the device of a constituent assembly does not avoid the need to tackle party political differences and to maintain the momentum of reform through negotiation as well as consensus building. It may also prove inadequate to deal with a non-crisis situation, as “the motive power of constituent assemblies will come from acting quickly, in periods of great public euphoria where natural law ideas are dominant - normally following on some great political or social revolution or similar upheaval, when there is little difficulty for the constitution-makers in perceiving the nature of the public mood and in translating it into technical legal form.”⁶⁶

- 188 The Liberal Democrats propose the use of a constituent assembly which would “revise, codify and supplement”⁶⁷ constitutional reform measures introduced by means of ordinary law in a first Parliament, bringing them together into a written constitution. The constituent assembly would be made up of all MPs elected to a new Parliament under a proportional representation system. The assembly would be free to decide its own procedure and would have to adopt the written constitution by a majority of at least two thirds and the constitution would then be submitted to a referendum. In this sense, it is at odds with the more traditional notion that a constituent assembly will assume a blank sheet of paper as a starting point, and the extent to which a constituent assembly would be satisfied with altering an existing constitution must be questioned.
- 189 It is also difficult to see how those elected as MPs could function both as normal Members of Parliament and members of the constituent assembly, unless there is an immediate crisis of political authority that requires it as in South Africa. For Parliament to function as a constituent assembly and perform its normal functions it is almost certain to require either a considerable increase in the number of days or hours it sits, or a minimalist non-constitutional legislative programme. The latter option effectively means putting Government on hold (or on auto-pilot) for as long as it takes to reach a constitutional settlement.
- 190 Moreover, the assumption that a constituent assembly would be particularly well equipped to agree a constitutional settlement relies on there being a degree of consensus amongst its members about the substance of constitutional change, or at least a willingness to reach consensus. Yet it would take an enormous leap in political culture for such an assembly to be elected with the task of drafting a written constitution foremost in the electorate’s mind; voting is likely to remain based on party political affiliation and even with proportional representation there is no guarantee (nor is it likely) that avid constitutional reformers will dominate such an assembly. This constituent assembly would seemingly be entitled to over-ride all the reforms introduced and implemented in the previous parliament; but perhaps worse is the prospect of no agreement being reached. The procedures adopted by the constituent assembly would have to include some mechanism for securing decisions, even if not through consensus.

Calling in the Experts

Royal Commission

- 191 There are no standard criteria for when it is appropriate or helpful to set up a Royal Commission, and the breadth and political sensitivity of the subject matter referred to a Royal Commission can vary enormously. Although the origins of Royal Commissions lie in the Middle Ages, their golden age was the nineteenth century - between 1800 and 1859, more than 220 Royal Commissions were

established, covering subjects as diverse as the poor law, penal administration, sanitation, slavery, and housing. During a period of social, economic and political dislocation - and in the absence of a professional civil service - investigative committees entrusted with fact finding and policy making were an effective means of short-circuiting the political struggles that surrounded major reforms during the first half of the century.

- 192 But even then, they suffered from the selective use or collation of evidence, the packing of committees and the manipulation of opinion. They were also used on occasion as political expedients to delay or avoid political problems. Nevertheless, the extent to which Royal Commissions had been reduced in public (and certainly political) esteem over the next hundred years is perhaps best encapsulated by Harold Wilson's quip that Royal Commissions and departmental committees "take minutes and waste years"⁶⁸ and by Margaret Thatcher's reluctance to make any use of them at all, taking the view that Royal Commissions were an unnecessary diversion from the business of government.
- 193 There has been one previous attempt to refer constitutional reform to a Royal Commission. In 1968, the Wilson Government set up the Royal Commission on the Constitution, chaired first by Lord Crowther and then by Lord Kilbrandon, in response to growing demands for decentralisation. The Commission was first decided on in 1968, started work in 1969 and reported in October 1973. Vernon Bogdanor has argued, and the view is widely supported, that the Commission was established as the "expedient of a harassed administration...the demand for immediate concessions to meet the nationalist threat could be contained, and by the time the Kilbrandon Commission reported the SNP and Plaid Cymru might no longer be so credible politically, in which case its findings could be quietly pigeon holed."⁶⁹ The political expediency that lay behind its establishment was further exposed by the fact that, despite the broad terms of reference for the Commission, the Parliament (No. 2) Bill to reform the House of Lords was about to be introduced into Parliament at the very same time that the Commission was decided upon; and by the subsequent decision to proceed with Scottish local Government reform without waiting for the Commission's report.
- 194 The expectation that the members of a Royal Commission should be both broadly representative, and expert in the field, presents immediate obstacles to consensus forming. In the case of the Kilbrandon Commission these inevitable difficulties were compounded by the loss through death of two members (including its first Chairman) and the resignation of three others. Two of the remaining members issued a Memorandum of Dissent - which argued that the Commission's terms of reference permitted a comprehensive review of constitutional arrangements, whereas the main report focused almost exclusively on devolution. On publication, the Commission's report was debated briefly in the House of Commons, but neither of the two main parties' election manifestos made any commitment to devolution.
- 195 In the event, the nationalist threat did not recede, and both the SNP and Plaid Cymru polled well in the February 1974 election which returned Labour to power six months after the Royal Commission had reported. This ensured that the Commission's recommendations were further considered, through the publication of a Green Paper for consultation (although only 4 weeks were given for responses) and then a hurriedly produced White Paper which attempted to identify principles on which devolution would proceed with the details in several more White Papers. At the very least, it can be seen that the work of the Commission assisted little in reducing the decision making burden of the government. The history of the Scotland and Wales Bill and the subsequent separate Scotland and Wales Acts is well known.

- 196 There is nothing intrinsically wrong with Royal Commissions - indeed, most policy making processes are preceded by inquiry or investigation of some sort. The principal advantage of a Royal Commission is that it is a public body which is expected to invite evidence from a wide range of bodies and individuals. In doing so a Royal Commission can raise and address new ideas and may also create a climate sympathetic to change.
- 197 However, it is not overstating the case to say that there are more reasons why a Royal Commission might be inappropriate or ineffectual, particularly in considering constitutional reform measures. Firstly, Royal Commissions are famously regarded as an 'excuse for procrastination' and even setting one up would raise questions about a Government's commitment to reform. Lord Kennet, as long ago as 1937, observed that "when a Government finds itself extremely hard put to distract the attention of the public from one of the fundamental ills for which the public expects a remedy from the government, and for which the Government is sorry it can find no remedy, it promotes a dog-fight between the people with different views, and for starting a dog-fight there is no method so valuable as that of a Royal Commission."⁷⁰
- 198 Second, Royal Commissions may produce findings which are not sufficiently policy oriented or which fail to reflect the realities of the political environment into which their recommendations are delivered. Previous experience also suggests that there is a strong possibility of the report not being unanimous. Moreover, although the fact that Royal Commissions are initiated by and report to Government - not Parliament - can lead to a perception that they lack independence, there is always a risk that the Government may not welcome the findings produced. The decision then is whether to accept the recommendations despite the Government's own reservations; or to disagree and face the political consequences.
- 199 Third, and perhaps most important, is the importance of engaging parliamentarians in negotiating a settlement of a constitutional issue, rather than collecting the views of external experts. Depending on the issue under consideration, the need may well be for political direction rather than the objective analysis which is ostensibly the input of the Royal Commission (quite apart from the fact that it is extremely difficult to identify a range of sufficiently expert, but non-partisan, Commission members). To the extent that objective analysis is required to feed policy decisions, it can just as well be carried out by departmental or commissioned researchers.
- 200 The decision to appoint a Royal Commission may therefore serve two unhelpful ends: keeping a contentious issue alive and without resolution for a period of years, whilst adversely affecting the reputation and authority of the Government because of public perceptions about the purposes to which Governments put Royal Commissions and their inherent utility.

Constitutional Convention or Commission

- 201 The terms constitutional convention and constitutional commission are used to describe a variety of bodies. For the sake of clarity it is worth outlining what is meant by them in this report. *Constitutional convention* is used to refer to a body made up of a combination of politicians, experts and the wider civic community - as, for example, in the case of the Scottish Constitutional Convention. (The term convention has also been used to apply to what are essentially constituent assemblies, as with the United States Constitutional Convention in 1787). *Constitutional commission* is used to describe an independent, expert, standing body, such as the Law Commission.

- 202 Although it has no official status, the Scottish Constitutional Convention (SCC) launched in 1989 provides an example of how a constitutional convention could work. It is made up of representatives of the Scottish Labour Party, the Scottish Liberal Democrats and representatives of other parts of Scottish civic society: the trade unions, churches, women's movement, ethnic minority groups and sections of the business and industrial community.⁷¹ The aim of the SCC was to develop a workable and realistic scheme for a Scottish Parliament. The SCC proceeded initially through working groups and prepared a draft scheme in 1990. Issues which were left outstanding, such as proposals on gender balance, electoral system and constitutional implications at a UK level, were referred to a Constitutional Commission which was established in 1993. The Commission was a much smaller body which took expert evidence on these technical issues and reported its findings back to the Convention for decision.
- 203 The Scottish Constitutional Convention has been successful in attracting support and achieving consensus in its decision making. In bringing together such a wide cross-section of people and engaging politicians in the process, the SCC has managed to be both educational and consultative and to combine technical advice with building political consensus. It represents a degree of cross-party co-operation which is quite alien to national politics (although not so uncommon at local Government level). Even so, two limitations should be noted: the Scottish Conservatives and the SNP both refused to participate in the Convention thus limiting the authority of its recommendations; and the consensus rule for decision making meant that where no such consensus could be reached, the Convention has remained silent. Hence its proposals do not deal exhaustively with all the issues that are raised by the prospect of devolution, nor have their proposals yet faced the test of implementation.
- 204 Australia offers an example of some of the strengths and weaknesses of both the convention and commission models. A Constitutional Convention was set up in 1973 and deliberated until 1985. The Convention was made up of delegates from Federal and State Parliaments in order to generate non-partisan support necessary for constitutional amendments. It failed in this aim, hampered by the continuing hostilities caused by the dismissal of the Whitlam Government in 1975.⁷² Frustrated with the Convention's lack of progress, in 1985 the Hawke Government established a Constitutional Commission in its place. The Commission was independent, made up of six members: two lawyers, two academics and two politicians and encompassed broader expertise through working groups which examined specific areas. Its remit was to conduct a fundamental review of the Australian Constitution and to report on its revision.
- 205 The strengths of the Commission in comparison with the Convention were that it was not dominated by politicians and it based its findings on systematic and wide consultation. In addition, through public meetings held round the country the Commission played an important role in involving and educating the public in constitutional issues. On most areas the findings of the Commission were unanimous. Four of the Commission's proposals were put to referendums but were rejected by the electorate in September 1988. Any further impact has been hampered by loss of political interest in constitutional reform. This may be changing now with the revival of republicanism as a major issue.
- 206 In relation to constitutional reform in the UK, Anthony Lester argues that "...a well constructed and well directed constitutional convention would be an effective means of promoting public education about the need for a new settlement, of preparing a well rounded scheme, of circumventing Whitehall resistance, and of limiting parliamentary Opposition".⁷³ The main difficulty in holding a constitutional convention on the constitutional reform agenda would be persuading parties other than those already committed in principle to reform to take part.

Timescale is another factor to consider. For a convention to take on the whole of the constitutional reform agenda at once would be a massive task, which would make it difficult to sustain the same momentum as the more focused work of the SCC, and may run into similar problems as a Royal Commission. In addition, there will be political and practical pressures to proceed with measures at different speeds.

- 207 A constitutional commission could be established as part of the reform process, providing a new agency which cut across Whitehall boundaries and would be "committed to the enterprise and has the expertise and authority to drive it along".⁷⁴ The advantages of such a constitutional commission would be its potential for ensuring that the reform programme as a whole is coherent and that the interaction of the various elements within it were fully thought through. It would be a means of removing thinking about, if not legislating on, constitutional questions from the political arena; would offer opportunities for public education and could develop as an independent point of reference for constitutional questions e.g. how to phrase referendum questions. It would not however remove the need for co-ordination of policy within Whitehall, discussed above.
- 208 However, the Nolan Committee's report on the registration of MPs' interests demonstrated the difficulty of finding consensual solutions even to quasi-constitutional issues. There was some hostility to the recommendations of the Nolan Committee as they related to the House of Commons. The Select Committee set up to consider the implementation of the proposals accepted them all in principle, with some modifications and reserved for further consideration the question of consultancies. The House accepted the Committee's report, but Opposition resurfaced when the issue of consultancies came to be debated. The final decision was approved by a majority of 51, with the Prime Minister and several Conservatives opposing the change.⁷⁵ Although implemented, the experience of Nolan shows that even if coherence is achieved at the planning and drafting stage of reform there is no guarantee that it will survive the parliamentary passage. In the case of a constitutional reform programme, opponents could effectively target the clauses that were dependent on one another and sabotage the whole package of reform.
- 209 Another, longer term role, for a standing constitutional commission in the UK would be to monitor and revise constitutional changes and tackle issues referred to it by Government. This would emulate the role of the Law Commission, although its members would not be senior members of the legal profession and judiciary, but similar in professional background to the Nolan Committee. Indeed, some have regarded the work of the Nolan Committee on Standards in Public Life as foreshadowing the introduction of some independent constitutional monitoring machinery.
- 210 Professor Rodney Brazier recommends two roles for a constitutional commission:
- to consider and report on any constitutional provision which, in its opinion, were in need of clarification or reformulation.
 - to consider any aspect of the UK constitution referred to it by a Minister, and to report on whether and how it might be reformed.⁷⁶
- 211 It would provide an external and independent motor of reform and provide expert advice⁷⁷ - to do for the constitution what the Law Commission does for the rest of English Law. In addition, a standing constitutional commission might take on the consolidation of piecemeal measures if each of the items on the reform programme were legislated for in a phased programme. However, there is no reason to expect that the recommendation of such a commission would be acceptable to Government or Parliament unless there were external pressures for reform.⁷⁸

Public Consultation

Manifesto Commitment

- 212 The importance of a manifesto commitment is that it provides a means by which a Government can claim public support for a particular action. This has become especially important since the establishment of the Salisbury doctrine that the House of Lords will not vote against the principle of any measure included in a Government's election manifesto. Manifestos are more than a means by which a Government can claim public support for a particular action. Manifesto commitments also make the party itself think through and declare its policy in advance of the election and educate opinion as well as preparing civil servants for the future. The most specific example of a manifesto pledge on constitutional reform is to be found in the two general elections of 1910, which were essentially fought on the question of whether the House of Lords' powers should be restricted and the party manifestos concerned themselves only minimally, if at all, with other matters. But it is more usual for manifesto commitments to be expressed very broadly.
- 213 In other cases, the argument that the election of a Government gives an automatic mandate for all the policies outlined in a manifesto is obviously less credible, given that electors will usually vote for the 'best of all possible worlds', which is not the same as offering a rubber stamp of approval on all that party's policy commitments. Some would argue, as Baroness Birk, that a manifesto commitment on a constitutional matter does not give the Government *carte blanche* to enact legislation: "To say that an issue is constitutional does not mean that a change should never be made, but it should be made only with great care, great deliberation and great trepidation; and, too, only when a very strong case has been made out. This supersedes any manifesto commitment."⁷⁹ Even where Parliament accepts that a manifesto commitment sanctions the pursuit of a particular objective, it does not necessarily accept that the particular means of achieving the objective will also be regarded as sanctioned, as the Opposition in both Houses to the Conservative Government's two stage abolition of the GLC and Metropolitan Counties demonstrated.
- 214 But whatever the limitations of a manifesto commitment as a guarantee of legislative success in government, they do not override the need to explain clearly in a manifesto the reforms a party intends to pursue in government. As Viscount Alexander of Hillsborough argued during the passage of the Life Peerages Act 1958, "on such a vital matter as amendment of the Constitution...details of the proposed reforms should be submitted in any general appeal to the electorate for their mandate. It is not good enough simply to say in an election address...'We propose to deal with the reform of the House of Lords'."

Green and White Papers

- 215 The publication of Green and White Papers provide an opportunity for debate and consultation. At the very least, they will bring issues to the attention of MPs, particularly if parliamentary time is given to debating them. Publication of such documents should also serve to get the Government's proposals into the public arena and foster wider discussion and debate, although the dissemination of Green and White Papers is usually limited and prompts only limited formal feedback, unless accompanied by a more broad based public relations-consultation exercise. The numbers of responses to Government consultation papers is commonly lower than, for example, the numbers of people who ring into tabloid newspaper "decision-lines". Moreover, those who do choose to reply may not be representative of the population at large - indeed, they are likely to over-represent extremist points of view and the opinions of those with vested interests.

- 16 The process of consultation through Green and White Papers can also take considerable time which Ministers may ill afford to lose - in the 1970s it took two years and nine months, a general election, one Green Paper and two White Papers (and a supplementary statement) before the introduction of the first devolution bill. However, this need not be the case - the time taken in the seventies resulted as much from Labour's political difficulties in pursuing devolution as from the technical task. So long as a reasonable period is allowed for consultation, unmanageable delay can be avoided.
- 17 Governments in other countries have adopted different means of developing proposals for constitutional reform. One of the most recent examples is the Canadian Government's handling of its draft Charter of Rights. There were nationally televised hearings of a joint parliamentary committee on the Government draft of the Charter. The committee heard evidence from 1000 individuals and 300 groups, leading to 65 substantial amendments to the original draft.⁸⁰ This was of course also time consuming and it should be noted that it took place in the context of much higher public awareness of constitutional and rights based issues than there is in the UK at present. However, it was an important factor in securing support for the final version of the Charter, giving the public a sense of ownership and in raising the level of understanding of its provisions and operation.

Referendums

- 218 Some would argue that, constitutional reform and referendums go together. In some countries, referendums are required before changes to the constitution can go ahead, and many other countries have chosen to use referendums to settle constitutional issues. In the UK, the doctrines of Ministerial responsibility and parliamentary Government mean that the use of a referendum sits uneasily in our constitutional tradition. However, four referendums have been held in Britain so far; one on EC membership and three others on the constitutional status of Northern Ireland, Scotland and Wales. It seems likely that we will see further referendums in the near future. All three main parties either support, or have not ruled out a referendum on further European integration; and whichever party is in power, some form of referendum is likely to accompany any settlement in Northern Ireland. In addition, the Labour Party has promised referendums on electoral reform and the introduction of elected assemblies in the English regions, and the Liberal Democrats have promised to extend powers to hold referendums to local and regional Government and to introduce advisory citizens' initiative referendums.
- 219 A. V. Dicey first introduced the referendum into main stream British political debate in 1890. He argued that the referendum would "protect the Constitution from sudden changes, and thus ensure that every amendment in the fundamental laws of the land shall receive the deliberate sanction of the people..."⁸¹ Like most advocates of the referendum, Dicey had his own political concerns in mind when supporting its introduction. He believed that it would act as a block on Home Rule for Ireland - a 'national veto'. The referendum was seen as a conservative device which, in the absence of more rigid constitutional requirements, could prevent a Government from making constitutional changes without demonstrating broad support.
- 220 This use of the referendum as an extra check on the Government resurfaced during the crisis over Lloyd George's 1909 Budget. During debates about the Parliament Act 1911, various proposals were made involving the use of the referendum including:
- as a means of resolving conflicts between the two Houses, i.e. an alternative to the Parliament Act's removal of the Lords' veto.

- as an addition to the Parliament Act, obligatory for 'constitutional' legislation.
 - as a regular part of government, to be used on issues where the two Houses reached deadlock and when 200 MPs petitioned for one.
- 221 Such proposals failed to attract support. "The referendum was a necessity only when the absolute veto of the Lords was dying, but not before"⁸² and proposals for its use were perceived as being driven by political expediency: the Unionists were split over free trade and the promise of a referendum on the issue was a means of healing party splits and allowing free-traders to remain within the Party.
- 222 After the passage of the Parliament Act proposals for the use of the referendum resurfaced periodically, including a suggestion by Churchill that one be used to extend the term of the wartime coalition government. However, the referendum only re-emerged as a major political issue in the late 1960s in the context of Northern Ireland and membership of the European Community.
- 223 The Ireland Act 1949 stipulated that Northern Ireland would not cease to be part of the UK without the consent of the Stormont Parliament. With the prorogation of Stormont in 1972 'a system of regular plebiscites' was promised as an alternative means of ascertaining the will of the people of Northern Ireland. The 1973 poll was the only one ever held. It consisted of two questions:
- Do you want Northern Ireland to remain part of the United Kingdom?
 - Do you want Northern Ireland to be joined with the Irish Republic outside of the United Kingdom?
- 224 The Government argued that a referendum would remove the border issue from political debate by resolving it through a referendum. Critics of the referendum pointed out that the result was determined by the borders set by the partition in 1921 and was bound to reflect the Protestant majority in Northern Ireland. The Republicans dismissed the poll as a propaganda exercise and it was boycotted by the majority of the Catholic population. The turnout was 58.7%, of whom 98.9% voted to remain within the UK. The legitimacy of the referendum result was never accepted by the Catholic community in Northern Ireland and the simple 'yes-no' formula of a referendum was criticised as an inadequate way of dealing with the complex issues involved.
- 225 The idea of a referendum on EC membership was first put forward by the Liberals in 1969 as the only means by which deep divisions over Europe in the country as a whole could be resolved. In the 1970 general election both main parties were committed to entry into the EC and opposed to a referendum on the issue. However as the Conservative Government negotiated detailed conditions for entry, divisions grew within both the main parties and calls for a referendum gained renewed strength.
- 226 A Conservative back-bencher's amendment to the European Communities Bill providing for a referendum was not supported by the Labour Party, but this stance was undermined by Pompidou's announcement that a referendum on admitting the new member states would be held in France. As Vernon Bogdanor notes, "not only was Britain the only country of the four then seeking admission to the EEC (Britain, Denmark, Ireland and Norway) which would not be holding a referendum, but it now appeared that the French electorate would be offered the right denied to the British of determining whether there was 'full-hearted consent' for British entry."⁸³
- 227 The Labour Party changed its policy and campaigned in both the 1974 general elections on a platform of renegotiating Britain's entry terms and promised that the electorate would be

allowed to decide 'through the ballot box' whether or not to accept these terms. This left open the possibility of holding another general election, but it would have been the third election in eighteen months and divisions within the Labour Party made a referendum the more attractive option. The Cabinet was split sixteen in favour to seven against continued membership and the rest of the Party was similarly divided.⁸⁴ Collective responsibility on this issue was suspended for the duration of the referendum campaign and members of the Party participated in both of the two umbrella organisations co-ordinating the campaigns for and against continued membership.

228 The referendum attracted a high turnout of 64% of the electorate, of which 67.2% voted 'yes' and 32.8% voted 'no'. Even with this decisive result, current debates about Britain's continuing role in Europe illustrate that although the referendum defused political tensions about Europe in the short term, it in no way decided the issue once and for all. For the Labour Party, the gamble of holding a referendum paid off. The Party's pledge to hold a referendum was popular with the electorate and may have contributed to the Labour Party's electoral success in the 1974 elections⁸⁵ and in the longer term it also served to maintain Party unity in a way that might have been impossible otherwise.

229 Although the White Paper on the EC Referendum stressed "the unique nature of the issue",⁸⁶ eighteen months later the Government was forced to concede two further referendums on devolution to Scotland and Wales. The reasons were again largely to do with internal party discipline. The original Scotland and Wales Bill did not include provision for a referendum, and was never desired by the Government. But with some Labour Party back-benchers strongly opposed to the measure, the Government hoped that the concession of a referendum would secure the legislation's passage through Parliament. The introduction of an amendment making provision for a referendum was controversial in itself. It was conceded at second reading once the passage of the Bill appeared in danger and was seen as establishing a precedent allowing a Government to hold a referendum as a way of overcoming parliamentary Opposition to a measure.⁸⁷ In the end the Government failed to secure a guillotine and the Bill was abandoned.

230 When separate Bills were introduced for Scotland and Wales they included provision for referendums, but this time the Government came under pressure to include a 40% threshold. This required that 40% of the eligible electorate vote 'yes' before devolution went ahead. An amendment to this effect was carried on both Bills.⁸⁸ The Scottish and Welsh referendums were held on 1 March 1979. In Scotland, although a majority of those who voted were in favour of devolution (51.6%), the 'yes' votes failed to reach the 40% threshold (32.8%). In Wales there was a resounding vote against devolution (79.7% voted 'no').

231 The concession of referendums on devolution is a lesson in how not to do it. The circumstances in which the Government conceded the referendum provision during the second reading of the original Scotland and Wales Bill meant it was on the defensive from the start. The Scotland and Wales Acts have been much criticised and it has been argued that had the Government known from the beginning that its proposals would be subject to a referendum their approach may have been more coherent.⁸⁹ The complex sharing out of responsibilities, differences between the measures proposed for Scotland and Wales and the perception that the proposals represented politically expedient solutions rather than a principled approach made them very difficult to defend, let alone promote. None of this was helped by the background to the devolution referendums: the winter of discontent and the struggles of a minority Government to stay in power.

- 232 As Europe once again became a major issue in British politics, the referendum debate re-emerged. During the 1990 Tory leadership campaign, Margaret Thatcher refused to rule out a referendum on economic and monetary union. More recently the issue of whether or not to hold a referendum on the ratification of the Maastricht Treaty was a dominant theme during its parliamentary passage, particularly in the House of Lords. The Government's objections to a referendum were that it would represent an abdication of responsibility by the House and the Government and that one was neither necessary nor appropriate.
- 233 The Labour Party explained its Opposition to a referendum in similar terms, claiming that it would undermine parliamentary democracy. Although much of the campaigning for a referendum came from the Euro-sceptics, the Liberal Democrats also supported a referendum but from a pro-European perspective. The Liberal Democrats argued that a referendum would involve the public in the debate and that as sovereignty belonged to the people, not Parliament, it was the people that should make the decision to transfer more sovereignty to Europe.
- 234 After the four referendums of the 1970s the argument that referendums have no place in the British constitutional tradition is hard to sustain. All of the major referendums held to date were about 'constitutional measures' and it is going to be impossible for any Government embarking on major constitutional change to avoid the issue of whether or not they should be used.
- 235 There are several arguments in favour of their continued use. First, constitutional change is an issue in which Government may have a vested personal and professional interest and its judgement and that of its MPs should therefore be subject to a more detached check. In addition, strict party discipline normally undermines the ability of MPs to act on their own considered judgement, whereas the referendum allows MPs greater scope to break with the party line (without endangering the Government they may in general support). In the absence of a written constitution, the referendum also provides a limited means of entrenchment. This can operate in three ways:
- the weight of precedent and convention can make it difficult for a Government to implement a measure without holding a referendum.
 - a Government can pass legislation requiring a referendum before a change could be made.
 - the use of referendum in securing a change can establish a precedent making it difficult for the measure to be reversed without a second referendum.
- 236 Although in theory Parliament could choose to ignore precedent or pass legislation reversing any formal requirement to hold a referendum, it would be a controversial route to follow. In this way the referendum can help to secure our constitutional arrangements and act as a guard against hasty and unwanted change. The ability of the referendum to settle issues once and for all should however be treated with caution. At best a referendum can offer a 'snapshot' of public opinion in respect of a specific issue and whilst it can give a decision legitimacy it cannot provide an authoritative answer for all time, and the sovereignty of Parliament means that the power to legislate against a referendum result, however recent or overwhelming, remains with Westminster.
- 237 Finally, referendums involve the electorate much more directly in public decision making, and as a result can have an educative effect and increase voter participation in debate about public issues. This may not be enough to overcome voter apathy, but could go some way to countering the growing resentment of politicians making decisions without sufficient consultation with the public. Popular support for referendums is high: in 1968 a poll found that 69% of respondents believed that Britain should adopt a referendum system and the 1995 MORI/Joseph Rowntree

Reform Trust & MORI *State of the Nation* survey showed that this belief has been strengthened with 77% of respondents coming out in favour of the greater use of referendums.⁹⁰

- 238 On the other hand, referendums are not a panacea. Political expedience rather than democratic principle has been the dominant theme in past UK referendums and unless rules or conventions are developed for the use of referendums, it is likely to remain so. There are no guarantees that a Government will receive the referendum result it wants, nor that Parliament will accept legislation that gives effect to policy agreed through referendum. In addition, referendum results are difficult to divorce from the overall standing of the Government. Some also argue that referendums are a bad way to make decisions, simplifying issues by forcing a 'yes or no' answer which is unable to reflect shades of opinion and placing heavy reliance on the choice and wording of the question. Moreover, their outcome can be affected by the unequal provision of information and resources. There is also a more fundamental argument of principle that, by returning decision making to the electorate, referendums detract from MPs' representative role and undermine Ministerial responsibility and parliamentary sovereignty (although Parliament continues to decide which issues go to a referendum and, as mentioned above, is not formally bound by a referendum result unless it chooses to be and its successor might choose not to be).
- 239 Some of these problems can be minimised through the way in which questions are set, adequate and fair provision for dissemination of information and the careful use of referendum results, but referendums should still be recognised as blunt instruments by which to resolve complex issues.
- 240 The use of a referendum on one constitutional measure will generate political pressure for the consistent use of referendums in relation to further constitutional change. For example, if the agreement which results from the Inter-Governmental Conference is considered to be constitutionally significant and therefore to warrant a referendum, it is going to be very difficult to argue that other major constitutional measures such as devolution should not also be subject to a referendum. Similarly with the commitments to a referendum on electoral reform and on a settlement in Northern Ireland - indeed a referendum on Ireland's future relationship with the UK and Eire - will offer an obvious parallel for Scotland and Wales. However, opponents of the use of referendums will be able equally to point to major constitutional changes which have not required a referendum, e.g. the Parliament Acts, the Maastricht Treaty and successive parliamentary reforms.⁹¹
- 241 Even if it is not planned to hold a referendum on a measure, the possibility of being forced to concede one should be anticipated. The experience in the 1970s where referendums on devolution to Scotland and Wales were held, show how damaging the failure to anticipate such a concession can be. It is preferable to anticipate irresistible pressure for a referendum and propose it (or at least have advanced contingency plans for one), than to be forced onto the defensive and concede a referendum unprepared.
- 242 Within a major programme of constitutional change, the timing of any referendums is going to be an important consideration. Practical decisions will need to be made about whether referendums should be pre- or post-legislative, and the legislative programme and strategic planning will have to take into account:
- ⊕ the areas in which it is held (e.g. should a referendum on Scottish devolution be held only in Scotland or throughout the UK?).
 - ⊖ the use of thresholds.
 - ⊖ the timing and potential controversy of any enabling legislation.

- the timing in relation to other elections e.g. European Parliament elections.
- time needed to mount an information campaign.
- time needed for implementation, or drafting, of legislation to give expression to any decision arrived at.
- the fact that referendum results are difficult to divorce from the overall standing of the government.
- who should be responsible for each of these stages i.e. should they be handled within Government or by some external body?

Conclusion

- 243 This century has seen repeated attempts in the shape of inter-party conferences and independent inquiries to debate constitutional issues at a step removed from normal party hostilities. However, few of these attempts have resulted in legislation which had cross-party support and in some cases failed efforts to achieve consensus may even have hindered the passage of the legislation. This may reflect the inherent difficulty of turning a compromise over wording and content into legislative form: "Nothing is more hampering to the Parliamentary Counsel, when drafting stage is reached, than to be obliged to build what is usually a complex structure round 'sacred phrases' or forms of words which have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees. A still more serious objection to agreed form of words of this kind is that they often turn out to represent agreement upon words only, concealing the fact that no real compromise or decision has been reached between conflicting views up on some important question."⁹²
- 244 A Government embarking on consultation must therefore be realistic about what can be achieved. Each of the consultation mechanisms discussed in this chapter has merits and disadvantages. The benefits of consultation can be that it:
- produces more widely acceptable policy and technically accurate legislation.
 - allows for compromise before final decisions are made.
 - allows for the strength and nature of opposition to be assessed.
 - provides a means for building support for a measure.
 - educates the public and MPs about the issues involved.
 - lends weight and authority to the position the Government takes.
- 245 One of the key determinants in the success of consultation will be political will. It is also crucial that objectives are clearly defined and realistic - governments have tended to expect too much from consultation, which can only ever serve a limited number of functions. In designing mechanisms for consultation and inquiry, effective planning can minimise the chances of:
- producing compromises which are unworkable in legislation.
 - identifying and entrenching opposing views.
 - forcing a Government onto the defensive.
 - providing a focus for opposition to a measure.
 - making the Government look indecisive and directionless.
- 246 A further reason for the lack of success of consultation mechanisms may be that they are usually entered into as a defensive act, resorted to only when the usual political channels fail. As Professor Rodney Brazier points out: "[Governments] do not look ahead and use departmental committees, Royal Commissions, inter-party talks and the like in a planned way, in order to see how Ministerial initiatives on the constitution might be improved. Rather, those mechanisms are resorted to only when events leave them no other choice."⁹³

Constitutional Legislation in the 20th Century

"...history helps to lengthen perspective and by so doing discourages excessive partisanship. This must, however, be qualified by saying that it applies to a reasonably detached study of history and not to living in its shadow with an obsessive concentration."

Roy Jenkins, 'Should Politicians Know History?' in *Portraits and Miniatures*, 1993

- 1 Throughout the report, historical precedents have been used to illustrate the backdrop to reform and to assist in identifying the conventions that govern the passage of constitutional reform measures. This Appendix is a factual summary of the key features of 17 key constitutional reform measures this century presented in a series of tables. The factors identified in each case include:
- manifesto commitment;
 - the nature of any pre-legislative consultation or inquiry.
 - the Government's parliamentary majority and date of the general election.
 - the Minister responsible for the Bill.
 - the parliamentary procedure adopted.
 - the parliamentary time taken.
 - the use of a referendum.

Manifesto Commitment

- 2 A manifesto commitment provides a means by which a Government can claim public support for a particular action. The tables quote any commitment made by the party of Government in the previous election campaign relating to the reform considered. In some cases there was no commitment, and in others no clear commitment to legislation. See also paragraphs 153 - 154 and 212 - 214.

Pre-legislative Consultation or Inquiry

- 3 A wide variety of consultative and inquiry mechanisms have been used to develop policy, broaden support for existing policy or negotiate settlements. This has led to an expectation that constitutional change should be preceded by consultation. The various consultative mechanisms which have been used in relation to constitutional reform this century are identified in the tables. See also paragraphs 164 - 246.

The Government's Parliamentary Majority and Date of the General Election

- 4 The size of the ruling party's majority in the House of Commons is, of course, a key determinant of the ease with which constitutional reform measures can be secured.⁹⁴ Alliances between parties have not necessarily proved to be more effective at facilitating the passage of reform - in part because of the need for delicate management of internal conflicts. And there will always be some back-bench rebels on any issue and on constitutional reform more than most (the clearest examples in these tables are the Parliament No. 2 Bill to reform the House of Lords in 1968-9 and the Maastricht Bill 1993. See also paragraphs 28 and 156.

Minister Responsible for the Bill

- 5 The lead policy Minister is generally the Minister to introduce the measure at second reading, supported by a junior Minister from the same department or a Cabinet Minister from another department directly involved. The lead Ministers identified in the tables provide a guide as to where the policy responsibility for constitutional measures has been assigned in the past. For five of the bills examined the lead Minister in the House of Commons was the Leader of the House and for three the Home Secretary. However, internal party politics and the personal standing and authority of an individual will have as much, if not greater, bearing on his or her ability to steer a bill through Parliament than any formal title or Cabinet rank. See also paragraphs 64 - 71.

Parliamentary Procedure Adopted

- 6 Parliamentary procedure for constitutional measures differs from the procedure for ordinary bills only in that the committee stage of the bill in the House of Commons is taken in a committee of the whole House, i.e. on the floor of the House, rather than in a standing committee. All but one of the measures included in this table were handled in this way. The use of timetabling motions (guillotines) is also a feature of the more recent attempts at constitutional reform. See also paragraphs 74 - 163.

Parliamentary Time Taken

- 7 The time taken for constitutional measures has tended to be a lot greater than for other bills. This is in part because of the levels of controversy they cause and in part because of the use of a committee of the whole House. The tables show the amount of time constitutional bills have taken to get through their various stages in both the House of Commons and House of Lords. These times have been rounded to the nearest hour and should be treated as a close guide rather than exact figures. See also paragraphs 87 - 92 and 116 - 138.

Use of a Referendum

- 8 The use of referendums in the UK is a fairly recent phenomenon, the first being held in the 1970s. Since then, there have been repeated calls for referendums - especially on European issues. It is unlikely that any future constitutional measure will survive its parliamentary passage without being subjected to demands that a referendum be held. The tables identify the constitutional measures which have been the subject of a referendum and where sustained argument has been raised in favour of holding one. See also paragraphs 218 - 242.

KEY TO TABLES

Purpose	preamble to the Bill number of clauses and schedules in Bill (number of clauses in Act)
Manifesto Commitment	whether there was a manifesto commitment at the previous election and, if so, the wording of that commitment
Pre-legislative consultation or inquiry	any form of consultation or inquiry prior to legislation being introduced
Election Date	date of the previous general election
Parliamentary Majority	the results of the previous election

HOUSE OF COMMONS

Lead Minister	who introduced the Bill		
Supporting Ministers	Minister(s) who made important speeches or supported the Bill		
	Hours spent	Vote (if taken)	Comments
First Reading	rounded to the nearest hour	(votes on amendments not included)	CWH = Committee of the Whole House Guillotine (if used)
Second Reading			
Committee Stage			
Report Stage			
Third Reading			
Consideration of Lords Amendments			

HOUSE OF LORDS

Introduced by	which Minister introduced the Bill		
	Hours spent	Vote (if taken)	Comments
First Reading	rounded to the nearest hour	(votes on amendments not included)	all taken on the floor of the House
Second Reading			
Committee Stage			
Report Stage			
Third Reading			
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: rounded to the nearest hour House of Lords: Total:
Referendum	whether or not a referendum was used or proposed

The Unit would like to thank Lena Troth and Helen Fox for their assistance in the preparation of these tables.

Parliament Act 1911

Purpose	An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament. 6 clauses, no schedules (8 clauses, no schedules)
Manifesto Commitment	January 1910 General Election - Liberal Manifesto "The limitation of the [House of Lords] veto is the first and most urgent step to be taken..." December 1910 General Election - Liberal Manifesto "As lately as January in the present year, I expounded to you in detail, and you approved by a decisive majority at the poll, the present aims of Liberal policy.....I ask you to repeat, with still greater emphasis, the approval which only eleven months ago you gave to the proposals of His Majesty's Government."
Pre-legislative consultation or inquiry	Constitutional Convention April 1910 (failed)
Election Date	14 January - 9 February 1910 and 2-19 December 1910
Parliamentary Majority	C. 272 Lab. 42 Lib. 272 Irish Nat. 84

House of Commons

Lead Minister	Prime Minister		
Supporting Ministers	(most other Cabinet Ministers spoke at some point)		
	Hours spent	Vote (if taken)	Comments
First Reading	14	351-227	same bill had been presented April 1910
Second Reading	28	368-243	
Committee Stage	95		CWH
Report Stage	15 guillotined	281-200	
Third Reading	7	362-241	
Consideration of Lords Amendments	10		first day of debate adjourned by Speaker due to grave disorder

House of Lords

Introduced by	Lord President of Council		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	23		
Committee Stage	30		
Report Stage	3		
Third Reading			taken immediately
Consideration of Commons Amendments	16	131-114 (not insisted on)	passed through because of abstentions - threat to appoint large numbers of Liberal Peers

Total Parliamentary Time (hours)	House of Commons: 169 House of Lords: 72 Total: 241 (general discussion of the role of the House of Lords and its relationship with the House of Commons dominated the previous session)
Referendum	proposed

Representation of the People Act 1918

Purpose	An Act to amend the Law with respect to Parliamentary and Local Government Franchises and the Registration of Parliamentary and Local Government Electors, and the conduct of elections, and to provide for the Redistribution of Seats at Parliamentary Elections, and for other purposes connected therewith. (gave vote to all men over 21 and all women over 30) 33 clauses, 9 schedules (47 clauses, 9 schedules)		
Manifesto Commitment	January and December 1910 General Elections None		
Pre-legislative consultation or inquiry	Speakers Conference - legislation based on agreement reached there		
Election Date	2-19 December 1910		
Parliamentary Majority	C. 272 Lib. 272	Lab. 42 Irish Nat. 84	
Lead Minister	Secretary of State for Colonies		
Supporting Ministers	Secretary of State Home Department		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	14		
Committee Stage	114		CWH
	6		recommitted for a further hours to add 2 further amendments - 3R followed immediately
Report Stage	49		
Third Reading	14	178-61	vote to recommit to committee
Consideration of	18		some amendments agreed to
Lords Amendments	2		amendment on alternative vote returned to Lords twice
	3		
Introduced by	Joint Parliamentary Secretary of National Service Department		
	Hours spent	Vote (if taken)	Comments
First Reading	<1		
Second Reading	11		
Committee Stage	46		
Report Stage	13		
Third Reading	1		
Consideration of	5		some amendments insisted on - returned to Commons.
Commons Amendments	2		amendments insisted on - returned to Commons.
Total Parliamentary Time (hours)	House of Commons: 220 House of Lords: 79 Total: 299		
Referendum	no (one proposed on the enfranchisement of women)		

Government of Ireland Act 1920

Purpose	An Act to provide for the better Government of Ireland. (recognised partition) 70 clauses, 6 schedules (76 clauses, 9 schedules)		
Manifesto Commitment	December 1918 General Election - Coalition Manifesto "Ireland is unhappily rent by contending forces, and the main body of Irish opinion has seldom been more inflamed than it is at the present moment. So long as the Irish question remains unsettled, there can be no political peace either in the United Kingdom or the Empire, and we regard it a one of the first obligations of British statesmanship to explore all practical paths towards the settlement of this grave and difficult question on the basis of self-government. But there are two paths which are closed - the one leading to a complete severance of Ireland from the British Empire, and the other to the forcible submission of the six counties of Ulster to a Home Rule Parliament against their will. In imposing these two limitations, we are only acting in accordance with the declared views of all English political leaders."		
Pre-legislative consultation or inquiry			
Election Date	14 December 1918		
Parliamentary Majority	Coalition: Unionists 335 Coalition Lib. 133 Coalition Lab. 10	C. 23 Irish Unionist 25 Lib. 28 Lab. 63 Irish Nat. 7	Sinn Fein 73 Others 10

Lead Minister	Prime Minister		
Supporting Ministers	Chief Secretary for Ireland Leader of the House		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	16	348-94	proposed 20 day limit on remaining stages of the Bill
Committee Stage	57		CWH
Report Stage	8		
Third Reading	3	183-52	
Consideration of Lords Amendments	8		

Introduced by	Lord Chancellor		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	19	164-75	
Committee Stage	24		
Report Stage	4		
Third Reading	1		
Consideration of Commons Amendments	1		
Total Parliamentary Time (hours)	House of Commons: 92 House of Lords: 49 Total: 141		
Referendum	no		

Parliament Act 1949

Purpose	An Act to amend the Parliament Act 1911. (reduced Lords' power of delay to 1 year - passed under the 1911 Parliament Act) 2 clauses, no schedules		
Manifesto Commitment	July 1945 General Election - Labour Manifesto "We give clear notice that we will not tolerate obstruction of the people's will by the House of Lords."		
Pre-legislative consultation or inquiry	Conference of Party Leaders 1948 - failed to reach agreement. King's Speech debate		
Election Date	5 July 1945		
Parliamentary Majority	C. 213 Lib. 12	Lab. 393 Communist 2	Others 20

House of Commons

Lead Minister	Secretary of State for Home Affairs		
Supporting Ministers	Attorney-General		
1947			
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	13	345-194	
Committee Stage	3		CWH
Report Stage			reported without amendment
Third Reading	4	340-186	
Consideration of Lords Amendments	no amendments		
1949			
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	7	333-196	
Committee Stage	no debate	286-117	CWH considered without amendment or debate to meet Parliament Act 1911 requirements
Report Stage			reported without amendment
Third Reading	4	340-187	
Consideration of Lords Amendments	no amendments		

continued

Parliament Act 1949 continued

House of Lords

Introduced by	Lord President		
1947			
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	17	81-177	refused 2nd reading
Committee Stage			
Report Stage			
Third Reading			
Consideration of Commons Amendments			
1949			
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	2	37-110	refused 2nd reading for second time passed under Parliament Act 1911
Committee Stage			
Report Stage			
Third Reading			
Consideration of Commons Amendments			
Total Parliamentary Time (hours)	House of Commons: 1947, 20; 1949, 11 House of Lords: 1947, 17; 1949, 2 Total: 1947, 37; 1949, 13		
Referendum	no		

Life Peerages Act 1958

Purpose	An Act to make provision for the creation of life peerages carrying the right to sit and vote in the House of Lords. 2 clauses, no schedules	
Manifesto Commitment	May 1955 General Election - Conservative Manifesto "It has long been the Conservative wish to reach a settlement regarding the reform of the House of Lords, so that it may continue to play its proper role as a Second Chamber under the Constitution. The Labour Party's refusal to take part in the conversations we have proposed on this subject must not be assumed to have postponed reform indefinitely. We shall continue to seek the co-operation of others in reaching a solution. We believe that any changes made now should be concerned solely with the composition of the House."	
Pre-legislative consultation or inquiry	Legislation in accordance with principles established at failed Conference of Party Leaders 1948.	
Election Date	26 May 1955	
Parliamentary Majority	C. 344 Lab. 277	Lib. 6 Others 3

House of Lords

Introduced by	Leader of the House		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	12		
Committee Stage	6		
Report Stage			
Third Reading	1		Bill reported without amendments
Consideration of Commons Amendments	none		

House of Commons

Lead Minister	Secretary State for the Home Department		
Supporting Ministers	Lord Privy Seal		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	12	305-251	Crown consent given at 2R
Committee Stage	4		CWH
Report Stage			reported without amendments
Third Reading	3	292-241	
Consideration of Lords Amendments	none		

Total Parliamentary Time (hours)	House of Commons: 19 House of Lords: 19 Total: 38
Referendum	no

Peerage Act 1963

Purpose	An Act to authorise the disclaimer for life of certain hereditary peerages; to include among the peers qualified to sit in the House of Lords all peers in the peerage of Scotland and peeresses in their own right in the peerages of England, Scotland and the UK; to remove certain disqualifications of peers in the peerage of Ireland in relation to the House of Commons and elections thereto ; and for purposes connected with the matters afore said. 7 clauses; 2 schedules	
Manifesto Commitment	none	
Pre-legislative consultation or inquiry	Main provisions arose out of the Stansgate case - Tony Benn MP's campaign to sit in the House of Commons rather than succeed to his father's peerage - and the subsequent Report of the Joint Select Committee published in December 1962. The Conservatives originally wanted the Joint Select Committee to consider composition and remuneration as well as the specific questions of peers' eligibility to sit in the Houses of Parliament and vote in Parliamentary elections. Labour objected, saying that if the terms of reference went beyond the immediate issue, they should also include functions and powers. The Joint Committee was eventually established with narrow terms of reference and included 11 MPs and 12 peers.	
Election Date	8 October 1959	
Parliamentary Majority	C. 365 Lab. 258	Lib. 6 Others 1

House of Commons

Lead Minister	Chancellor of the Duchy (also Leader of the House)		
Supporting Ministers	Attorney General		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	5		agreed to without division
Committee Stage	3		CWH
Report Stage			reported without amendment
Third Reading			3R followed on immediately
Consideration of Lords Amendments	<1		amendment agreed to

House of Lords

Introduced by	Lord Chancellor wrapped up by Lord President (Leader of Conservatives in Lords)		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	5		
Committee Stage	5		CWH
Report Stage	<1		
Third Reading	<1		
Consideration of Commons Amendments	none		
Total Parliamentary time (hours)	House of Commons: 9 House of Lords: 11 Total: 20		
Referendum	no		

Parliament (No. 2) Bill 1968 - 69

Purpose	A Bill to Amend the law relating to the composition and powers of the House of Lords; to make related provisions as to the Parliamentary franchise and qualification; and for purposes connected therewith. 20 clauses, 1 schedule	
Manifesto Commitment	March 1966 General Election - Labour Manifesto "Legislation will be introduced to safeguard measures approved by the House of Commons from frustration or delay by the House of Lords."	
Pre-legislative consultation or inquiry	Inter-Party Conference - broke down after Lords rejected Southern Rhodesia Order 1968. White Paper	
Election Date	31 March 1966	
Parliamentary Majority	C. 253 Lab. 363	Lib. 12 Others 2

House of Commons

Lead Minister	Home Secretary		
Supporting Ministers	Prime Minister, Leader of the House, Attorney General		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6	285-135	Queen gave support to government at second reading
Committee Stage	79		CWH Sheldon gave longest speech for 15 years Foot/Powell alliance withdrawn by PM - prioritisation of Industrial Relations and Merchant Shipping Bill
Report Stage			
Third Reading			
Consideration of Lords Amendments			

House of Lords

Introduced by	Never reached Lords, but expected to have been supported		
	Hours spent	Vote (if taken)	Comments
First Reading			
Second Reading			
Committee Stage			
Report Stage			
Third Reading			
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: 85 House of Lords: 0 Total: 85
Referendum	no

European Communities Act 1972

Purpose	An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar. 12 clauses, 4 schedules
Manifesto Commitment	June 1970 General Election - Conservative Manifesto "If we can negotiate the right terms, we believe that it would be in the long term interest of the British people for Britain to join the European Economic Community, and that it would make a major contribution to both the prosperity and the security of our country. ...Only when we negotiate will it be possible to determine whether the balance is a fair one, and in the interests of Britain. Our sole commitment is to negotiate; no more, no less. As the negotiations proceed, we will report regularly through Parliament to the country. A Conservative Government would not be prepared to recommend to Parliament, nor would Members of Parliament approve, a settlement which was unequal or unfair."
Pre-legislative consultation or inquiry	Select Committee Consultative committee
Election Date	18 June 1970
Parliamentary Majority	C. 330 SNP 1 Lab. 287 Others 6 Lib. 6

House of Commons

Lead Minister	Chancellor of the Duchy of Lancaster		
Supporting Ministers	PM, Home Secretary, Foreign Secretary		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	17	309-301	
Committee Stage	193		CWH splits in Labour made up for Cons. back-bench rebellion guillotine introduced after 10 days of debate
	7	304-293	
Report Stage			Bill reported without amendments
Third Reading	6	301-284	16 C. noes 4 C. and 13 Lab. abstentions
Consideration of Lords Amendments	none		

House of Lords

Introduced by	Lord Chancellor		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	13	189-19	3 line whip
Committee Stage	29		
Report Stage	13		
Third Reading	8	161-21	
Consideration of Commons Amendments	none		

Total Parliamentary Time (hours)	House of Commons: 223 House of Lords: 63 Total: 286
Referendum	no

Northern Ireland Constitution Act 1973

Purpose	To make new provision for the Government of Northern Ireland 43 clauses, 6 schedules	
Manifesto Commitment	June 1970 General Election - Conservative Manifesto None - direct rule re-imposed from Westminster in 1972	
Pre-legislative consultation or inquiry	Cross Party Talks White Paper	
Election Date	18 June 1970	
Parliamentary Majority	C. 330 Lab. 287 Lib. 6	SNP 1 Others 6

House of Commons

Lead Minister	Secretary of State for Northern Ireland		
Supporting Ministers	Prime Minister, Secretary of State Home Department		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6	230-7	
Committee Stage	21		CWH
Report Stage	4		Bill reported without amendments immediately
Third Reading	3	97-5	
Consideration of Lords Amendments	<1		agreed to

House of Lords

Introduced by	Lord Privy Seal		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	2		
Committee Stage	3		Committee and all subsequent stages taken in one day so Bill could be on statute book for first meeting of the new Assembly
Report Stage			taken immediately
Third Reading	<1		taken immediately
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: 34
	House of Lords: 5
	Total: 39

Referendum	no
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Referendum Act 1975

Purpose	To provide for the holding of a referendum on the United Kingdom's membership of the European Economic Community 6 clauses, 1 schedule
Manifesto Commitment	October 1974 General Election - Labour Manifesto "Our genuine concern is for democratic rights in sharp contrast to the Tory attitude. In the greatest single peacetime decision of this century- Britain's membership of the Common Market, British people were not given a chance to say whether or not they agreed with the terms accepted by the Tory Government. Both the Conservatives and the Liberals have refused to endorse the rights of our people to make their own decision. Only the Labour Party is committed to the right of men and women of this country to make this unique decision. The Labour Government pledges that within twelve months of this election we will give the British people the final say, which will be binding on the Government - through the ballot box - on whether we accept the terms and stay in or reject the terms and come out."
Pre-legislative consultation or inquiry	White Paper. Adjournment debate in the House of Commons 11 March 1975. Government won the vote 312 - 262.
Election Date	10 October 1974
Parliamentary Majority	C. 277 SNP 11 Lab. 319 PC 3 Lib. 13 Others 12

House of Commons

Lead Minister	Leader of the House		
Supporting Ministers	Prime Minister Secretary of State for the Home Department		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6	312-248	
Committee Stage	21		CWH
Report Stage	4		Bill reported immediately with amendments
Third Reading	1	180-41	
Consideration of Lords Amendments	<1		all agreed to

Introduced by	Lord Chancellor		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	3		
Committee Stage	3		
Report Stage	no debate		
Third Reading	no debate		
Consideration of Commons Amendments			
Total Parliamentary Time (hours)	House of Commons: 32 House of Lords: 6 Total: 38		
Referendum	June 1975		

Scotland and Wales Bill 1977

Purpose	To provide for changes in the Government of Scotland and Wales 115 clauses, 16 schedules	
Manifesto Commitment	October 1974 General Election - Labour Manifesto "The next Labour Government will create elected assemblies in Scotland and Wales. It will also consult with the local authorities and other interested parties about the democratisation of those regional bodies which are at present non-accountable. A separate statement setting out more detailed proposals has already been published by the Labour Party and the Government's proposals are set out in the White Paper. Separate manifestos are being published for Scotland and Wales."	
Pre-legislative consultation or inquiry	Based on the findings of Royal Commission on the Constitution 1969 - 1973 Green Paper June 1974: 7 possible schemes Two separate White Papers 1974	
Election Date	10 October 1974	
Parliamentary Majority	C. 277 Lab. 319 (lost 5 by-elections '75-'77) Lib. 13	SNP 7 PC 3 Others 12

House of Commons

Lead Minister	Leader of the House		
Supporting Ministers	Prime Minister Secretary of State for Scotland and Wales Chancellor of the Exchequer		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	25	292-247	majority of 45 - secured votes by promising referendums proposal for a constitutional convention - defeated by 48
Committee Stage	93 6 on guillotine	guillotined motion rejected 283-312	CWH Govt. defeated on guillotine motion introduced after 10 days debate in committee (22 Lab. noes, 21 abstentions) Bill abandoned
Report Stage			
Third Reading			
Consideration of Lords Amendments			

House of Lords

Introduced by			
	Hours spent	Vote (if taken)	Comments
First Reading			
Second Reading			
Committee Stage			
Report Stage			
Third Reading			
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: 124 House of Lords: 0 Total: 124
Referendum	

Scotland Act 1978 repealed 1979

purpose	To provide for changes in the Government of Scotland and in the Constitution and functions of certain public bodies 83 clauses, 17 schedules	
Manifesto Commitment	October 1974 General Election - Labour Manifesto "The next Labour Government will create elected assemblies in Scotland and Wales. It will also consult with the local authorities and other interested parties about the democratisation of those regional bodies which are at present non-accountable. A separate statement setting out more detailed proposals has already been published by the Labour Party and the Government's proposals are set out in the White Paper. Separate manifestos are being published for Scotland and Wales."	
Pre-legislative consultation or inquiry	Based on the findings of Royal Commission on the Constitution 1969 - 1973 Green Paper June 1974: 7 possible schemes Two separate White Papers 1974	
Enactment Date	10 October 1974	
Parliamentary Majority	C. 277 Lab. 319 (lost 5 by-elections '75-'77) Lib. 13	SNP 7 PC 3 Others 12

House of Commons

Lead Minister	Leader of the House		
Supporting Ministers	Prime Minister Secretary of State for Scotland		
	Hours spent	Vote (if taken)	Comments
1st Reading	no debate		
2nd Reading	7	307-263	11 Labour MPs voted against 2R, 4 Conservatives voted in favor
Committee Stage	102	guillotine accepted 313-287	CWH guillotine introduced 2 days after 2 R
Report Stage	15		
3rd Reading	7	297-257	
Consideration of Lords Amendments	24 3		guillotine accepted 292-274 on Lords amendments (239 of them) after 1 hours debate 8 amendments returned to the Commons

House of Lords

Introduced by	Lord Chancellor		
	Hours spent	Vote (if taken)	Comments
1st Reading	no debate		
2nd Reading	14		
Committee Stage	91		Bill heavily amended
Report Stage	22		
3rd Reading	8		
Consideration of Commons Amendments	7		Government accepted some 170 amendments including 29 key concessions

Total Parliamentary time (hours)	House of Commons: 158 House of Lords: 142 Total: 300
Referendum	March 1979

Wales Act 1978 repealed 1979

Purpose	To provide for changes in the Government of Wales and in the Constitution and functions of certain public bodies 84 clauses, 12 schedules	
Manifesto Commitment	October 1974 General Election - Labour Manifesto "The next Labour Government will create elected assemblies in Scotland and Wales. It will also consult with the local authorities and other interested parties about the democratisation of those regional bodies which are at present non-accountable. A separate statement setting out more detailed proposals has already been published by the Labour Party and the Government's proposals are set out in the White Paper. Separate manifestos are being published for Scotland and Wales."	
Pre-legislative consultation or inquiry	Based on the findings of Royal Commission Green Paper June 1974. 7 possible schemes Two separate White Papers 1974	
Election Date	10 October 1974	
Parliamentary Majority	C. 277 Lab. 319 (lost 5 by-elections '75-'77 Lib. 13	SNP 7 PC 3 Others 12

House of Commons

Lead Minister	Leader of the House		
Supporting Ministers	Prime Minister Secretary of State for Wales		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	7 hours followed next day by guillotine motion 3 hours	295-264	guillotine motion accepted 314-287 (3 hours)
Committee Stage	64		CWH
Report Stage	7		reported immediately with amendments
Third Reading	6	292-264	
Consideration of Lords Amendments	17 3		Government accepted 83 of the Lords 198 returned from Lords accepted amended version of two others

House of Lords

Introduced by	Lord Chancellor		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6		
Committee Stage	43		Bill heavily amended
Report Stage	11		
Third Reading	2		
Consideration of Commons Amendments	5		not agreed to

Total Parliamentary Time (hours)	House of Commons: 107 House of Lords: 67 Total: 174
Referendum	March 1979

European Assembly Elections Act 1978

Purpose	An Act to make provision for and in connection with the election of representatives to the Assembly of the European Community and to prevent any treaty providing for any increase in the powers of the Assembly from being ratified by the UK, unless approved by Act of Parliament. 16 clauses, 5 schedules (8 clauses, 2 schedules)		
Manifesto Commitment	October 1974 General Election - Labour Manifesto None - not an issue in 1974		
Pre-legislative consultation or inquiry	Council of European Ministers Select Committee Green Paper White Paper		
Election Date	10 October 1974		
Parliamentary Majority	C. 277 Lab. 319 (lost 5 by-elections '75-'77) Lib. 13	SNP 7 PC 3 Others 12	

House of Commons

Lead Minister	Home Secretary		
Supporting Ministers	Prime Minister Foreign Secretary		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	7	381-98	same Bill presented four months before
Committee Stage	38 3 on guillotine	CWH guillotine accepted 314-137	guillotine introduced after 23 hours
Report Stage	4		followed immediately - no amendments
Third Reading	4	159-45	
Consideration of Lords Amendments	none		

House of Lords

Introduced by	Minister of State, Home Office		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	3		
Committee Stage	4		
Report Stage			Bill reported immediately no amendments
Third Reading	10 mins		
Consideration of Commons Amendments			
Total Parliamentary Time (hours)	House of Commons: 56 House of Lords: 7 Total: 63		
Referendum	no		

Local Government Act 1985

Purpose	To abolish the GLC and metropolitan county councils; to transfer their functions to the local authorities in their areas and, in some cases, to other bodies and to provide for other matters consequential on, or connected with the abolition of these councils. 98 clauses, 17 schedules		
Manifesto Commitment	June 1983 General Election - Conservative Manifesto "The Metropolitan Councils and the Greater London Council have been shown to be a wasteful and unnecessary tier of government. We shall abolish them and return most of their functions to the boroughs and districts. Services which need to be administered over a wider area - such as police and fire, and education in inner London - will be run by joint boards of borough or district representatives."		
Pre-legislative consultation or inquiry	no - failure to do so source of considerable criticism and debate		
Election Date	9 June 1983		
Parliamentary Majority	C. 397 Lab. 209 Lib. 17	SDP 6, SNP 2	PC 2 Others 17

House of Commons

Lead Minister	Secretary of State for the Environment		
Supporting Ministers	Prime Minister, Chancellor, Home Secretary, Secretary of State for Education and Science, Secretary of State for Trade and Industry, Transport, Minister for Local Government		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	15 money resolution 1 further hour	354-219 vote on splitting bill between Standing Committee and CWH 351-196	
Committee Stage	6 176 3 hours debate on guillotine	unamended 277-156 276-195	CWH clause 1 only Standing Committee Guillotine moved after 100 hours in standing committee
Report Stage	13		
Third Reading	1	325-170	
Consideration of Lords Amendments	6		

House of Lords

Introduced by	Minister of State, Department of the Environment		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6		
Committee Stage	66		
Report Stage	35		
Third Reading	6		
Consideration of Commons Amendments	4		
Total Parliamentary Time (hours)	House of Commons: 42 on floor of House (plus 176 hours in standing committee) House of Lords: 117 Total: 335		
Referendum	no		

European Communities (Amendment) Act 1986

Purpose	An Act to amend the European Communities Act 1972 so as to include in the definition of 'the Treaties' and 'the Community Treaties' certain provisions of the Single European Act signed at Luxembourg and the Hague on 17 and 28 February 1986 and extend certain provisions relating to the European Court and any Court attached thereto; and to amend references to the Assembly of the European Communities and approve the Single European Act. 4 clauses, 1 schedule	
Manifesto Commitment	1983 General Election - Conservative Manifesto "We shall continue both to oppose petty acts of Brussels bureaucracy and to seek the removal of unnecessary restrictions on the free movement of goods and services between member states, with proper safeguards to guarantee fair competition. The Labour Party wants Britain to withdraw from the Community, because it fears that Britain cannot compete inside and that it would be easier to build a Socialist siege economy if we withdrew. The Liberals and SDP appear to want Britain to stay in but never to upset our partners by speaking up forcefully. The Conservatives reject both extreme views."	
Pre-legislative consultation or inquiry	Agreed by Prime Minister and Council of Ministers. Select Committee	
Election Date	9 June 1983	
Parliamentary Majority	C. 397 Lab. 209 SDP 6	SNP 2 PC 2 Others 17

House of Commons

Lead Minister			
Supporting Ministers	PM, Foreign Secretary		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	6	319-160	
Committee Stage	24 guillotine debated 3 hours	149-43 guillotine accepted 270-153	CWH guillotine introduced after 3 days in committee (amended during debate)
Report Stage	unamended		
Third Reading		149-43	
Consideration of Lords Amendments	no amendments		

House of Lords

Introduced by	Minister of State FCO		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	4		
Committee Stage	13		
Report Stage			reported without amendment
Third Reading	2		
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: 33 House of Lords: 19 Total: 52
Referendum	no

European Communities (Amendment) Act 1993

Purpose	An Act to make provision consequential on the Treaty on European Union signed at Maastricht on 7 February 1992. 3 clauses, no schedules (8 clauses, no schedules)	
Manifesto Commitment	April 1992 General Election - Conservative Manifesto None - Treaty signed in November 1991.	
Pre-legislative consultation or inquiry	Negotiating position debated in Parliament	
Election Date	9 April 1992	
Parliamentary Majority	C. 336 Lab. 271 Lib. Dem. 20	SNP 3 PC 4 Others 17

House of Commons

Lead Minister	Foreign Secretary		
Supporting Ministers	PM (and other Cabinet ministers)		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	22	336-316	
	'paving' motion to proceed with Bill 7 hours	319-316	
Committee Stage	137		CWH
Report Stage	13		lost vote on Committee of the Regions
Third Reading	6	292-112	
Consideration of Lords Amendments	none		

House of Lords

Introduced by	Lord Privy Seal		
	Hours spent	Vote (if taken)	Comments
First Reading	no debate		
Second Reading	26		
Committee Stage	39		3 line whip used for referendum vote
Report Stage	19		Bill reported without amendments
Third Reading	6		
Consideration of Commons Amendments			

Total Parliamentary Time (hours)	House of Commons: 185 House of Lords: 90 Total: 275
Referendum	no (proposed)

Procedural Reform in the House of Commons

"...parliamentary procedure tends always to be a little out of date."

Introduction to the Third Report of the Select Committee on Procedure HC 189 (1945-46)

Introduction

- 1 Since 1945, there have been several attempts at significant reform of parliamentary procedure. Throughout this period there has also been a steady trickle of incremental improvements to the workings of both Houses of Parliament. In this section, three periods of significant reform - two largely successful, and one not - are examined with a view to identifying their origins and key determinants of success or failure.⁹⁵

1945-46 Procedure Committee

- 2 The Select Committee on Procedure established in 1945 was effectively presented with a blueprint for reform of the parliamentary procedures that required little more than some fleshing out of the details. Writing nearly twenty years later, Herbert Morrison (by that time Lord Morrison of Lambeth) explained that: "During the Second World War it had been clear to the Coalition Government that there would be an exceptionally heavy programme of legislation in the reconstruction period. It was important that the parliamentary machine should not break down under that burden...Towards the end of the war a Committee of Ministers of the Coalition Government had discussed methods of adapting the machinery of Government to bear the particular stresses and strains of the reconstruction period. In particular a scheme for the acceleration of proceedings of Public Bills had been drafted by the Committee, but it had not been approved by the War Cabinet"⁹⁶.
- 3 Although there was no duty on the Procedure Committee to follow the proposals drafted by the wartime Committee (and the Government stressed that they advocated such measures as "a trial, on an experimental basis, during the first one or two sessions") the Procedure Committee's first report was produced just over one month after being commissioned and was based largely on the proposals in the Government memorandum. This was undoubtedly facilitated by the presence on the Committee of Government MPs who had been involved in the preparation of the draft plan and were only too aware of the scale of the new administration's legislative ambitions and the incapacity of the existing procedures of the House of Commons to cope with them. More idealistic proposals for "the general improvement of the machinery and forms of proceeding of the House so as to provide suitable instruments for the discharge of its functions"⁹⁷ proposed by the then Clerk to the House, later Lord Campion, were not considered.
- 4 The principal change introduced was that all bills, save those "of first class constitutional importance" would be sent to a standing committee instead of being dealt with by the committee of the whole House. In addition, the Government's proposal for formal timetabling of legislation was accepted by the Procedure Committee who recommended, after canvassing a number of alternatives, that Allocation of Time Orders be administered by a business sub-committee of each standing committee, consisting of a Chairman and 7 other members chosen by the Speaker, with their provisions to be approved by the parent committee.

Reasons for success

- the pragmatic intent: the impetus to reform was the need to streamline the legislative process, through whatever ad hoc measures might be found, in order to get a substantial package of main programme legislation through Parliament. The Government had won a resounding

majority in the general election, promising a radical package of complex social and economic measures which gave them the authority to insist that the terms of reference for the Procedure Committee were "to consider schemes for the acceleration of proceedings on public bills". In the short term, this clear objective helped to focus the minds of the reformers (although in the longer term, the benefits to the quality of legislation may be questioned).

- the enormous number of new MPs in the 1945 Parliament - 345 new MPs in total, 200 of them on the Labour benches - which both facilitated acceptance of the Government's proposals as the new MPs were not able to counter the proposals with the judgment derived from experience of the system, and somewhat awed by finding themselves part of the institution at all, and for the same reasons ensured that there was no irresistible pressure for further more radical (or more backbench-friendly) reform.
- The proposals therefore had Government support. The speed with which the proposals were considered and introduced was partly because of a collective sense of the importance of beginning on reconstruction, and therefore setting the ground rules, and an awareness by the Government that unless this happened in the early days of a new government, the changes might never happen at all.

1965-70 Reform of Procedure

- 5 After 1965 there was a significant growth in the number of Procedure Committee reports and recommendations, many of which demonstrated an increasing reluctance on the part of Procedure Committees to act in support of Government interests, identifying instead a responsibility to defend the interests of back-benchers.
- 6 Significantly, these years also saw the development of a more broadly based parliamentary reform movement, arising from a unique combination of factors: increasing anxiety about economic performance, with governmental and administrative reform perceived as key to a reversal of fortune, was combined with a pervasive belief in the benefits of institutional reform; there was also a generally shared belief that Parliament had declined seriously in relation to the Executive. In addition, generational change meant MPs on both sides were keener than before on procedural reform, not least because many were teachers and journalists ("ideas people" not "producers"); and the establishment of Study of Parliament Group in 1964 and the publication of Bernard Crick's influential "The Reform of Parliament" in the same year represented a discreet academic pressure group for change.
- 7 However, the Wilson Government did not, on coming into power, have any carefully prepared plans for procedural reform in the Commons: "indeed the available evidence suggests that right down to 1970 procedural reform proposals depended substantially on improvisation. The Government was generally guided by its view at any particular point in time of what kind of changes might facilitate the passage of its own business on the floor, in the committee of the whole House, and in standing committee. But it recognised too that in the climate of opinion of the 1960s it was expedient to give some satisfaction to those who were demanding changes."⁹⁸
- 8 Richard Crossman was made Leader of the House of Commons in August 1966 and had both a personal commitment to, and academic interest in, parliamentary reform. The changes made in the following two years included: expediting the passage of the Finance Bill by the relegation of

large sections to a standing committee; simplifying the procedures for Supply, and Ways and Means; extending the range of standing committees for legislation; making experiments with morning sittings and second reading committees; and, as a counterpoint to these Government-supporting measures, extending select committee activity.

- 9 There was no one source of the changes, nor was the Procedure Committee regarded with any great deference: some Government reforms had never seen the light of a Procedure Committee meeting, whilst some recommendations of the Procedure Committee were simply ignored by the government. Consultation with MPs was not much valued. The outcome was a patchwork rather than a coherent package, much of which failed during the parliament or was replaced soon after.

Reasons for failure

- external pressure was valuable in providing a climate conducive to positive reform, but was overshadowed by the Government failure to appreciate the often quite distinct pressures and interests within the House. For example, a proposal for the creation of specialist committees “of scrutiny and advice” was made by the Procedure Committee in 1964-65 and its recommendations were well received. But the Government announced in 1966 that although it would experiment with specialist committees, they would have wide terms of reference, without the firm orientation towards scrutiny of administration and expenditure which had been envisaged by the Procedure Committee. “In determining the areas which they were to investigate, the Government used a variety of criteria which resulted in some committees with spheres of activity which were peripheral to the interests of the majority of MPs ...as a result some committees appeared to have little connection with the mainstream of national political and economic planning.”⁹⁹
- the failure to produce a package that balances the interests of as many sections of the House as possible (Government vs. Opposition; front-benchers vs. back-benchers; as well as party political interests). Richard Crossman’s reforms sought to reconcile two almost opposite goals by seeking “ways in which while leaving the Executive the necessary freedom of action, we can develop institutions detailed, continuous and effective in their control.”¹⁰⁰ The tensions inherent in trying to reach such a reconciliation erupted on the floor of the House shortly after the reforms were in place. MPs questioned the Government’s motives and charged the Government with trampling on the rights and privileges of the House. In respect of the select committees, the situation was worsened by the fact that Crossman claimed to be implementing the Procedure Committee recommendations.
- the wrong person in the right place at the right time. The circumstances were certainly favourable to reform, and some have held that this opportunity was wasted by a Leader of the House who was distrusted and disliked by some Cabinet colleagues as well as by the Opposition.
- inaccurate or inadequate financial forward planning. A 1973 Royal Commission research paper records that “the operation of the new committees strained the technical resources of the House of Commons, making demands on accommodation and Commons’ staff which the Leader of the House used as a reason for limiting the numbers of ‘departmental’ committees”¹⁰¹.

1979 Select Committee Reforms

- 10 The system of Departmental Select Committees introduced in 1979 was adopted by the Conservative Opposition as a manifesto commitment after the Labour Government rejected the 1978 recommendations of the Procedure Committee they had themselves established. This was in part classic political game-playing. But the Conservative Party's support for the Procedure Committee reform package was not only a function of knee jerk adversarial politics.
- 11 The timing of the report towards the end of the parliament meant supportive noises made from the Opposition benches prior to the general election were not easy to ignore on return to office; this was allied with the personal commitment of Norman St. John Stevas, who as Shadow Leader of the House and then Leader of the House championed the reforms and ensured that a manifesto commitment to implementing them was given in 1979. Moreover, the Cabinet were convinced by the argument that the committees, work in scrutinising departmental activity would help to stem the bureaucracy and inefficiency of Whitehall and would be in line with Margaret Thatcher's ideological commitment to "rolling back the state"; and by growing backbench pressure to accept the recommendations, partly the result of the more professional approach of the large number of new members (many of whom reflected the Procedure Committee's ideal of the full-time career politician). The experience of minority Government had also highlighted the scope for effective back-bench intervention and many parliamentarians were loath to lose such influence.
- 12 More widely, the Labour Party had been riven by serious internal dissent and the last thing they wanted was to supply new channels for argument and Opposition. The Conservative Party was by contrast relatively deferential and homogeneous; it also projected itself as the party of reform; the two parties had different experience of select committees - the Labour Party remembered the difficult years in the 1960s and mid to late 1970s of specialist committees; the Conservatives, period of Government in 1970-74 had coincided with the relatively ineffectual Expenditure Committee.

Reasons for success

- an effective and zealous champion of the cause within the Cabinet - and the same person in the Shadow Cabinet during preparations for the general election.
- a united and confident party of Government and the boost provided by the fact that the reforms at least appeared to fit with the ideology of the party of government.
- the prior examination of the issues by the Procedure Committee both gave authority to the reforms (although slightly different in number and focus to the Committee's recommendations) and flushed out likely areas of Opposition or tension in advance. Agreement on the changes was also assisted by the reforming mood in the House of Commons.
- the speed of introduction. Norman St. John Stevas knew that if the reforms were not introduced in the early days of the new Government, the Cabinet would have time to appreciate how difficult their lives would be made by Select Committees.

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- 23 Peter Hennessy, *The Hidden Wiring*, 1995.
- 24 See Appendix A.
- 25 *The Preparation of Legislation. Report of a Committee appointed by the Lord President*, Cmnd 6053, May 1975.
- 26 The Life Peerages Act 1958 was introduced in the House of Lords, but was not particularly controversial.
- 27 Standing Order No. 61.
- 28 Standing Order No. 61 (2). A motion for any one of these alternatives may be moved by any Member immediately after the second reading and is decided upon immediately without debate or amendment.
- 29 Standing Order No. 61 (3). If such a motion is opposed, the Speaker may allow a brief explanatory statement from the Member making the motion and a Member opposing the motion, before putting the question. The Finance Bill is regularly treated in this way, but it is unusual for other bills to split.

- 30 See *First Report from the Select Committee on Procedure, Session 1945-46*, HC 9. The Procedure Committee examined ways in which the House of Commons could deal with its expanding work load. The Committee recommended that bills should, as a rule, be referred to a standing committee. One of the exceptions to this rule was 'first class constitutional issues'.
- 31 Standing Order No 69.
- 32 For more detailed discussion of the passage of the Maastricht Bill see: D.Baker, A. Gamble & S. Ludlam 'The Parliamentary Seige of Maastricht 1993: Conservative Divisions and British Ratification', *Parliamentary Affairs* Vol. 47 No 1, 1994 and Richard Rawlings 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union Part One and Two', *Public Law*, 1994. This section draws heavily on both these accounts.
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- 54 See for example the Hansard Society Commission on the Legislative Process, *Making the Law*, November 1992.
- 55 Keith G. Banting and Richard Simeon eds., 'Introduction', *Redesigning the State*, 1985.