



# HOUSE OF LORDS

Unrevised transcript of evidence taken before

## **The Select Committee on Constitution**

Inquiry on

## **CONSTITUTIONAL REFORM PROCESS**

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Witnesses: Dr Alexandra Kelso and Professor Matthew Flinders

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Members present

Baroness Jay of Paddington (Chairman)  
Lord Hart of Chilton  
Lord Crickhowell  
Lord Irvine of Lairg  
Lord Norton of Louth  
Lord Pannick  
Lord Rodgers of Quarry Bank  
Lord Shaw of Northstead

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**Examination of Witnesses**

**Dr Alexandra Kelso**, [Lecturer in Politics, University of Southampton], and **Professor Matthew Flinders**, [Professor of Parliamentary Government and Governance, University of Sheffield].

**Q107 The Chairman:** Good morning to both of you and thank you very much for coming. We do record these sessions; so if you would be kind enough, when you first speak, to identify yourself for the record that would be very helpful. Thank you also for your very useful background papers which have really enabled us to get a view of what your main concerns are and also avoid the necessity of taking up time by asking you to give an opening statement. So, if we may, I think we will just plunge straight in with some questions and probably questions in which we quote back to you some of the things that you have said.

Professor Flinders, could I perhaps begin with you? I thought one of the interesting things you said was, if I may quote, “One of the most curious elements of monitoring the process of constitutional change under the Coalition Government has been the manner in which the traits of the previous Labour Government”—and then you describe them in fairly negative terms—“have been continued”. Now, why is that curious? Because, of course, it seems to all of us that if you have an executive with a programme that it wants to carry through and it has a majority in the House of Commons, it is pretty much bound to act in that way.

**Professor Flinders:** Yes. I am Professor Matthew Flinders, University of Sheffield. I think it is curious for two main reasons and, in a way, why I think this Committee's inquiry is so important at the moment is that there is a real opportunity and I think a sense of wanting some change to how things are done. The reason I think it is curious—and it is not just about the previous Government—is that all governments in opposition tend to get incredibly frustrated, as do many observers, with our rather ad hoc and flexible approach to constitutional reform and yet, too often, when they move into office they adopt exactly those sort of quite loose structures themselves.

The issue about the manifesto and governments coming in to implement policies is absolutely right. We elect politicians to implement public policy. I think the real big issue comes particularly when constitutional reforms are then brought forward that were not included in any manifesto. So, yes, it is funny; history never repeats itself, but it certainly seems to rhyme very frequently.

**Q108 The Chairman:** Take an example. As you say, you can be frustrated as an observer or as somebody monitoring constitutional change. If a government decides that even if something was not in the manifesto it is going to do it, what is there to change the process? What levers are there to change the process?

**Professor Flinders:** I think that is the real question that the Committee is tackling. It is this issue between rigidity and flexibility and I get the sense that this Committee is really looking at whether there is a need, to use a famous parliamentary term, to shift the balance from the pure flexibility we have to putting some brake on the capacity of new governments to bring forward reforms. The question then is, "How do you impose a brake?" I think there are a number of mechanisms through which you can seek to put some controls on the capacity of new governments. For example, there is a famous quote by Peter Hennessy about

constitutional change on the back of an envelope and the way the abolition of the Lord Chancellor was suddenly announced, the creation of a new department. The Bank of England reform was not in the manifesto at all.

I was reading through the previous transcripts of evidence and it was very interesting. There were a number of circular arguments and this issue of how you defined reform kept coming up, “What is the difference between change, reform and revolution?” I suppose my starting point is that reform, to many people, is a bit like apple pie and motherhood: very hard to argue against; whereas my position is that bad reform can be more problematic than doing nothing. It is about how we inject some review system, not to tie the hands of the government but simply to inject a degree of taking of stock, taking a breath and, in fact, also lessons learned which is something we are not very good at.

**Q109 Lord Irvine of Lairg:** What brakes are you recommending?

**Professor Flinders:** I think there are a number of different brakes that could be implemented and, of course, we all exist in a political climate where we have to have our political antennae and radar bleeping loudly. I personally think that there is now a good case for a strengthened form of committee on the constitution; a committee of both Houses that was building upon recent reforms that we have had brought forward after the Wright Committee to, in a sense, shift the balance of power more broadly back between the legislature and the executive, that would allow a committee to issue authoritative reports and ensure that a certain staged process had been gone through.

**Q110 The Chairman:** I think the point is when would this be instigated? In a sense what you are talking about is a kind of super pre-legislative scrutiny. Is that what you are suggesting in terms of parliamentary procedures or does it go further back than that?

**Professor Flinders:** I think, in a way, you can see a spectrum of reforms that could be brought forward with the implementation of some bolstered pre-legislative scrutiny probably being the most realistic reform; although you could go much further in arguing for the implementation of much more formal and legalised brakes on the constitution requiring super-majorities or even a role for the judiciary. But, of course, as soon as you start going down those paths you churn up the bigger questions about the notion of parliamentary sovereignty, the role of the Supreme Court. We are dealing with something that is like a very tight knot and as soon as you start pulling on one end it gets a lot tighter and more complex.

**Q111 Lord Irvine of Lairg:** We want you to give us some solutions.

**Professor Flinders:** In terms of one possibility, and from reading previous transcripts, one pragmatic step forward to place limits on the capacity of the executive would be a joint committee of both Houses that may be in itself bolstered or supported by a committee on the constitution. I know that is something this Committee looked at under Lord Norton over a decade ago and at that time I believe the debate was quite close but you were not convinced that it was needed. I think one of the challenges faced by all parliamentary committees is that they often struggle in relation to the resources and back-up staff that they have. A joint committee of both Houses would give it the credibility the legitimacy and the prestige. A separate committee on the constitution, a standing committee, feeding and fuelling that joint committee would give it a certain amount of teeth.

**Q112 Lord Hart of Chilton:** What would that committee do?

**Professor Flinders:** It would essentially be there to provide authoritative and independent briefings on the rationale for the reforms, the likely impact of those reforms. In a way, the

preventative knowledge of the government that these issues exist is as important as what those things do. So if there were to be a joint committee of both Houses, I think essentially what you might do is make sure that government ministers knew that the reforms they brought out would have to go through a system, would be closely analysed and would have to go through a clear process, which I do not think is all that difficult.

I mean, defining the constitution: the Committee, in many ways, had to do that right at the beginning of its work in order to know what it was doing. You had the interesting list by Professor Baker, I think it was: eight points. I think there are three points missing. But essentially you can pretty well carve away the basic framework of what is constitutional—there will always be some fuzziness at the boundaries—and then applying some sort of process around that with a bolstered committee that has its own research support I think would be important for not only examining government programmes when they came in but also forcing the government not to rush through changes.

I could give you a very good example if you would like. The Public Bodies Bill was a very good example of a piece of legislation that was rushed out very quickly. Now, if that had been an authoritative unit that would have had an opportunity to examine that in great detail—as this Committee did—earlier and the Government knew that was going to happen, I am sure the Government would have spent a little bit more time and a little bit more thought not rushing through such hasty legislation.

**The Chairman:** Now, I have Lord Norton, Lord Irvine and Lord Crickhowell all wanting to ask follow-up questions. Dr Kelso, I recognise that you have not been involved in this conversation but do please chip in. There will be further questions, I am sure.

**Q113 Lord Norton of Louth:** We can come up with the proposals that may be desirable for ensuring that a government is subject to more detailed scrutiny. I am concerned with

how we get from here to there. They might be desirable, but how realistic? How much will be dependent on Parliament itself and the extent to which Parliament itself can act independently of the executive? How much are you looking for the government to do and what safeguards are there to ensure that whatever it says “yes” to can be maintained?

**Professor Flinders:** You are absolutely right; it is very easy for us to come up with ideas about what we could do. What is often missing is the physical will to make them happen and that has been the same for decades, as you know better than I do. I think, though, that we are, at present, at a very important point in our political history because life beyond the Palace of Westminster is changing. It is changing very dramatically. It is changing because society is getting more complex and its demands are increasing.

Also, it is very interesting; I have been reading all the information about this Committee’s work and the big gap that I see is the public. This is a debate about elites and there is a lot of current work about the massive decline in public trust in politicians and political institutions and, in a way, I see the role of an academic as a sort of a bridge. The public do not hate politics, which is what a lot of academics think. The public do not understand politics. So in a way this is an issue not about the executive and Parliament, but between the executive, the Parliament and the public. I think there is a real public pressure now for clarity about why things happen and what is the driving impulse behind them.

**Q114 Lord Norton of Louth:** But how do you ensure that public action is then translated into action? Because it strikes me you only achieve change either through imposition—which means the parliamentary will has to be there—or government itself is persuaded it is in its own interests for change to occur. So I am wondering which route you think might be realised.

**Professor Flinders:** I think it is a case of both routes: public pressure and awareness. I mean, it is very interesting; Nick Clegg appeared before the Committee to talk about the Coalition's reforms about restoring faith in politics. Restoring faith in politics will only occur when the public reconnect and understand what is occurring and why. One of the great problems with the referendum coming up on AV is that the public are very well-attuned to electoral reform. They are not interested in it but they know what AV is about and they are very concerned that this is not a constitutional reform for the public's interest. They see it as a deal between two parties to form a Government.

Given that we are in an interesting stage with the Coalition Government, given that there are a huge number of constitutional reforms coming through, the implications of which have not been thought through at all, and given that also governments tend to become much more open to major reforms when they know they are on the way out than when they are on the way in, I think there is a sense that, if it was a realistic, well thought through reform to slightly shift the balance, this could be a good time.

**Q115 The Chairman:** Could I just interject? Dr Kelso, you said in your submission that you felt that the lack of clarity about this was one of the central compelling questions in contemporary UK politics, which in a sense is reinforcing what Professor Flinders has just said. But I think, to us cynics around the table who see all the vox pops on television with people showing total disinterest in the referendum, for example, it is a queryable statement, to put it politely. Why do you feel that it is so compelling? What is the evidence for that?

**Dr Kelso:** Are you talking about the role of the public in this?

**The Chairman:** Well, you said that the lack of clarity or the absence of a clear blueprint for the way we do these things is one of the most compelling questions.

**Dr Kelso:** It is compelling because we can sit as academics and you can sit as politicians with a reasonable grasp of how these things work. To the average member of the public most of this is just completely baffling. It seems to come from nowhere very often. There seems to be no movement and a great many different constitutional issues over the course of time and then suddenly there is a great flurry of activity and a great haste to achieve some kind of outcome at the end, without any clear explanation for why that is the case.

So the lack of a blueprint is worrying for a number of reasons. It is worrying, first of all, because it can result in bad constitutional reform and I agree with what Matt has said; just because you call it reform does not mean it is inherently a good thing.

**Q116 The Chairman:** No, I think we are all agreed on that.

**Dr Kelso:** It can sometimes be hugely problematic. But on the other side of it, the fact that there is no clear set mechanism in place, other than the fact that a government can secure a parliamentary majority for change, leaves the public feeling very excluded from this. It seems to me the AV referendum is a very good example of that because prior to the last election the idea of moving towards electoral reform that involved AV simply was not on anyone's agenda particularly. Suddenly that is the choice that has been given and those are the choices, between single member, plurality and AV. It is possible to give those choices because it is a process controlled by elites and I think that is where my own interest is, in looking at how we expand the discussion outside of elites.

So, yes, we do have to have a discussion about what would a parliamentary committee look like that looked at these things, but a lot of work has gone on, on that, before. I think we have to push the discussion outside of just looking at how we would change legislative or parliamentary institutional processes, to look at how we involve the people in this. Now, the kind of solutions that are out there, these kinds of discussions, can be prone for a sort of

sneering contempt in some cases, “Well, the people aren’t interested. Why would we try and institute mechanisms to make people interested who don’t really care?” I think that is a very dangerous route to go down. The fact is that there are a great many people who are interested, who care a great deal, but have choices forced upon them that they may not be inclined to have made were those not the choices placed before them in the first place.

**The Chairman:** Not to interrupt you, but I think you have touched on an extremely important point and we may come back to the questions which you raised—for example, with your example from British Columbia and so on—slightly later. But can we just continue the internal discussion, if we can call it that, for the time being?

**Q117 Lord Crickhowell:** Dr Kelso has just made briefly the first point I was going to raise. Professor Flinders, I think, has used the words “constitutional reform” on about 20 occasions and, as Rodney Brazier pointed out in a note to us, it is a very loaded word. In earlier meetings I have said it is a political word and the present Deputy Prime Minister is an arch exponent of using the word “reform” in a political way, “This must be good; it is reform. People must do it because it is reform”.

I am very anxious that when we come back and look at these issues we will talk about constitutional change and the need to persuade people that the change is necessary and desirable. I fear if we jump to the word “reform” we are weakening the whole case for an examination.

I want to move on to a second point. Right at the start, I think, Professor Flinders talked about the significance of manifesto commitments. Well, yes. Those of us who have fought general elections on manifestos are rather more cynical about manifestos and whether anyone has ever read them or taken any notice of them, including those of us who fought the elections. But we are now in a different situation anyway, one that Dr Kelso has just

referred to: a Coalition which has a deal that brings together a range of policies, which may or may not have been in a manifesto, in order to create a Government. How do we deal with that situation? That takes us way beyond manifesto commitments into things that were never contemplated by either party and adds a further difficulty, which is the urgency of the situation.

There is all this talk about pre-examination and so on. But if you have two parties that have been brought together on deal, there is an urgency in the timetable to get that deal implemented in a balanced way, which is one of the reasons that I think so many of the mistakes that Professor Flinders has described in the Government's approach have occurred. They have a deal. They have an urgency to get on with it and they ride roughshod over all these lovely theoretical ideas that you advance and we all want. How do you deal with this particular problem? If we are moving into the world of coalition it is not a question of manifestos. It is a question of political deals and the government that has been created having the executive power to push ahead in order to safeguard and maintain the work of that government.

**Professor Flinders:** The only way to my mind you can get around preventing coalitions coming into life, or any government for that matter coming into office or forming a coalition, and a key plank of it being some kind of constitutional deal that as to be pushed through very early in order to assure everyone involved that this is a worthy agreement is to have some kind of legislation in place that sets a minimum timeframe on the passage of constitutional legislation. There has to be a minimum timeframe involved before any piece of constitutional legislation is able to either enter the formal legislative process and/or be approved. Now, that is one possible practical solution.

But it is an opportunity to take it beyond our legislation, to get beyond it simply being about committees of the whole House, that you place a timeframe on it. That then becomes

something that coalitions, if they are to be formed, are aware of. In other words, it cannot be something that has to be introduced the first day that Parliament is convened. It cannot be something that must be very quickly rustled together in order to meet political party demands rather than constitutional propriety demands.

That is one way forward, I think; to have some kind of set timeframe on it. What would that timeframe be? Some of the examples I looked at and that I gave some information on in the paper that I submitted to you—and I know we are going to come back to it—for example, the British Columbia electoral reform; that process took close to a year from the beginning of creating the forum to the end when they produced results. That gives an indication of how long matters of this magnitude ought to be subjected to before any serious legislation is introduced.

Now, that goes back to Matt's point: that there is a balance here between flexibility and rigidity, which he talks about in his paper. As soon as you start introducing any kind of measures that put constraints on the ability to act you are going to sacrifice flexibility and that is where the critique can come from. But ultimately it is about choosing what it is that you value. Do you value the desire to slow down these processes so that there is more time or do you prefer that government can act quickly, if sometimes hastily?

**Q118 Lord Irvine of Lairg:** Professor Flinders, speaking for myself, I was very attracted, as I think you were too, by Sir John Baker's attempt to assist us and by listing out categories of legislation that you would regard as constituting substantial constitutional change. But, intriguingly, you said that there were three points missing and I would like you to tell me what they are.

**Professor Flinders:** A very quick answer is that the electoral system did not seem to be there in a designated form, the Bank of England or war and emergency powers. Those three

seem pretty obvious areas that were not included. One of the great problems here is that in a way if you try and list everything it becomes so big and unwieldy it is not of much help. I do think it is very interesting; coming up with a statement about how you define the core elements of the constitution is not very hard. Designing a process through which all pieces of legislation that are defined as within that remit must follow is not very hard. What is harder is getting the government to accept that they need to have a restriction on their powers.

What is interesting, I think—and this goes back to border issues—is that in British politics, because of its very adversarial nature, new governments come in and it is as if there is a land grab. Ministers are so scared that they are going to lose this new window, this momentum—they are there to change—and they will rush in very quickly and then often you go through a more long-winded process where committees like this one then provide the fine-tuning, the amendments on the legislation, that really should have been done much earlier.

I am talking about having a very clear but proportionate system for legislation that is defined as constitutional where all governments will know that anything they propose, any coalition deals that are put together, will still have to go through this process to prevent the hastiness that currently seems to come out. I think there is also a bigger issue here. At the moment there does not seem to be much of a joined-up approach to the constitution and I think that is another very big issue. If you look around what is going on—

**Q119 The Chairman:** What do you mean by “joined up”; within Government or across the legislation?

**Professor Flinders:** No, I mean across the Government. This is why I think a review in a joint committee would be so important. At the moment we have various different departments and various different ministers spinning off—this is not a party political point; this tends to happen under all governments. We have strong ministers in departments who

spin off with very big reforms, but without thinking about how all the bits of the jigsaw fit together. Now, if you just look at the moment with the Localism Bill, which is a mighty monster—what is going to happen with the elected police commissioners—that holds all sorts of risks. The Health Bill: all of these elements are being driven largely by one dominant individual and how they all map together, how they work as part of a coherent whole, is an area where I think the Government lacks a central oversight capacity ensuring that a legislative brake might help promote that broader picture.

**Q120 Lord Irvine of Lairg:** But what process are you recommending? All you have said specifically is that maybe there should be a joint committee of both Houses looking at proposals for constitutional change. Then you said that you felt that such a committee would be better resourced. Speaking for myself, I do not feel that this Committee has any shortage of resources or any shortage of high-quality advice, both from the clerks and from outside advisors. So what process do you feel that a joint committee should follow? Is there anything more that can be said about a joint committee than that what it says might carry more weight?

**Professor Flinders:** Well, I think it would carry more weight. What would be important though is that all pieces of legislation that the committee interpreted as sitting within its definition of being constitutional would then have to go before the committee for a pre-legislative review, screening, discussion, reporting, in a much more robust way. What I am trying to stop is the capacity for governments to be able to just announce reforms and drive them through without having to acknowledge any parliamentary mechanism that would just halt them for a short time.

**Dr Kelso:** On that point, if I could add, that is where the issue of time comes in. So in terms of specific suggestions, just simply creating such a committee and enabling it to look at pre-

legislative constitutional legislation sounds fine but there would perhaps have to be a compulsion there it had a set amount of time in order to do that. Quite how long that would be is certainly up for debate but some committees have had only a few weeks.

So quite serious legislation in a pre-legislation way would have to be jettisoned. It would have to become an accepted part of the process that with any legislation that fell under the description set out as constitutional legislation, part of the deal, part of the way the game was played, was that it was going to spend X amount of time in committee; enough time for that committee to be able to take enough evidence. Once that becomes part of the process it might well not be something governments like because it slows them down, but that is the whole point of what you are trying to suggest might be the way forward.

**Q121 Lord Pannick:** Dr Kelso, you mentioned just now “compulsion”. That is the point. Are you and Professor Flinders recommending that Parliament should adopt a series of conventions that would be subject to the power of government to override them or are you recommending that there should be something more than that?

**Dr Kelso:** Any time we talk about a process where it is more than convention, everyone starts screaming about parliamentary sovereignty. If we are serious about changing this we have to go beyond assuming it cannot be done because government is able to exercise the majority to override anything that is simply a convention. I am not sure about whether it should be a convention or whether it should be something stronger. I do not know what Matt’s views are on it, but I think it should be reasonably lengthy.

I think for government to step back and say, “We do not accept there is a need for a 12 or 15-week period of time for Parliament to study this in advance of something happening”, could over time, hopefully, become such a difficult thing for a government to justify doing; that it did not think Parliament needed any time to look at what could be quite a serious

issue. As we know, many of the problems associated with legislation are because there has not been enough time to root out all the possible problems with it and to tease out some of the concerns. The more time you can get to do that, although it might slow down the process, the better. But, in terms of the specific mechanism, I would have to think about it a little more possibly.

**Professor Flinders:** Obviously it would be up to the committee. The committee would not need to inquire into every single piece of legislation. I mean, they would have to be parsimonious in their definition of what is constitutional. But I think, realistically, there are a number of examples, if we just go back in recent history, where the executive was originally adamant that it would not do things and then, because of a combination of pressures from different points within the House, it decided to relinquish a certain degree of control. I am thinking about the Prime Minister appearing before the Liaison Committee. For a long time that was something that would not happen. Now it would be very hard for a Prime Minister to go back and refuse to honour that convention.

Look at what has happened with select committees and the introduction of pre-appointment hearings. For a long time various governments refused to give select committees any capacity to interview ministerial appointments to public bodies. I think the key issue here is clarity. The issue is not about constitutional reform—maybe reform is a loaded question—what I think we are talking about today is good governance. Good governance is transparent, it is clear and it provides an opportunity to reflect before decisions are made rather than then trying to close the gate once the horse has bolted.

Essentially that is what we do not have in our system. It is well known. The question is whether there is a window of opportunity now. I remember Tony Wright talking about parliamentary politics being about cracks and wedges; that often you have to get the first small reform that then you can build upon over time. Maybe this Committee, or maybe a

joint committee of both Houses, and a clear definition with a process does not sound very radical or very strong, but it might be a first step towards applying some sort of brake that could then evolve in change.

**Q122 Lord Rodgers of Quarry Bank:** If I could try and clear my own mind, if I may, and ask a rather simple question but it may have been swallowed up a bit by earlier discussion. The constitutional reform process is the subject of our discussion. When does such a process stop? We have discussed it on and off. For example, you referred to reading the transcript and looking at what Professor Feldman said at that time. Then you referred to the Whig version of history; it was progressive, steady improvement over time. Do you take a Whig view?

**Professor Flinders:** I take what you might say is a Whiggish view, which is based about realism and a commitment to both continuity and change. In a way this is the balance that this Committee is trying to pull off at the moment, which is how to still ensure we have parliamentary sovereignty and a strong government while at the same time, in some important areas but a relatively small span of areas, we are discussing whether to impose some clearer limits on their discretion. So there are many different options we could discuss, like the introduction of super-majorities within the House, for constitutional legislation. Now, realistically, I do not think that would fly with the Government at the moment. I think what might fly would be change of an evolving process based on the committee system which has, in recent years, moved forward very significantly. Does that answer your question?

**Q123 Lord Rodgers of Quarry Bank:** I do not think so. Maybe I have not asked a sufficiently clear question. I am just thinking, are we rolling on forever and ever having

constitutional reform and what is the end product? What are we expecting? Is there some point—not in my generation or the next one over—at which there is no need to have legislation in order to get constitutional reform or change, whatever the word is?

**Professor Flinders:** I am not sure I can give a perfect answer to that question. I think we are looking for a more transparent and clearer process that allows for consultation and reflection before constitutional reforms are passed, which is often what we simply do not have at the moment. It is very interesting; academics from around the world often phone me or email me and say, “I’ve just read that this is happening. What is going on?” It is absolutely impossible to tell them, to explain. They cannot believe it. They are questioning, “Where is the map? How does all this fit together?” They think that somebody here in the House knows and the fact is that very often they do not. It is being driven by one department and even ministers who are in the Cabinet are unsure what is going on. It is that broader picture and a shift towards clarity, transparency and broader public understanding and debate about how our constitution is shaped. At the moment we do not have that.

**Q124 Lord Rodgers of Quarry Bank:** Is reform subjective?

**Professor Flinders:** Of course it is subjective, which is why I think throwing out reforms to a process of discussion is so important. At the moment I am recording a series for Radio 4 very foolishly called *In Defence of Politics*, going back to Bernard Crick’s famous book which is 50 years old next year. Of course, Crick’s argument was that politics cannot make all sad hearts glad. But by promoting transparency and explaining why things are happening, that will allow people—even if they do not get what they want—to at least buy into the system. What we have at the moment is a very insular system where very few people understand it and, therefore, struggle to buy into it.

**Dr Kelso:** I think if I could add to that. It is subject and that is exactly the reason why the process through which debate surrounding what the constitution should evolve into and become in the future has to be made clearer. We cannot ever find some constitutional end point where everyone agrees that we have reached some kind of constitutional perfection and we do not ever have to do anything else. That is never going to happen because societies change, political demands change, expectations change and processes and systems have to change to meet those things.

But the better you can make the process through which debates and discussion and disagreements are handled, the more likely you are to make people feel that the constitution as it exists, imperfect though it is, is hopefully a reflection of the best well of what society as a whole wants; whereas right now, it is decided by elites to meet elite needs. I understand that is what we are all trying to get away from. But any time we throw up any objection—“What about parliamentary sovereignty? How could we possibly make government agree to this constraint in its power?”—it is another obstacle in the track of taking that forward. The better you make the process, the better we can then handle disagreements over what the outcome of constitutional change secures.

**Q125 Lord Pannick:** I want ask, Dr Kelso, about your proposal for dealing with elitism; that is the British Columbia example. Is this an appropriate moment to deal with that? You suggest we should consider moving towards the British Columbia Citizens’ Assembly on Electoral Reform type model. You take a random selection of 100 or 150 people. Can I ask, what is the advantage of that over a traditional model in which you have proper pre-legislative scrutiny and you have proper public consultation where everybody can express their view? At the moment I do not really understand why the answer to elitism is to introduce a system that has, it seems to me, the worst ingredients of anti-elitism; that you

take a random group of people who may or may not have any knowledge, any interest, anything valuable to contribute, and you treat them as somehow more valuable than a proper public consultation.

**Dr Kelso:** I disagree, I am afraid, with the premise that you put forward. I think that is an example of the sort of sneering contempt for public participation in the process that is out there. I like the British Columbia example for a number of reasons. I do not think it necessarily has to replace the kind of pre-legislative scrutiny processes that we have been discussing. I think those are still valuable and I do not think it necessarily has to be a substitute for them. I think in some occasions the issue may be of such constitutional magnitude that it can be helpful to explore other ways of going about it, which is why I like the kind of story that the BC model gave us.

There are a couple of things I like about it. First, it is still representative democracy because it is still a representative sample of people. A referendum asks people what are often very simple questions about things which, as you have said, they may not necessarily know a great deal about in the round. One of the benefits of this model, and I think one of the reasons it had a reasonable degree of success in terms of the process of the BC institution itself, is that it brought together a group of people who, yes, may not have had a great deal of knowledge and understanding to start with; but it provided them with that knowledge.

That is why it took so long in order to get to that point of being able to make a deliberation and make a recommendation, because it provided them with the knowledge. So it brought an expert and that is not that different to what parliamentarians do. Parliamentarians faced with a complex public policy issue hopefully go and seek advice; hopefully take evidence; hopefully go and speak to people who are perhaps, in detail, involved in the process in order to get a better handle on it.

It is not that dissimilar to what politicians do in a legislative scenario and a government scenario anyway. But it was also tied in with an end product of the referendum. So this wasn't something that existed in isolation. It was not something that the public was going to have to be forced to swallow in the end and take the judgment of 160 people over their own. That informed the work that they did because they knew the stakes were high; that whatever option they suggested was going to be put to the people and it was not an academic exercise. It was not an intellectual exercise.

It did not work. The referendum was not successful in the end because there was a super-majority associated with it, which it missed by a couple of per cent. But the reason I like it is because it is one way of tackling the issue of how we involve the public better than we do right now. It is about trusting the public to be able to participate in a process about something that is very complicated, that is detailed; to be able to trust them to listen to experts, to give their time, to commit to as a process and for others around them, other members of the public, to see that in place. I think that is a very encouraging example, that people can be trusted with information about their own constitution to make a judgement about it.

Just to be clear, I do not think it has to replace pre-legislative scrutiny and so on. There is certainly no way you are going to have a process of this kind for absolutely every constitutional issue that comes about. But for some of the very big issues I think it may well be a worthwhile model to think about in the future.

**Q126 Lord Pannick:** Can I just make clear, I am not sneering at public consultation. On the contrary, I want to see more public consultation. I want to see people fully informed about the issues before any decisions are taken. My question is whether it is better to do this through 150-160 people or rather to focus on informing everybody; because the 150, if

they are going to look at this seriously, are going to be a very small cohort of people who have the time. Most people have other things to do in their lives. That is why they are not politicians.

**Professor Flinders:** Sure. I can certainly send you some of the background documents that they produced as part of their work and they did not pressgang 160 people into doing this when they did not want to. They were willing participants and they paid attention to the issue of representativeness and they were randomly selected. They were not—

**Q127 The Chairman:** Did they report back then, Dr Kelso? Picking up Lord Pannick's point; all right, you have 150 or however many people it is who are extremely well-informed, have taken note of these issues. But what is their responsibility? You said they are representative. Do they go back to their communities? Does it work outwards, as it were, as well as inwards?

**Dr Kelso:** The process of representation is that you entrust a small cohort of society to—

**The Chairman:** Sorry, I misunderstood your point about representation. No, it was my misunderstanding.

**Q128 Lord Pannick:** Can I just ask one question? Surely MPs are supposed to be representative. Why should one be more interested in the views of 150 randomly selected people than in the activities of Members of Parliament who, if they are doing their job properly, should surely inform the people in their constituencies? If they do not then they should be voted out, or is that an idealistic position?

**Dr Kelso:** Well, I think you are slightly spinning it in a difficult way I am struggling to understand. It is not saying that politicians cannot represent the public and in fact do so. But on some big constitutional issues, we are talking about changing the fundamental rules of the

game, about how the constitution operates—which is what this was about. This was not about education policy or health policy or how to divide up some kind of social services budget. This was about changes to the electoral system.

So I think on some of those macro-constitutional issues the benefits of taking it to this non-politician group of people is that it enables the public to see that politicians are willing for the public to come forward with solutions in this organised way; that they can be trusted to do it; that the politicians do not feel that they themselves are the repository of all information about how the constitution works.

It also takes it beyond this idea that we have to be careful about involving the public in constitutional issues because they are so complex. The evidence here is that these people, once they were properly facilitated, given the information by academics and by people who were experts in various electoral systems and how they functioned, were quite capable of thinking these issues through when they were given time to do so and debating among themselves and coming up with solutions in a way that is what we understand by representative politics; that you entrust people to make those decisions on your behalf. It is not something that would apply to every constitutional issue out there; that you would want to look at every issue, but for some of the big ones.

If this model, which I have explained in the paper a little bit, had been put in place in advance of the current electoral reform referendum in this country, I would be very surprised if the solution that we would have been given was AV. It would be surprising that that was the solution that was picked up on. Instead what we have is a process where the Yes Campaign are trying to educate people about what AV is when in fact it probably was not anyone's first choice to begin with. So the very fact that there was a discussion in place, that they were able to produce documents that outlined the rationale for their decision-making and how

they reached it, perhaps spoke to people in a way that it does not when it comes direct from politicians.

But that perhaps is one step towards starting to demonstrate that this discussion we are having about reconnecting people with politics and with politicians, re-engaging and rebuilding trust, perhaps that is one way to start going down it. It is not a panacea. It is not going to fix everything. Certainly in the BC example the electoral system remained unchanged. But when you are talking about process, I think there is something there.

**Q129 Lord Crickhowell:** Just a follow up. The old-fashioned way of doing this, rather than having 150, was something called a Royal Commission. I happened to enter politics at a time when we had had Royal Commissions looking at local government reform. It was a huge issue for a lot of people and the British public became extremely well-informed about the issues and felt very, very strongly about them. I suppose if I ever made a name for myself in my own constituency it was on the issues that arose from that process. So there are long-established ways of looking at major issues. Are we making a mistake in moving away? I mean, Royal Commissions are now considered bad things and being kicked away, out of touch. Is there something to be said for that rather more formal way of looking at the thing rather than your random 150?

**The Chairman:** Can I just add to that, because it is something that we have discussed? If the British governance model of good parliamentary and good constitutional government was working in terms of the Cabinet committee structure—the ways in which every age was golden in the past, as Lord Crickhowell said, but we know that is not true—in which you did have these more formally consistent groups of ways of processing constitutional change and if we, in a sense, reverted to those more formal arrangements, would that answer some of

the questions? I mean, in a sense, do we have a model already which, if we properly organised it, would achieve what we want?

**Professor Flinders:** We do have a model and I think it may have worked. I presume you are talking about the Redcliffe-Maud Royal Commission on Local Government and—

**The Chairman:** The Royal Commission on House of Lords Reforms, for example.

**Professor Flinders:** Yes. I think one of the issues is that society has changed. It might not be that the model does not work so much. I am thinking about the last Royal Commission on the Constitution, which was Kilbrandon in 1973 and that was only on devolution. I would not argue for or against some sort of commission on the constitution but, for me, the real question and why there is this turn towards more deliberative or participatory mechanisms is this issue of reaching out. It is about how you inspire confidence and involvement among the public, because unfortunately as soon as you mention MPs or royal commissions the public do switch off for a number of reasons.

Going back to the question of continuity and change, often in life the best thing for facilitating major change is a crisis and one of the things that I think is very interesting about the MPs' expenses scandal is that it did create a momentum for significant change. Whether you agreed with the pace or direction of change or not, it did lead to real changes between the relationship between MPs and the executive. I think it would be possible now for a reform based around good governance in the constitution to, in a way, continue that momentum and get itself in place in a way that would not have been possible maybe five or 10 years later.

But what is really interesting, I think, is at the moment we are in a time when the confidence of politicians—not just in the UK but particularly in the UK—is at an all-time low. It sounds ridiculous but we have said several times that the answer to this question is not about providing solutions. It is quite easy for us to come up with a set of solutions. It is about

ensuring that the political will exists to get those things done. I do not want to be rude, but one of the issues is that I think we are at a time now where more politicians need to stand up and say, “Yes, mistakes were made. We’re not perfect. Politics delivers more than you think it does, but there is a time and a need for reform now”. I think that could harness some—

**Dr Kelso:** Could I just come in on the point? I just want to recap because, with the example I gave in the paper, the number of 150 participants has been raised a couple of times. That was what suited the Province of British Columbia. If any such forum or any such model that was similar to that was ever going to be used in this country—British Columbia only has about 4 million people—presumably we would want to try something a little bit different. If it was ever going to be something we wanted to replicate in the future for another discussion about electoral reform, were it to be pursued in the future, arguably we would tailor it to fit our needs. So I want to be clear that I am not suggesting we bring this over wholesale, but the basic fundamentals.

**Q130 The Chairman:** No. Perhaps I could ask you a factual supplementary before Lord Shaw comes in. Are there any other international examples that you could give of where you thought that public consultation on this kind of issue had been effective?

**Dr Kelso:** Well, the reason that the BC one is used quite often is because it is an example of quite a big issue of constitutional significance being up for discussion. My colleague at Southampton University, as part of the Power Inquiry into British Democracy a few years ago, looked at a whole lot of participatory, deliberative models and experiments that had been tried across a whole range of settings, looking at different kinds of issues. I could certainly make that available to you.

**The Chairman:** No, we have had evidence, not specifically in relation to this inquiry but we did an inquiry about referendums last year in which we did—thank you.

**Q131 Lord Shaw of Northstead:** At present, of course, the House of Commons has the ultimate authority. It can change anything. It all depends on them. But we are now having draft proposals for House of Lords reform. I am just wondering: do you feel that there is any scope here in the reform of the House of Lords whereby the House of Lords, in certain circumstances, might well have more power? For example, if a constitutional change is being proposed, it has to have the agreement of the House of Lords and, certainly more particularly, if a referendum is proposed—and we have had so many examples of hasty referendums for the convenience of the government—would it be wise for them to have necessity of agreement of the House of Lords if it were to go through? The House of Lords, if changed, it would appear, would have a much more consistent body of opinion because of the different election periods that it would have. So there would, in that sense, be no new House of Lords at any time; whereas every five years there would be a new House of Commons.

**Professor Flinders:** I think, in theory, to have a second chamber that required a super-majority to allow a piece of constitutional legislation through would be in line with a lot of countries around the world. Whether that was a reform that a sufficient degree of political will could be put behind is a completely different matter. The university sector at the moment, we are doing more for less. We always bid for three in the hope that we will get two. It may well be that a package with a joint committee of both Houses on constitutional reform with a definition of “constitutional issues” and then a very clear process—some sort of super-pre-legislative scrutiny—possibly tacked on to that role for the reformed chamber

could work, but could also be given up as part of a negotiation that would inevitably occur. But, yes. I mean, we are unique in the UK with the flexibility that we give our governments.

**Q132 The Chairman:** Thank you both very much. If I can make the foolish attempt to sort of summarise what you are saying; I think that many of the Committee Members are responsive to the notion of greater rigidity, in your terms, and the balance between rigidity and flexibility in relation to constitutional process. But I think you both, as well as we, acknowledge that this can only happen through being driven by political will to change. So, in a sense, although we can recommend in theory, we are still not, unless we get a political fair wind, going to change in practice. Is that fair?

**Professor Flinders:** That is fair but I think the wind might be more in your favour now, particularly after the AV referendum, than it has been for quite a while.

**The Chairman:** Well, thank you both very much. You have been very helpful and thank you, too, for your papers which we can certainly refer to.