The Conservative-Liberal Democrat Agenda for Constitutional and Political Reform

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Foreword

The new Conservative– Liberal Democrat coalition government announced on 11 May 2010 has a very ambitious and wide ranging agenda for political and constitutional reform. It was first unveiled on 12 May, when David Cameron and Nick Clegg published the outline coalition agreement which had been negotiated between the Conservatives and Liberal Democrats in the preceding four days. The agreement contained in section 6 a list of proposals for constitutional and political reforms. On 20 May they published *The Coalition: Our Programme for Government*, which contains in section 24 a slightly expanded list of commitments for political reform. On 21 May the Cabinet Office published the coalition's *Agreement for Stability and Reform*, which explains the procedural arrangements for information sharing and joint consultation between the coalition partners, and for joint signing off on all policy and legislation.

This briefing offers an analysis of those proposals, with comments on the likely timetable, possible difficulties of implementation, and any overseas experience where relevant. Each chapter opens with the relevant extract from the *Programme for Government*. The briefing has been written quickly and there has been less time than usual to consult other experts, inside and outside government. But I should acknowledge swift and meticulous research support from Ceri Lloyd-Hughes and Adam Cadoo, two interns with the Constitution Unit; and thoughtful comments as always from Meg Russell and Alan Trench. It is also a fast moving picture. So more than ever, any mistakes and misunderstandings are my own.

Robert Hazell
4 June 2010

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Summary of Key Points

Management of the coalition

The Liberal Democrats did well out of the allocation of ministerial posts, with 22% of seats in the Cabinet and 19% of junior ministers, when a proportional share would have entitled them to 16%.

The procedural agreement of 21 May on consultation and dispute resolution is as important to effective government as the Programme for Government on 20 May. The Programme needs a mid term review, to allow the coalition to drop policies which have not been realised or are unrealisable, and to add new ones. The Deputy PM needs additional resources to support him in the joint consultation and signing off arrangements, or there will be bottlenecks at the centre.

Fixed term parliaments

A five year term is long by comparison with most other Westminster and European parliaments. Westminster's fixed terms need to fit alongside the electoral cycle for the devolved assemblies, the European Parliament and elections to the second chamber. If the government wished to avoid any clash between UK general and other elections, it could move general elections to October, with the next election to be held in October 2014.

The government's proposed 55% threshold before they can seek a dissolution belongs better in the coalition agreement, if it is meant to bind the coalition partners together for this parliament rather than to be an enduring constitutional principle. It should not prevent the opposition parties from tabling confidence motions on which the normal threshold of 50% should continue to apply. The power of dissolution is better regulated by codification in the new Cabinet Manual than in legislation.

Referendum on AV

The referendum on AV is quite likely to be lost. The difference between AV and FPTP is slight. Some electoral reformers will campaign against, because AV is not proportional. Others will claim that a vote for AV is a vote for perpetually hung parliaments. If voters are confused, they are likely to cling to what they know.

One way of increasing the referendum's chances would be to include the government's proposal to reduce the size of the House of Commons with the proposal on AV. Another way of raising public interest might be combine a referendum on the electoral system for the Commons with the issue of an elected House of Lords. The latter is a far bigger change, constitutionally and politically, than a switch from FPTP to AV for the Commons, and more deserving of a referendum.

Combining the two issues would help to foster a more joined up debate about the electoral system for the Commons and the Lords. Bicameralism works best when the two chambers are complementary, with different composition from different electoral systems. PR makes sense for one chamber, but not for both. The choice of AV for the Commons and PR for the Lords could provide the best of both worlds.

Reducing size of the House of Commons

Reducing the Commons requires a wholesale review of all constituency boundaries. That requires legislation in the first year to radically streamline the boundary review process, and abolish local inquiries.

More equally sized constituencies would remove only around one third of the current bias in the operation of the voting system against the Conservatives. If the Conservatives wanted to eliminate the bias they would need to support PR.

Reform of the House of Lords

The committee to develop proposals for an elected second chamber could do so by the government's target of December if it takes the July 2008 White Paper as its starting point. That was the report of a cross party group on which Conservatives and Liberal Democrats were represented. It will need to resolve the overall size of the House; whether it is to retain the Crossbenchers, and so be 80% elected; the electoral system and electoral cycle; and length of the term.

Lords reform is genuinely difficult because all the parties are divided; supporters of an elected House disagree on key issues; and the Commons find the idea of an elected second chamber a threat. There is now a tradition of free votes on the issue; the Lords are opposed to change; and the media and public opinion are fickle.

The government might need to fall back on more modest reforms to strengthen the interim House. These should include provisions for resignation and retirement; discipline; putting the Appointments Commission on a statutory basis; and articulating the proportionality principle in a government statement or code.

The proportionality principle, that the size of the party groups should reflect their share of the votes cast at the previous election, is becoming a constitutional convention. The size of the party groups in the new Parliament is Con 201, Lab 239, LD 80. If reapportioned to reflect their share of the vote, the Cons should have 213 (+12), Lab 172 (-67), and LD 135 (+55). The government could work towards these targets by a policy of 'one out, one in', with natural wastage in the Labour group allowing gradual replenishment of the other groups.

Reform of the House of Commons

A test of the government's commitment will be whether they bring forward in full the Wright Committee's proposals for a Backbench Business Committee, and later a House Business Committee.

The proposal for a petition with 100,000 signatures to trigger a debate in Parliament will require procedures to approve the wording of the petition and verify the signatures. It risks raising expectations: in British Columbia and in New Zealand not a single petition has led to a change in the law.

The right of recall will apply only to MPs found guilty of serious wrongdoing. That should be determined by the Commons Committee on Standards and Privileges.

Devolution

The Calman plans for fiscal autonomy in Scotland cannot properly be delivered without a multilateral commission to devise a needs-based formula for all the territories of the UK. It makes no sense to allow Northern Ireland to vary the rate of corporation tax.

It will be very tight to hold a referendum on primary legislative powers for Wales in October, as the Welsh Assembly hope. If not held in October, it may be deferred to March.

Commission on the West Lothian Question

The government must decide in the terms of reference whether this commission is simply to work up a scheme for English votes on English laws, or look at wider solutions to the West Lothian Question, such as PR. It should be an all party parliamentary committee, chaired by a Conservative MP, with representation from Scotland, Wales and Northern Ireland.

Europe

It is difficult to entrench a referendum requirement for future EU treaties, because a future Parliament could repeal it. At most the requirement would be politically entrenched. The courts would hold it to be non-justiciable.

Regulation of political parties

The Conservatives are much stronger financially than Labour or the Liberal Democrats, and have less interest in reaching agreement on party funding. The Lib Dems have lost their Short money (paid only to opposition parties) and will want an increase in state funding. This will be hard to justify at a time of public spending cuts.

Promoting all party primaries may meet resentment from the other political parties; create tensions between party headquarters, local constituencies and party activists; and possibly raise concerns about their fairness, because there is no effective means of enforcing spending controls, or detecting fraud.

Freedom of information and Transparency

The government believes that publishing the details of public expenditure and salaries will lead to restraint and lower expenditure. There is no evidence that the American initiatives on which the policy is based have generated significant reductions. Nor is there evidence that greater transparency necessarily leads to greater trust.

British bill of rights

An independent commission can be more imaginative and energetic than a government-led exercise. But the government needs to think through what the commission's task is going to be, and to allow stages in the process for government, Parliament and widespread public consultation.

1 Coalition government and how it will operate

1.1 Coalition Government: Lessons from overseas

In 2002 the Constitution Unit published *Coalition Government in Britain: Lessons from Overseas,* a detailed report by Ben Seyd based upon two years' research looking at the experience of coalition government in Denmark, Germany, Ireland and New Zealand. Some of the practical lessons from his report on managing coalition government include:

- The need for mutual trust and understanding between the coalition partners, especially the leaders
- Formal procedures for information sharing, and for signing off policy proposals by both coalition partners
- Additional resources for the Deputy Prime Minister, who will be central to joint signing off arrangements
- The need also to decentralise coalition coordination to departments, to avoid bottlenecks at the centre
- Dispute resolution procedures, possibly including a formal coalition committee
- A pool of trusted special advisers to help resolve coalition management issues, at the centre and in departments.

The need for formal procedures for information sharing, consultation and dispute resolution appeared to have been overlooked in the new government's outline coalition agreement of 11 May, and its more detailed Programme for Government published on 20 May. But that omission was rectified with the publication on 21 May of the coalition's procedural guide on how the two parties would work together, the *Coalition Agreement for Stability and Reform.*

1.2 Coalition Agreement for Stability and Reform

The procedural agreement is quite short, at just three pages, but it shows that the new government is aware of the lessons summarised above. The introduction states that the coalition parties will work together 'on the basis of goodwill, mutual trust and agreed procedures which foster collective decision making and responsibility while respecting each party's identity'. Close consultation and a balanced approach are to underpin the allocation of responsibilities, the government's policy and legislation, the conduct of its business and the resolution of disputes.

The government expect the coalition to endure for the whole of a five year Parliament until May 2015. There is as yet no provision for a mid term review. That would be sensible, to allow the government to drop policy commitments which have not been realised or are unrealisable, and to add new ones. One risk of coalition agreements is that they can be too inflexible, and make it hard for new issues which were not in the original programme for government to get onto the agenda.

The allocation of Cabinet, Ministerial and Whip appointments is to be approximately in proportion to the size of the two parliamentary parties. With 57 MPs to the Conservatives' 307, the Liberal Democrats could expect 15.7% of ministerial posts if they received a strictly proportionate share. In practice they have done rather better, with

22% of the 23 seats in Cabinet, and 19% of the 73 junior ministerial posts. The Deputy Prime Minister nominates the Liberal Democrat ministers, who may not be removed without his full consultation. The early resignation of David Laws MP on 29 May demonstrated some of the constraints imposed by coalition government. His post of Chief Secretary was regarded as a Liberal Democrat post, so he was replaced by another Liberal Democrat, Danny Alexander MP. Danny Alexander had been Scottish Secretary, and his replacement is another Liberal Democrat, Michael Moore MP.

Collective responsibility continues to apply to all Ministers, save where it has explicitly been set aside. There are four items in the Programme for Government which contain 'agree to disagree' provisions:

- The referendum on AV (see chapter 3), where both parliamentary parties in both Houses will be whipped to support a simple majority referendum on AV, but the parties will be free to campaign on opposing sides in the referendum itself
- The renewal of the Trident nuclear deterrent, where 'the Liberal Democrats will continue to make the case for alternatives'
- New nuclear power stations, where a Liberal Democrat spokesman will speak against the National Planning Statement allowing their construction, Liberal Democrat MPs will abstain, and this will not be an issue of confidence
- Transferable tax allowances for married couples, where Liberal Democrat MPs may abstain.

1.3 Cabinet Committees

The new government has announced eight Cabinet Committees, and five sub-committees so far: a lot less than the Brown government's 11 Cabinet Committees and 21 sub-committees. Each committee has a chair from one party, and deputy chair from the other. The committees are also smaller. The key committee is the Coalition Committee, co-chaired by the Prime Minister and Deputy PM, with eight other members. Unresolved issues can be referred by any other committee to the Coalition Committee for resolution.

Day to day resolution of difficulties within the coalition is to be achieved by the Coalition Operation and Strategic Planning Group. It is not formally a Cabinet Committee, and consists of just four members: Oliver Letwin MP and Danny Alexander MP as co-chairs, and Francis Maude MP and Lord Wallace. The latter as Jim Wallace MSP had eight years' experience of leading a coalition government as Deputy First Minister in Scotland from 1999 to 2007. Danny Alexander was set to play a central role in making the coalition arrangements work, as Nick Clegg's former Chief of Staff and his adviser in the Cabinet Office. He was a member of six out of the new government's eight Cabinet Committees. His loss from that central role in managing the coalition will be as keenly felt as the loss of David Laws.

The other Cabinet Committees are on national security; European affairs; social justice; home affairs (which includes constitutional and political reform); economic affairs; banking regulation; and parliamentary business and legislation.

1.4 Ministerial lead on political reforms

When the coalition was formed it was made clear that Nick Clegg would lead on constitutional and political reform. On 2 June the Prime Minister announced the following transfer of responsibilities to give effect to this:

> **The Cabinet Office**
>
> As previously announced the Deputy Prime Minister has been given special responsibility for political and constitutional reform. To bring this into effect responsibility for the following will transfer from the Secretary of State for Justice to the Deputy Prime Minister:
>
> Introducing fixed-term Parliaments
>
> Legislating to hold a referendum on the alternative vote system for the House of Commons and to create fewer and more equal sized constituencies
>
> Supporting people with disabilities to become MPs
>
> Introducing a power for people to recall their MP
>
> Developing proposals for a wholly or mainly elected second Chamber
>
> Speeding up implementation of individual voter registration
>
> Considering the "West Lothian question"
>
> Introducing a statutory register of lobbyists
>
> Reforming party funding
>
> Supporting all postal primaries.
>
> The Deputy Prime Minister will also have policy responsibility for the Electoral Commission, Boundary Commission and Independent Parliamentary Standards Authority (Hansard 2 Jun 2010 : Column 23WS).

Some 70-80 staff in the Constitution Directorate of the Ministry of Justice who work on these subjects will transfer across and work directly to the Deputy Prime Minister. The main missing item is human rights and the British bill of rights: the policy lead on that appears to lie with Kenneth Clarke and the MoJ.

The government is proposing for a new Select Committee to be established to scrutinise the Deputy Prime Minister in relation to his responsibilities for political reform, to be called the Political and Constitutional Reform Committee. But on 3 June the Leader of the House said to Christopher Chope MP that he could force a debate on the issue, and on the relation of the new committee to the Justice Committee and to PASC (Hansard HC deb 3 June 2010 cols 581-2). The debate on whether to establish the committee will be in mid June. Christopher Chope may also raise whether the committee should be a Joint Committee of both Houses. A Joint Committee would take a lot longer to establish, because of the need to negotiate with the House of Lords.

2 Fixed term Parliaments

Coalition commitment

We will establish five year fixed-term parliaments. We will put a binding motion before the House of Commons stating that the next general election will be held on the first Thursday of May 2015. Following this motion, we will legislate to make provision for fixed term parliaments of five years. This legislation will also provide for dissolution if 55% or more of the House votes in favour.

Fixed-term parliaments are becoming increasingly common in the Westminster world. Their main benefit is greater stability, and fairness between government and opposition. They deny to the incumbent government the right to set the election date to suit their own electoral advantage. They also make for greater predictability, allowing for better planning and long term decision making. The possible disadvantages are a lack of flexibility, and the risk of lame duck governments staying on if there is not an adequate safety valve allowing for early dissolution.

In their election manifestos the Liberal Democrats and Labour both supported fixed term parliaments. The Conservatives said nothing specifically on fixed-term parliaments, but pledged to make "the Royal Prerogative subject to greater democratic control so that Parliament is properly involved."

Having fixed-term parliaments involves setting a fixed date for general elections through legislation, limiting the power of the Prime Minister to decide when an election should be held. The legislation needs to address three policy issues: the length of the fixed term; regulating the prerogative power to dissolve Parliament; and providing a safety valve so that a government can fall mid-term, if necessary.

2.1 Length of fixed term

Australia and New Zealand both have three-year maximum terms. The legislatures of Canada and many of its provinces have four-year fixed terms, as do most Australian states. The devolved legislatures in Scotland, Wales and Northern Ireland all have four-year fixed terms. Ireland's lower house has a five-year maximum, as in the UK. In continental Europe most countries have four year fixed terms, and only three (France, Italy, Luxembourg) have five years. So a five year term is long by comparison with most other parliamentary systems. It also feels long by comparison with Westminster's recent experience. An analysis of those post war parliaments which ran for a full term records seven parliaments which lasted four years (1951, 1966, 1970, 1979, 1983, 1997, 2001), three which lasted four and a half years (1945, 1955, 1974), and four parliaments which ran for five (1959, 1987, 1992, 2005); so the balance is more even than people suppose. But more debate is certainly needed on whether the term should be four or five years.

Thought also needs to be given to how Westminster's fixed terms will fit with the electoral cycles for the devolved assemblies, the European Parliament and elections to the second chamber. The table below sets out the electoral cycles for future elections to the European Parliament and the devolved assemblies, with separate columns for a four

and a five year cycle for the House of Commons. Dates in italics indicate a combination of a UK general election and European parliamentary election on the same date; dates in bold indicate a clash between a general election and devolved assembly elections.

Figure 2.1 Electoral cycle for UK general elections and other elections

European elections	Devolved elections	UK elections 4 yrs	UK elections 5 yrs
2014	**2015**	***2014***	**2015**
2019	2019	2018	2020
2024	2023	2022	2025
2029	2027	2026	2030
2034	2031	2030	**2035**
2039	**2035**	***2034***	2040

Second chamber elections are likely to be for one third of the House each time. They could be held at the same time as elections to the Commons; or if they were to be staggered between general elections, they could be held at the same time as European Parliament elections (five year intervals, 15 year terms), or devolved assembly elections (four year intervals, 12 year terms): see chapter 4.

If the government wished to avoid any clash between UK general and other elections, the simplest solution might simply be to move the date of general elections to October, and provide for the next UK general election to be held in October 2014.

2.2 Regulating the Prerogative

The legislation will need to make clear that it regulates the prerogative power to dissolve Parliament. Otherwise there is a risk that a Prime Minister who wanted to call an early election could simply request a dissolution from the Monarch under the old prerogative power, notwithstanding the new legislation on fixed term parliaments. This is what happened in Canada, which introduced fixed-term parliaments at the federal level in 2007. The law did not alter the Governor General's reserve power to dissolve parliament, which would have required a constitutional amendment. A year later Stephen Harper, the same Prime Minister who had introduced fixed term legislation, sought a dissolution one year before the end of the fixed term, when his party's poll ratings had temporarily increased. The Governor General, relying on her reserve powers, granted Harper's request. In practice, it seems that the Canadian law only fixes the maximum term, leaving the Prime Minister free to call an election at other times. Unless the new law in the UK regulates the prerogative power, it risks being similarly ineffective.

2.3 Safety valve for mid term dissolution

Fixed term parliaments require a safety valve to allow an ineffective government to fall mid term, or a deadlocked parliament to be dissolved. The Scottish Parliament and devolved assemblies all require a two thirds majority for dissolution. The Con-Lib Dem coalition agreement proposes a 55 per cent threshold before Parliament can be dissolved. This is intended to prevent the government calling an early election without the consent of both coalition partners.

It will not prevent the opposition parties from tabling confidence motions, on which the normal threshold of 50% should continue to apply. If the government is defeated on a confidence motion, the Prime Minister would resign and his government would fall. An alternative government might be formed from the existing parliament; or (more likely) fresh elections would be held. The legislation would need to provide that the 55 per cent threshold would be overridden by a confidence motion.

Confidence motions and the power of dissolution are now covered by chapter 6 of the new draft Cabinet Manual, and the legislation will need to cross-refer to that (Cabinet Office 2010). It is preferable to regulate dissolution by the codification in the new Cabinet Manual than in legislation, because the Cabinet Manual can state broad principles while legislation tries to cover every eventuality. An alternative possibility would be for the government to put the 55% threshold in the coalition procedural agreement rather than trying to prescribe it in legislation. That is where it properly belongs, if the 55% threshold is meant to be part of a deal to bind the coalition partners together for this parliament, rather than an enduring constitutional principle.

Dual thresholds are not necessarily wrong. A system with dual thresholds operates in Scotland, where they have a two thirds threshold before the parliament can dissolve itself. But if the First Minister faces a no confidence motion, he must resign if a simple majority votes against him. The parliament must then be dissolved if it cannot agree on a replacement.

The safety valve for mid term dissolution can be vulnerable to abuse: a government which wants to precipitate an early election can try to engineer a vote of no confidence, as has happened in Germany. Safeguards against that can include a high threshold, as in Scotland and the other devolved legislatures. Another safeguard is a requirement of a 'constructive' no confidence motion, which must nominate an alternative government to take office in the event that the motion is carried.

2.4 Timetable

The government intend to introduce this summer an early parliamentary resolution setting the date for the next election. They might issue a short Green or White Paper at the same time explaining their legislative plans for fixed term parliaments, and the balance between regulating the power of dissolution in the new Cabinet Manual and in legislation. There will at the very least need to be a detailed statement at the beginning of the parliamentary debate, and an indication that the government is willing to listen and to compromise on some issues. The Labour party also had a commitment to fixed term parliaments in their manifesto, and it could still be possible to craft legislation which might have cross-party support beyond the coalition.

Legislation can be introduced in the first session, once the policy issues set out above have been resolved. It could initially be a draft bill, subject to pre-legislative scrutiny. It can be freestanding legislation, which has no connection with other political reforms, save for one: elections to the second chamber. The government will need to be clear how the electoral cycle for the Commons matches that proposed for the Lords, even if the Lords reform legislation follows later.

3 Referendum on electoral reform, and smaller House of Commons

Coalition commitment

We will bring forward a Referendum Bill on electoral reform, which includes provision for the introduction of the Alternative Vote in the event of a positive result in the referendum, as well as for the creation of fewer and more equal sized constituencies. We will whip both Parliamentary parties in both Houses to support a simple majority referendum on the Alternative Vote, without prejudice to the positions parties will take during such a referendum.

A referendum on the Alternative Vote (AV) represents a big compromise for both parties. The Conservatives are staunch supporters of First past the Post (FPTP) and see no need for change. The Liberal Democrats have long supported the Single Transferable Vote (STV), and will see AV as a very poor substitute, since it is not a proportional system. Hence the provision that after being whipped to support a referendum on AV in Parliament, the parties will be free to fight on opposing sides during the referendum campaign. Ironically the one party which does formally support a referendum on AV is the Labour party, although in practice the Labour party are divided on the issue.

The Conservatives and Liberal Democrats are closer together in wishing to reduce the size of the House of Commons: the Conservatives to 585, the Lib Dems to 500. This is a more difficult proposal to implement, because it involves a wholesale redrawing of all constituency boundaries, which is difficult to do inside one parliament.

3.1 The referendum on AV

AV is a preferential voting system which ensures that each MP is elected by more than half the votes in their constituency. Voters rank the candidates, and losing candidates are successively eliminated until one gets more than half the votes. It is not proportional. If AV had been used in 2010, the results would not have been hugely different, but would have hurt the Conservatives most. The Electoral Reform Society estimates the Conservatives would have got around 280 seats, Labour 260 and the Lib Dems 80 seats under AV.

Legislation is needed to authorise the referendum, to specify the question, and name the date. A nation wide referendum would cost the same as a general election, around £80m. It would save money, and help increase turnout, if it is held at the same time as other polls. The earliest likely date is May 2011, when there will be devolved elections in Scotland, Wales and Northern Ireland, and about 280 local authorities in England.

The referendum will be supervised by the Electoral Commission, who will select and fund umbrella bodies to lead the campaigns on each side, as they did for the North East regional assembly referendum in 2004. The Conservatives and Lib Dems will be free to campaign on opposite sides. It will take time to educate and inform the British public about the relative merits of different electoral systems. It may be particularly difficult to

educate people about the difference between FPTP and AV, because the difference is slight and the impact on the overall result is small. Many voters may wonder what the fuss is about.

Reformers tend to take it for granted that a referendum would be carried. That is by no means a foregone conclusion, especially if the governing parties campaign on opposite sides. Some electoral reformers may also campaign against, on the basis that AV is not enough. Others will claim (incorrectly, but plausibly) that a vote for AV is a vote for perpetually hung parliaments. Others will use the vote simply to kick against the government. If voters are confused, they are likely to cling to what they have (FPTP), or just stay away.

In Canada, British Columbia and Ontario have both recently had governments committed to electoral reform. They established Citizens' Assemblies to decide on a new voting system: a more participatory and legitimising process than that proposed in the UK. British Columbia chose STV, and Ontario MMP, the same system used for the Scottish Parliament and Welsh Assembly. But only 37% of the people of Ontario voted for the new system in their 2007 referendum; and in BC, 39% of the people voted for STV in their second referendum in 2009 (58% had voted in favour in 2005, just short of the 60% threshold). The lesson for reformers is that it requires huge public information and education campaigns before any referendum on electoral reform, because the public know nothing about different voting systems, and care even less.

A critical factor could be the position that the Labour Party takes, or at the least the position taken by reformers in that party. If the Labour Party decides to oppose the referendum and/or oppose the reform if the referendum Bill is passed, the referendum's only real friends may be the Liberal Democrats. They could look isolated and be painted as self-interested. On the other hand if Labour reformers who supported the AV referendum pre-May 2010 come out strongly in favour of it, this would significantly boost its chances. Also crucial is the position of pro-reform organisations outside Westminster. AV is a compromise for them too. If they embrace it and campaign for it this would help raise public awareness and support. But if they try to go for perfection, for example by pressing for an additional referendum question on a real PR system, this could fragment the coalition of organisations supporting change, confuse the arguments and scupper the reform.

One way of increasing the referendum's chances would be to include the government's proposal to reduce the size of the House of Commons with the proposed switch to AV. There is an argument of principle for so doing, because the reduction would be as big a change to Parliament as the limited change in the voting system. There are also tactical advantages. It would give the Conservatives a stake in the referendum, even if the propositions were put as separate questions. And if the propositions were combined into a single question, it would greatly increase its chances of being carried.

3.2 Combining electoral reform for the Commons and the Lords

Another way of raising public interest might be to combine a referendum on the electoral system for the Commons with the issue of an elected House of Lords. The latter is a far bigger change, constitutionally and politically, than a switch from FPTP to AV for the Commons, and more deserving of a referendum. Combining the two issues would help

to foster a more joined up debate about the electoral system for the Commons and the Lords; and it would force electoral reformers to ask themselves which chamber they wish to be more proportional.

Westminster is a bicameral parliament, and bicameralism works best when the two chambers are complementary to each other, with different roles and different composition. Many reformers want PR for the House of Commons, and PR for an elected House of Lords. The Liberal Democrats are a good example: their ideal would be for both chambers to be elected by STV. This would make the composition of Commons and Lords very similar. The Conservatives' preference that both chambers be elected by first past the post is equally odd.

PR makes sense for one chamber, but not for both. As Meg Russell has argued, the choice of AV for the Commons and PR for the Lords could provide the best of both worlds (Russell, 2010). It would retain features that defenders of the present House of Commons hold dear: the strong link between MPs and their constituents, and the ability to form majority single party governments. Alongside this, in a PR-elected upper house, a different range of voices would be heard. This would also build on the current strengths of the Lords, whose party balance is already a lot more proportional than the Commons.

A joined up debate is not going to happen, because the government is keen to hold the referendum on AV as soon as possible. The Lib Dems believe that will maximise its prospects of success. If they thought harder about the risks of failure, they might feel there was less risk in taking things more slowly, and holding a joint referendum on electoral reform for the Commons and the Lords. That is not without risk: it could cumulate the opposition, and referendums held later in the parliament would have less chance of success. But it would present a nice dilemma for Labour, because in their late conversion to AV a double referendum on AV for the Commons and a PR elected Lords is exactly what their manifesto proposed.

3.3 Reducing the size of the House of Commons

The House of Commons elected in 2010 has 650 members. The Conservative target is to reduce the House to 585 members, for the next general election to be held in 2015. The Lib Dem target is to reduce the House to 500 members. The parties have not yet agreed a compromise figure. Whatever the agreed target, the reduction will require a wholesale boundary review of all constituencies. For illustrative purposes, it is assumed the agreed target will be 585 members. That would require the removal of 65 constituencies, and raise the average size of each constituency from 70,000 to 77,000 electors.

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

3.3.1 Streamlining parliamentary boundary reviews

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

The legislation will need not just to specify the size of the reduction, but to speed up the process. This might include the following:

- Abolish Local Inquiries, and rely upon written representations only. This would be supported by most election experts. Half of all Inquiries result in no change at all. Of all the wards in areas for which Inquiries were held in the last periodic review, only 3% were moved between constituencies as a consequence.
- Abolish the consultation process altogether, and allow the Commissions' original recommendations to be final. This might save six months; but it might make the Commissions' recommendations more vulnerable to challenge in the courts, delaying the process even further
- Increase the staffing and resources of the Boundary Commission (and for England, the number of Commissioners). Increasing staffing and resources is what happened in 1992, when the Major government was very keen for the fourth periodic review to be completed before the next general election. The secretariat was increased from 12 to 40 staff, and a target end date set of December 1994. The review, which had started in February 1991, was completed in April 1995, and the report submitted to Parliament in June.

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

Legislation will be required to reduce the size of the Commons and to give the parliamentary boundary commissions new marching orders. It will not be easy to introduce legislation quickly, because there are some difficult issues to be resolved first:

- The timescale for the reviews: by what end date will the commissions be asked to report?
- The new procedure. Will Local Inquiries be abolished? Will consultation be abolished altogether?

- The body in overall charge: should this be the Ministry of Justice, or the Electoral Commission?
- The leaders of the Boundary Commissions. Should they continue to be serving judges?
- The electoral quota: will it be the same across the UK? Will Wales or Northern Ireland be allowed to preserve their existing quotas? Or will there be a devolution discount and proportionately larger constituencies in Scotland, Wales and Northern Ireland?
- The rules of the different commissions (which have diverged in their interpretation): will they be harmonised? (Butler 1992; Rossiter, Johnston and Pattie 1999)
- Parity. At the last review, 87% of the constituencies in England and Wales came within 10% of the electoral quota. How far should the commissions go to override natural and local boundaries in the quest for parity?
- The building blocks for the exercise: if parity prevails, the commissions may need to cross many more local authority boundaries, and go smaller than wards and down to polling districts. In that case they would need a new IT system to handle polling district data, which would add a year to the exercise and also to the cost
- The effect on the size of the National Assembly for Wales. This is tied to the number of Welsh MPs, as Westminster constituencies are the basis for Assembly constituencies, and the Government of Wales Act 2006 requires there to be half as many regional list AMs as there are constituency ones. Decoupling the size of the National Assembly from the number of Westminster AMs – as happened for Scotland in 2004 – would be necessary for the Assembly to be able to do its job.

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

2.3.2 Timetable

If the government introduced legislation to abolish Local Inquiries, and was able sufficiently to increase the staffing and resources of the Boundary Commissions, a fast track timetable for policy planning, legislation, wholesale boundary reviews and their implementation might be as follows:

Date	Activity
2010	General Election
May	Establish Cabinet Committee to plan policy and legislation
July	White Paper
November	Bill introduced, Second Reading
2011	
July	Royal Assent
Sept	Boundary Commissions start reviews
2012	
April	Provisional recommendations published
July	End of consultation period
October	Final recommendations for new boundaries published
December	Report laid before Parliament
2013	
2014	
2015	
May	Next general election

This is a very fast timetable, which allows two years' leeway at the end. If the fixed term parliament legislation is passed first and establishes May 2015 as the date for the next general election, the pace could be slower. But the Conservatives will be anxious to achieve greater parity in the size of constituencies as soon as possible, in case the coalition agreement collapses and the election is held sooner than 2015. The legislation will be controversial in both Houses: in the Commons, where MPs will fear for their seats; and in the Lords, where concerns will be expressed about gerrymandering and curtailing of due process.

The start of the timetable mirrors Labour's fast track approach in 1997, when after a May election they published the white papers on devolution in Scotland and Wales in July, and introduced the Scotland and Government of Wales bills in the autumn. A generous margin is needed at the end of the process, between publication of the new boundaries and the date of the next election, for two reasons. In the past the English Boundary Commission has always overshot the target completion date. And the political parties might need more time for candidate selection when there are 65 fewer constituencies, than when there are the same number of seats but with slightly different boundaries. Electoral Returning Officers might also need more time if there are constituencies which cross local authority boundaries.

The timetable also raises a question about the link between changing constituency boundaries and the referendum on AV. As a matter of principle the referendum should possibly include the proposed reduction in the size of the House of Commons, since that is as big a change to Parliament as the switch to AV. It might also be shrewd political tactics: people are more likely to vote for reducing the Commons than for AV, so if the two propositions are combined into one it could increase the chances of a Yes vote. But for political activists it will be important to know what the new constituency boundaries are: they can then calculate what they think about the effects of larger constituencies and of AV on their candidate's chances. They are not a large proportion of the electorate; but they are a significant mobilising force when it comes to getting the vote out.

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

4 Reform of the House of Lords

Coalition commitment

We will establish a committee to bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation. The committee will come forward with a draft motion by December 2010. It is likely that this will advocate single long terms of office. It is also likely there will be a grandfathering system for current Peers. In the interim, Lords appointments will be made with the objective of creating a second chamber reflective of the share of the vote secured by the political parties in the last general election.

4.1 Past history of Lords reform, and previous committees

The main reform of the House of Lords was in 1999, when 90 per cent of the hereditary peers were removed. 10 per cent were allowed to remain until the second stage of reform, the creation of a 'more democratic and representative' second chamber. The Wakeham Royal Commission put forward proposals for such a second chamber, but they received a bad press for the small elected element they proposed. The Cabinet was divided, and referred the issue to Parliament. In 2003 the House of Commons rejected seven different options in a series of free votes.

In 2007 the House of Commons voted again, and this time voted for a wholly or mainly (80%) elected second chamber. The House of Lords voted for the second chamber to remain 100% appointed. Jack Straw then set up a cross-party group on Lords reform, which worked for 15 months, and his July 2008 white paper is in effect their report. For the new government to bring forward detailed proposals in six months is very ambitious; but if they take the July 2008 white paper as their starting point it could be done. It is the report of a cross-party group on which the Conservatives and Liberal Democrats were represented, and which reflects their views. There was a high degree of consensus about preserving the primacy of the House of Commons; retaining the distinctive role, functions and powers of the second chamber; and devising electoral arrangements to support that. The group articulated four key principles to maintain the difference between the two Houses:

- members of the second chamber should be elected on a different representative basis from members of the House of Commons;
- members of the second chamber should be able to bring independence of judgement to their work;
- members should serve a long term of office; and
- the second chamber should take account of the prevailing political view amongst the electorate, but also provide opportunities for independent and minority views to be represented.

4.2 The issues to be decided for an elected upper chamber

4.2.1 Size of the House, and appointed element

All parties want the second chamber to be much smaller than the present House, which has over 700 members. In the cross-party group Labour proposed a House of 400-450 members, while the Conservatives wanted only 250-300 members. If the non party crossbenchers are to be preserved, they have to be appointed, not elected. So those who wish to retain the crossbenchers must vote for 80% elected. A House of 300 members could consist of 240 elected members, and 60 appointed: an 80:20 ratio. A House of 450 could consist of 360 elected, and 90 appointed, with the same 80:20 ratio.

One unremarked consequence of having a wholly or largely elected House is that it would be composed predominantly of full time politicians. The current House has a strong part time element of members with careers and interests outside the House. That would largely disappear, except amongst the crossbenchers: many of whose voting records are poor, in part because of their outside commitments.

4.2.2 Electoral system and electoral cycle

In the cross party group the Conservatives argued for the second chamber to be elected by first past the post. It is a major step forward for them now to support a proportional voting system, as the coalition agreement does. The Lib Dems would prefer STV, but that is disliked by the other parties, in part because it involves politicians from the same party competing against each other in multi member constituencies. The most likely compromise will be to have multi member constituencies but to use party lists, the current voting system used for European parliamentary elections, and to use the same large constituencies as for the European Parliament (with the UK divided into 12 regions).

European Parliamentary elections use closed party lists. For the second chamber the party lists could be open or semi-open, enabling voters to express their own preference between party candidates by re-ordering the list. In practice that would make little difference to the outcome: in other countries few voters know enough about individual candidates to differentiate between them in that way. As critics have pointed out, party lists come close to the current system of appointment to the party benches in the House of Lords, where it is the party leadership which decides. But the Liberal Democrats now have a system of internal elections to select their nominees for the Lords, which other parties would be likely to follow.

The Conservatives and Labour party want elections to the second chamber to take place at the same time as elections to the House of Commons. The Liberal Democrats proposed elections every four years, on the same electoral cycle as the devolved assemblies. Now that they have agreement to fixed term parliaments, they are likely to agree to the second chamber sharing the same electoral cycle as the first chamber.

4.2.3 Length of term

To ensure a strong degree of independence, all parties are agreed on a single non-renewable term of 12-15 years. With fixed term, five year parliaments, and both chambers on the same electoral cycle, the term would be 15 years. If the fixed term is

changed to four years, it would be 12. There is also agreement on elections to the second chamber being staggered, with one third of the elected members being replaced at each election.

The 2008 white paper proposed a bar on appointed members of the second chamber standing for election, and *vice versa*. It also proposed a five year bar on members standing for election to the Commons, to prevent it being used as a launch pad for a political career there after leaving the second chamber. And it raised the question whether the bar should operate both ways.

4.2.4 Nomenclature

All parties are also agreed on breaking the link with the peerage. Peerages would still be awarded as part of the Honours system, but would not entitle the holder to membership of the second chamber. A majority on the cross party group favoured calling the new second chamber the Senate.

4.3 The obstacles to Lords reform

Given the seemingly strong cross-party agreement on these issues, it might be wondered why House of Lords reform has proved so difficult. The answers lie mainly inside Parliament and the parliamentary parties. All the parties are internally divided on Lords reform, with strong defenders of an elected or appointed House to be found spread across all parties. And even supporters of an all elected House disagree on some of the key issues set out above; so that agreement on the principle may conceal disagreement on some fundamental details.

A second difficulty is the degree of ignorance in the Commons about the House of Lords. The cross party group achieved a broad consensus because they were forced to think hard about the second chamber for over a year. Most MPs never think about the Lords, and never go there: in parliamentary language it really is 'the other place'. When they are forced to think about it, many find the idea of an elected second chamber a threat to their own sense of legitimacy, and primacy. There was a taste of that in the reaction of Scottish and Welsh MPs to the competition from the devolved assemblies. The 2008 white paper stated that the government welcomed a more confident and assertive second chamber. Not all MPs would necessarily agree.

A third difficulty is the tradition which has developed of holding free votes on Lords reform. The 2003 and 2007 votes were officially unwhipped, although there was some unofficial whipping behind the scenes. In 2007 more Conservative MPs voted against an elected second chamber than for it; although that might change now that half the Conservative MPs are new.[1] But if the free vote tradition is maintained, the government cannot be confident of getting its proposals through either House. On the other hand if the vote is whipped this will be hard for some members to swallow.

[1] The voting figures were that 98 Conservative MPs cast their votes against an 80% elected House, and only 80 in favour. 126 Conservative MPs voted against a 100% elected House, and only 57 in favour. The 100% elected option passed partly due to a lot of tactical voting by those on the Labour side opposed to an elected second chamber.

A fourth difficulty is resistance in the House of Lords itself. Unthinking critics assume that this is the only or the most important obstacle. There is certainly no appetite for an elected Lords amongst the Conservative peers, who voted strongly for an all appointed House in 2007: as did the House of Lords as a whole.[2] The Conservative leader in the Lords, Lord Strathclyde, is a loyal defender of his party's policy for an elected Lords, but managed to show only limited enthusiasm in his contributions to the Queen's Speech debate. But previous rounds of Lords reform suggest that the Lords will not resist if the government come forward with well thought through, balanced proposals, which seek to preserve the best features of the current House, and are willing to compromise. Preserving the cross benchers would be a good start. Allowing peers to retire and smoothing departures with redundancy packages will also help.

The final difficulty is media and public opinion. Public opinion polls over many years have shown support for a largely or wholly elected second chamber (with support for a largely elected chamber generally higher than that for a wholly elected one). When the Labour government looked set to cement a largely or wholly *appointed* House, it was widely criticised. But public and media opinion on this issue are complex, and contradictory. The public favour the idea of democracy, but polls also show that they value the independent and expert nature of the Lords. If this is seen to be threatened by Lords reform, public opinion could turn against the proposals. The same is true of the media. Both constituencies are only too ready to criticise government policy: by reversing one unpopular policy government should not assume that its replacement will be universally applauded. Arguments that expertise and independence should not be lost, and that we don't need 'more elected politicians' will have significant public resonance, and some support amongst key elements of the commentariat.

4.4 Interim appointments to the Lords

In the interim, Lords appointments will be made with the objective of creating a second chamber reflective of the share of the vote secured by the political parties in the last general election.

This statement continues the principle first articulated by the Blair government that so long as the Lords remains all appointed, the size of the party groups should broadly reflect their share of the votes cast at the previous general election. This aim of proportionality is gradually becoming a constitutional convention. At the 2010 election the three main parties' vote shares were: Conservative 36%, Labour 29%, Lib Dem 23%, and other parties 12%. As at 25 May 2010 the number of peers in the three party groups was Conservatives 185, Labour 210, Lib Dems 71 (and crossbenchers 181). With the new peerages announced on 28 May, the numbers are now Conservatives 201, Labour 239, Lib Dems 80.

The total number of party seats is now 520. If the party seats were reapportioned within this total to reflect their respective shares of the vote at the 2010 election, the Conservatives would have 213 (+12), Labour would have 172 (-67), and the Lib Dems 135 (+55). With hindsight it seems excessive of the outgoing Labour government to appoint 29 new Labour peers, when their numbers were already slightly more than

[2] The voting figures in the Lords were that 22 Conservative peers supported an 80% elected House, while 127 voted against; and 11 voted for 100% elected, with 136 against.

justified by their vote share from the 2005 election. And it was short sighted of the Conservatives and Liberal Democrats to oppose the retirement provisions in the Constitutional Reform and Governance Bill, which would have made it easier to replenish the numbers in the Lords without continuously adding to the cumulative total.

4.4.1 Rebalancing the numbers of Conservative and Liberal Democrat peers

Having had relatively few appointments in recent years compared to the other parties, the Conservative group has become older, and being older has a lower average attendance than the other party groups. Enabling peers to retire would enable a rejuvenation of the Conservative group, as well as helping to control overall numbers. But the figures above suggest that the Lib Dems have a stronger case to increase their numbers, if the policy is for the size of party groups to reflect the share of votes cast. On a perfect apportionment the Lib Dems would be entitled to four new peers for every new Conservative. How many new peers should the new government seek to appoint, and how fast?

Before the election the Conservative leader in the Lords, Lord Strathclyde said he needed 40 additional peers. Had the Conservatives won outright they would probably have given him those numbers: not immediately, but over the course of the Parliament. Liberal Democrat protests would have been ignored. But the Lib Dems are now in the government, and Nick Clegg has the policy lead on Lords reform. The Lib Dems could be generous towards their coalition partners, and suggest that appointments be made in the ratio of 2:1 Lib Dem to Conservative peers. And they could be gradualist, aiming to narrow the gap between the Conservative and Labour groups over the course of the Parliament, as Labour themselves did after 1997.

The Labour government for a long time was very restrained in its own rebalancing. It was not until 2006 that the Labour group in the Lords first overtook the size of the Conservative group, as shown in Figure 4.1 below.

Figure 4.1 Size of party groups in House of Lords 1997 to 2010

Year	Lab	Con	Lib Dem	Total size of House	Difference between Lab and Con
1997	116	477	57		- 361
1998	157	495	68	1146	- 338
1999	175	476	69	1165	- 301
2000	181	232	54	662	- 51
2001	199	231	62	688	- 32
2002	200	221	65	700	- 21
2003	188	215	65	679	- 27
2004	181	210	64	664	- 29
2005	201	202	68	691	- 1
2006	206	205	74	715	+ 1
2007	211	206	78	736	+ 5
2008	216	202	78	738	+ 14
2009	216	198	72	732	+ 18
2010	210	185	71	707	+25

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

There are other reasons for proceeding gradually. First, Cameron and Clegg will want to avoid accusations of patronage and flooding the Lords with placemen. They are also vulnerable to the charge that they are further increasing the size of an already over large House of Lords at the same time as they seek to reduce the size of the Commons. Second, quality matters more than quantity. The Lords is a useful recruiting ground for ministerial talent: it can be used to appoint people with a wide range of senior management and leadership experience which is in limited supply in the Commons. Third, there are logistical constraints. The House of Lords Appointments Commission (HoLAC) cannot process a large block of names all at once; and the House of Lords has run out of space, and will be hard pressed to find office space for all the new peers.

Figure 4.2 Gradual rebalancing of party groups 2010 to 2015

	Con	Lab	Lib Dem	Total	Difference bet Con and Lab
2010	201	239	80	520	- 38
2011	203	233	84	520	- 30
2012	205	227	88	520	- 22
2013	207	221	92	520	- 14
2014	209	215	96	520	- 6
2015	211	209	100	520	+ 2

Figure 4.2 shows a restrained approach, in which the objective is gradually to rebalance the party groups without further increasing the size of the House. It is in effect a policy of 'one out, one in' which is based upon natural wastage in the Labour group allowing gradual replenishment of the other groups. The assumption is that the Labour group will shrink by six members each year (deaths in the House of Lords have averaged around 18 a year).[3] These six places are then allocated 2:1 to the Lib Dems and Conservatives, so the Lib Dems get a net gain of four peers each year and the Conservatives two. (Lib Dem and Conservative peers will also die, so in practice there might be space for six new Lib Dem peers to be appointed each year, and eight Conservatives). The Conservatives may find this painfully slow. They need to be reminded that it took Labour two parliaments, from 1997 to 2005, before the Labour group matched the Conservative group. And if they want to move faster they should change the law to allow retirement. That would create more vacancies amongst the Conservatives, and allow the Labour group to shrink faster.

So long as the Conservative and Labour groups remain broadly of equal size, the actual size of the Conservative group will not make much difference to how often the

[3] In practice the deaths are not evenly spread across the three party groups. Because the Conservative group is older, their death rate is higher. But that need not undermine the general principle, that the Labour group should be allowed to deplete; with any vacancies in the Labour group being allocated instead to the Conservatives and Liberal Democrats. The principle can be articulated formally as follows:
1 the total size of the three party groups shall not increase
2 the Conservative and Lib Dem groups shall be allowed to replace any natural wastage ('one out, one in')
3 the Labour group shall be allowed to deplete ('one out, none in')
4 vacancies in the Labour group shall be allocated to the Lib Dems and Conservatives in the ratio of 2:1.
Rules 1 to 3 should be applied until the Labour group has depleted to its proportionate vote share at the last election. The ratio in rule 4 is a matter for negotiation between the Conservatives and Liberal Democrats.

government is defeated in the Lords. Contrary to what might be supposed from the nominal size of the party groups and Crossbenchers, it is the Liberal Democrats who have determined the outcome of most divisions in the House of Lords. Although on paper the Crossbenchers are the largest group holding the balance of power, they attend to vote far less than party members (Russell and Sciara 2008). Because of their higher participation and high cohesiveness, in nine divisions out of ten it was the Liberal Democrat votes which determined whether the Labour government won or lost (Russell and Sciara 2007). The same is likely to hold true for the new government, unless the Lib Dem peers become less cohesive and more rebellious under the strains of coalition. The new government is in a much stronger position in the Lords than the Labour government was, because the pivotal votes of the Lib Dems will give it an effective majority in most divisions.

Before making any new appointments the new government will want to consult their respective leaders and chief whips in the Lords, to find out what kind of fresh appointments they would like to see. They should also consult the HoLAC chairman, Lord Jay. Strictly HoLAC has no locus in relation to party nominees save for vetting for propriety; but in 2006 the commission rejected several Labour nominees, leading to the 'cash for peerages' inquiry. HoLAC are now taking a broader interest in the balance of skills and experience in the Lords, and in 2009 they commissioned an audit of the career backgrounds of the current peers, which may serve to highlight gaps that need to be filled.

4.4.2 Strengthening the interim House

If the new government finds it cannot make progress with an elected House of Lords, it may want to fall back on a more modest package of reforms to strengthen the interim House. The last Parliament saw growing recognition that the interim House needs some interim reforms. In 2008 and 2009 Lord Steel of Aikwood introduced a bill which would put the HoLAC on a statutory basis; end the system of by-elections for replacing the 92 hereditary peers; enable peers to retire; and to be disciplined or expelled. The Labour government initially opposed the Steel bill on the ground that improving arrangements for the interim House might delay more comprehensive reform. But in the Constitutional Reform and Governance Bill introduced in July 2009 it later adopted three out of the four measures in the Steel bill. Neither the government nor the Conservatives wished to put the HoLAC on a statutory basis.

Part 3 of the Bill contained provisions to end the system of by-elections for hereditary peers. It also provided for a power to discipline peers through expulsion or suspension; and for retirement. In the wash-up in the last week of the Parliament the Conservatives opposed the inclusion of these clauses, and they were dropped to enable the rest of the bill to pass.

The new government may wish to consider re-introducing the provisions for discipline and retirement. Retirement is the more important issue, given concerns about not increasing the overall size of the Lords, and the age profile of the Conservative group. Lord Strathclyde might want to take soundings of the other groups to find out how many peers might be likely to retire. That in turn would depend on the retirement package on offer.

5 Reform of the House of Commons

Coalition commitments

We will bring forward the proposals of the Wright Committee for reform to the House of Commons in full – starting with the proposed committee for management of backbench business. A House Business Committee, to consider government business, will be established by the third year of the Parliament.

We will ensure that any petition that secures 100,000 signatures will be eligible for formal debate in Parliament. The petition with the most signatures will enable members of the public to table a bill eligible to be voted on in Parliament

We will bring forward early legislation to introduce a power of recall, allowing voters to force a by-election where an MP was found to have engaged in serious wrongdoing and having had a petition calling for a by-election signed by 10% of his or her constituents.

5.1 Giving more power to MPs over the parliamentary agenda

Following the MPs' expenses scandal, a Committee on Reform of the House of Commons was established in June 2009 chaired by Tony Wright MP. The Wright Committee reported in November, recommending the election of Select Committee chairs and members; new petitioning arrangements; and the establishment of a Backbench Business Committee, to give more power to MPs over the parliamentary agenda. In debates in February and March the Commons agreed to the recommendations on the election of Select Committees, and petitioning. It also agreed a Backbench Business Committee, but the government failed to find time to put in place the necessary Standing Orders.

Standing Order changes were made in the last Parliament for the election of Select Committee chairs, in a secret ballot of the whole House. The share of committee chairs, proportionate to party strength, was announced on 26 May, and the election is to be held on 9 June. Select Committee members will then be elected by each party group, also by secret ballot. There will be a trial period for new public petitioning procedures, with the ability to debate significant petitions in Westminster Hall.

The missing element is the proposed Backbench Business Committee. On 27 May Sir George Young, the Leader of the House, said that he proposed a debate on the Standing Orders for the new committee in the second week in June, and would table the appropriate motions in good time before the debate. He also gave a commitment that a House Business Committee would be established within three years. The proposals for a separate House and Backbench Business Committee derive from the Constitution Unit's 2007 report *The House Rules?*.

5.2 Public involvement in setting the parliamentary agenda

With the limited time available to them, the Wright Committee made only modest proposals for public initiation of parliamentary business. They backed existing proposals to establish a Petitions Committee, suggesting that this role be given on an experimental basis to the Procedure Committee. The coalition government have gone much further, building on Conservative proposals to enable the public directly to influence the parliamentary agenda. The Conservatives had proposed that a petition signed by 100,000 voters would trigger a formal debate, and a petition of one million electors could require Parliament to consider a bill (Cameron and Herbert, 2008; Cameron, 2009a).
This would introduce a significant element of direct democracy into our system of representative democracy. The hope is that giving citizens the initiative in this way would enable people to re-engage with politics, over which they feel they have little influence. The risk is that if Parliament repeatedly rejects petitions, it may reinforce people's sense of powerlessness.

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

The closest models to the government's proposals are the citizens' initiatives in New Zealand and British Columbia, both Westminster parliaments which have experimented in recent years with citizens' initiatives. Details are in Figure 5.1.

Figure 5.1 Citizens' Initiatives in British Columbia and New Zealand

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

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

The topics of the three referendums were: not reducing the number of professional fire-fighters (organised by their union); reducing the size of Parliament from 120 to 99 members; and imposing minimum sentences and hard labour for all serious violent offences. The second was passed by 80%, and the third by 90%, but both were ignored by Parliament. In 2008 the Clerk declared that a petition to reverse an 'anti-smacking' law had reached the requisite number of signatures; but when inspected by officials, a sample of 30,000 signatures revealed too many inconsistencies.

The experience from British Columbia and New Zealand suggests the following procedural issues to be resolved:

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

A threshold of 100,000 signatures is about 0.2 per cent of registered electors. A successful petition would require Parliament to consider the issue, but not be binding: as in British Columbia and New Zealand. This must be right, if direct democracy is not to override representative democracy; but it risks raising expectations about the prospects of a petition leading to a change in the law. Cameron has said:

> We'll create a right of initiative nationally, where if you collect enough signatures you can get your proposals debated in the House of Commons and become law (Cameron 2009a).

It is worth recalling that in British Columbia and New Zealand not a single petition has become law.

5.3 Right of recall

All three of the major political parties had very similar proposals in their manifestos for a right of recall, based upon a finding of wrongdoing as the initial trigger. The key question here is who decides that an MP has been guilty of 'serious wrongdoing'. Should it be the Parliamentary Commissioner for Standards; the Commons Standards and Privileges Committee; the House as a whole; or the courts? The recent episode involving David Laws MP illustrates the difficulties. The *Daily Telegraph* alleged he had been guilty of wrongdoing over his expenses, and that was enough to force his resignation. But the political parties do not want to create an open season for the media or political opponents to campaign for the removal of MPs they dislike, which is effectively the system in British Columbia: see Figure 5.2 below. They want the right of recall only to be available for an MP who has been formally found guilty of serious wrongdoing, not simply tried by the media.

The best forum to determine serious wrongdoing is the Standards and Privileges Committee, if the Commons do not want to cede disciplinary jurisdiction to the courts (and not all wrongdoing will necessarily be criminal). But in the past the committee has been accused of being subject to party political influence, and treating frontbenchers more leniently than backbenchers. In the last parliament the government agreed to forfeit its usual majority, which helps in terms of party balance. If further stiffening were required, the Conservatives might revive their proposal that the committee be augmented by three independent non-MPs.

The second question is the threshold for a recall petition, and verifying the requisite number of signatures. This has been a problem in British Columbia, the only Westminster style parliament to have introduced a right of recall (see Figure 5.2). An electoral register of signatures must be maintained. This may be achieved with individual voter registration (see ch 8.1); at present only voters registered for a postal vote have to submit their signature. Verification of signatures should be done by the Electoral Registration Officer.

Figure 5.2 The right of recall in British Columbia, Canada

- BC is the only parliamentary system similar to the UK which has the right of recall. Registered voters in provincial electoral districts can petition to have a sitting Member of the Legislative Assembly ('MLAs') removed from office. If the petition is successful, the MLA is automatically recalled and a by-election is held.
- The recall process is triggered by the application of a registered voter for a petition. **There is no requirement of misconduct on the part of the MLA.** The applicant (known as the 'proponent') must simply give a statement of 200 words or less on why, in his/her opinion, the MLA should be recalled.
- The proponent has 60 days to collect signatures. The petition must be signed by more than 40% of the registered voters for the MLA's electoral district. If the petition achieves the requisite number of signatures, the MLA is automatically recalled and a by-election must be held. The recalled MLA is still eligible to run in the by-election.
- In practice, the right of recall has not proven very effective. Since its first use in December 1997, 22 recall efforts have been launched of which only two were submitted with enough signatures to proceed to the verification stage. One lacked sufficient eligible signatures; the other achieved its purpose when the MLA in question, Paul Reitsma, resigned when it looked as if the recall attempt would be successful.
- The 40% threshold has proved very difficult to meet. A significant proportion of the signatures collected are disqualified, mainly due to illegibility
- The right to recall has been subject to abuse. Some applications have been frivolous, while others have been linked to personal issues. Campaigns have been launched to harass or unseat opposition MLAs. There have been no recall attempts since 2003.

6 Devolution

Coalition commitments

We will implement the proposals of the Calman Commission and introduce a referendum on further Welsh devolution.

We recognise the concerns expressed by the Holtham Commission on the system of devolution funding. However, at this time, the priority must be to reduce the deficit and therefore any change to the system must await the stabilisation of the public finances. Depending on the outcome of the forthcoming referendum, we will establish a process similar to the Calman Commission for the Welsh Assembly.

We will continue to promote peace, stability, and economic prosperity in Northern Ireland, standing firmly behind the agreements negotiated and institutions they establish. We will work to bring Northern Ireland back into the mainstream of UK politics, including producing a government paper examining potential mechanisms for changing the corporation tax rate in Northern Ireland.

We will review the control and use of accumulated and future revenues from the Fossil Fuel Levy in Scotland.

We will establish a commission to consider the 'West Lothian question'.

6.1 Devolution finance

The thread running through a lot of these commitments is growing tensions over devolution finance. The big cuts in public spending will inevitably lead to cuts in the budgets of the devolved administrations; but there has been a growing realisation that the current system for funding devolution is unsustainable. The Scottish, Welsh and Northern Irish governments are funded by single block grants, with an annual adjustment by a population-based formula (the Barnett formula) to reflect changes in equivalent spending in England. The formula was meant to deliver convergence on English spending levels (the 'Barnett squeeze'), but has not done so. Its demise has long been predicted, but the difficulty has been to come up with an acceptable alternative.

In summer 2009 three separate reports were published, all highly critical of the Barnett formula, and devolution funding arrangements more generally. A House of Lords *ad hoc* Select Committee concluded that the Barnett Formula should no longer be used, but be replaced by a needs-based system. Relative need should be decided using a small number of need indicators, which are regularly reviewed by an independent, expert body. The committee was aware of the political sensitivity of any change to the funding formula, which inevitably creates winners and losers. They stopped short of proposing specific indicators, let alone numbers, but suggested the transition period could be three years for countries receiving increased grants, seven years for those whose grant is reduced.

In the same month the Holtham Commission on Funding and Finance for Wales published its first report. It warned that the Barnett squeeze would cause Wales to

become increasingly underfunded relative to its needs, creating an urgent requirement to reform the funding arrangements for Wales. The Holtham Working Party on Needs Assessment did discuss possible needs indicators. Application of those indicators to Scotland would lead to a cut in the Scottish government budget of around £4.5bn, illustrating the political sensitivities. Holtham followed in the footsteps of the Calman Commission on Scottish Devolution, which set out a blueprint for much wider reform of the devolution funding arrangements, accepting that a grant should be needs-based, and is the most important of the three reports (Calman, June 2009).

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

In addition to the question of fiscal powers, the other issues to be addressed are the amount of the block grant, and how the block grant is calculated and administered. The Lords Select Committee report was pretty critical of the Treasury's position as 'judge in its own cause' of how Barnett works. Changing that would require an independent arbiter to determine application of the Treasury's Statement of Funding Policy (a proto-Independent Finance Commission). This is something the government can do in the medium term, if it is willing to challenge the Treasury's conception of its own role, as it is cost-neutral. It is also something that the Scottish government supports.

6.1.1 Devolution finance in Scotland: implementing Calman

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

Last November the previous government accepted almost all Calman's recommendations, in particular the devolution of 10p in the pound of income tax (Scotland Office, 2009). The intention was to introduce a new Scotland Bill as soon as possible in the new Parliament, with implementation of the financial arrangements during the next term of the Scottish Parliament (2011-15). The new government's policy is likely to be very similar: the Conservative manifesto had a commitment to a White Paper by May 2011, and legislation by 2015. There are no other big taxes which can easily be devolved, although it could devolve more points of income tax than 10p. The big decision is whether to move over time towards a needs-based formula: a policy which would almost certainly disadvantage Scotland, which does well out of the Barnett formula. Devising a new formula based upon relative need would need to be a task for an independent commission, with representatives from all three devolved territories. The Scottish government will protest at any reduction to its budget; but the UK government needs to bring home the argument that if Scotland had greater freedom to levy its own taxes, its budget in future need not be reduced. It would be a matter of choice for the Scottish

government, which could levy additional tax if it wanted to maintain additional service standards.

Crucial to this is whether the Scottish rate operates on real revenues (as Calman recommended, after a transition period), or on Treasury estimates of Scottish revenue (as the November white paper said). The latter risks substituting one form of Treasury control for another, which is disadvantageous to Scotland both in terms of public spending and wider economic/fiscal respects. The Scottish government is opposed to Treasury estimates; if it is to have fiscal autonomy, it wants that to be based on real revenues.

On the fossil fuel levy, this is a small gesture towards the Scottish government's demands that the UK government release £700 million to give Scotland a fiscal stimulus during the economic crisis. Alex Salmond has asked for £350m in accelerated capital spending, £165m in London Olympic consequentials plus £180m from the fossil fuel levy held in London. The Liberal Democrats had a manifesto commitment to release the accumulated proceeds of the fossil fuel levy. The new government has agreed to do that, and will probably continue to do so after its review.

6.1.2 Devolution in Wales: the Holtham commission

The Holtham Commission has yet to publish its final report, due in June; but the interim report last July sounded a strong warning that Wales is becoming increasingly underfunded relative to its needs. The new UK government's response that Wales can expect no special favours until the public finances have been stabilised is understandable. But it is a little odd to publish a response before Holtham has reported. And it is even odder to propose as the next step 'a process similar to the Calman Commission for the Welsh Assembly'. First, because the Holtham Commission is the finance equivalent of the Calman Commission in Wales (with powers being the province of the All Wales Convention). Second, because any further steps need to be decided in cooperation with the Welsh Assembly Government, not unilaterally by the UK government. And third, because the next step is not obviously a unilateral or even bilateral one, but a multilateral commission to devise a needs-based formula for all the devolved territories of the UK: not further one-off solutions with separate special deals.

6.1.3 Devolution finance in Northern Ireland: corporation tax

The offer of examining ways of changing the rate of corporation tax in Northern Ireland is a gesture to the view amongst politicians there that this would help them compete with the lower tax rate in the Republic. But the policy and economic objections are strong, and the option was rejected by the inquiry carried out for the Labour government by Sir David Varney in 2007. Varney's conclusions were that:

> … in considering the costs and benefits for Northern Ireland in isolation, a clear and unambiguous case for a 12.5 per cent rate of corporation tax cannot be made.
> It is clear from this initial assessment that there would be an up-front cost of near £300 million per annum in lost corporation tax receipts, with no cost recovery in terms of tax receipts in a reasonable period of time.
>
> From a UK-wide perspective, the overall case against a reduction in the corporation tax rate in Northern Ireland is more marked. The likely displacement of both capital

> and profits from the rest of the UK, and the fact that this would be subject to a lower rate of corporation tax, mean that a reduced rate of corporation tax for Northern Ireland would certainly come at a long-term cost in reduced resources to be shared by the UK regions or in the financing of public services. The policy would result in a net cost of about £2.2 billion over ten years, with no prospect of full cost recovery over the long run (Varney, 2007).

Varney is gently saying that the proposal makes no sense. It certainly makes little sense in terms of the economics of fiscal federalism. It would only work if there were no circumstances in which Northern Ireland could get a bail-out if corporation tax revenues under-delivered, when all previous experience of the begging bowl politics of Northern Ireland suggests that is unlikely. The Scottish government would use it as a precedent for the devolution of corporation tax rates in Scotland. At that point, macro-economic management of the UK economy would become significantly more difficult.

6.1.4 Devolution finance and Intergovernmental relations

The tensions and complications of devolution finance all lend support to a recommendation of the Calman Commission that Labour dropped: to establish a new committee as part of the ministerial structure underpinning intergovernmental relations, namely a Joint Ministerial Committee (Finance). The UK Government could call an early meeting of devolved finance ministers with the Chancellor and Chief Secretary to the Treasury to discuss the UK emergency budget, while those plans are still being formulated, to engage the devolved administrations in the process. One of the few benefits of David Laws' replacement as Chief Secretary by Danny Alexander is that the Treasury might become more devolution-sensitive: they should capitalise on Alexander's devolution expertise.

6.2 Referendum in Wales on primary legislative powers

The clear commitment to introduce a referendum on Welsh devolution is an advance on the 'offer' of a referendum in the 12 May coalition agreement. The only question remaining is the timing: will it be held in October 2010, as the National Assembly and Government are still hoping; or will it be deferred until spring 2011, when it risks getting caught up in the Assembly election campaign? The difficulty is that sections 103 and 104 of the Government of Wales Act 2006 lay down a detailed series of steps which must be gone through before the referendum can be held:

- The Welsh Assembly must resolve by a two thirds majority to recommend holding a referendum
- The First Minister gives notice in writing to the Secretary of State of that resolution
- The Secretary of State must draft an Order defining the question and regulating the conduct of the referendum
- The Secretary of State undertakes 'appropriate consultation' on the draft Order
- The draft Order is laid before and approved by each House of Parliament, accompanied by a report from the Electoral Commission on the intelligibility of the referendum question

The draft Order is approved by the Welsh Assembly, again by two thirds majority.
The Welsh Assembly held its 'trigger vote' to start the process on 9 February, approving the resolution by 53 votes to 0. The First Minister sent notice in writing of the resolution on 17 February. To prevent the UK government dragging its feet, the Act then allows 120 days for the draft Order to be laid before Parliament. That period will expire on 17 June. It now looks very tight for the Secretary of State to publish the draft Order and undertake the appropriate consultation before laying it before Parliament.

On 20 May Carwyn Jones, the Welsh First Minister, announced that he had written to Cheryl Gillan, the new Secretary of State for Wales, saying that he understood that a draft Order was almost ready for publication. To help speed things along, he also included a proposed question for the referendum (in Figure 8.1 below). He repeated the Assembly's strong preference for the referendum to be held in late October. If the Secretary of State fails or declines to lay the draft Order before Parliament by 17 June, she must write to the First Minister giving her reasons why. That is not fatal: the process can be started again.

An additional step is that the Electoral Commission is required to advise on the intelligibility of the question. They take a broad view of this role, and also advise on its fairness: it must not appear to favour one side or the other. They do this by testing different formulations of the question on focus groups. The Electoral Commission will also supervise the referendum. This includes nominating (and funding) umbrella campaigning bodies for both sides, as they did in the 2004 referendum in the North East of England, and policing spending limits for the umbrella group and other participants. A complicating factor for the Welsh referendum is that most participating bodies will be on the Yes side, with three of the four political parties committed to supporting a Yes vote, as well as other organisations including the official Yes campaign. That makes it harder for the Electoral Commission to apply the PPERA rules in a way that is both even handed and practical.

Approval of the parliamentary Orders and participation in the referendum campaign will be an early test of discipline within the coalition government. The 12 Conservative AMs in the Assembly are mostly in favour of primary powers, but the three Conservative MPs from Wales in the last Parliament were against (as are most Labour Welsh MPs). But there are now eight Conservative MPs from Wales: some devo-supporters, some devo-sceptics, and some devo-realists, who don't like it but recognise it is probably going to happen. The devo-sceptics may want press for the 'agree to disagree' provision over the referendum on AV to be extended to the Welsh referendum as well. The Conservative manifesto said there would be a 'free vote' in the referendum, but that has not found its way into the coalition agreement.

Figure 6.1 Carwyn Jones' proposed referendum question on primary legislative powers in Wales

At the moment the Assembly can make laws about some, but not all, things which only affect people in Wales. Parliament has decided that the Assembly should be able to pass its own laws for Wales on all devolved subjects. But this can only happen if voters in Wales support this in a referendum. The devolved subjects include health and social services, housing, education and local government. The laws could not be about social security, defence or foreign affairs.

Do you want the Assembly to have the power now to pass laws on all the subjects which are devolved to Wales?

YES
NO

6.3 Commission on the West Lothian question

The West Lothian question relates to two anomalies – of representation, and of legislation. The legislative one is inherent in a Union parliament. The representative one can be reduced, though not eliminated, by systems of proportional representation that would enable Scotland and Wales to elect more Conservative MPs and fewer Labour ones. When the Conservatives dismiss PR, they also dismiss this partial solution to the West Lothian Question.

So the first question the new government must decide is the terms of reference of the new commission. How widely will it be allowed to roam? Is it simply to work up a scheme for the Conservative policy of English votes on English laws; or can it also examine Liberal Democrat policies of a federal solution for the UK, or PR for the House of Commons, which would also help solve the West Lothian question?

6.3.1 An English Parliament

This is the solution propounded by the Campaign for an English Parliament. It would in effect create a federation of the four historic nations of the UK, with England having its own separate government as well as parliament. Such a federation could not work because England would be too dominant, with 85 per cent of the population. No heavyweight British politician has espoused the idea of an English Parliament. The Conservatives briefly flirted with the idea in 1999 under the early leadership of William Hague, but subsequently fell back on the policy of English votes on English laws. The Liberal Democrats support a federation based upon the nations of the UK, but with England broken into regions with strong regional assemblies.

6.3.2 English votes on English laws

English votes on English laws has been Conservative party policy for a long time, put forward in the 2001, 2005 and 2010 election manifestos. It was proposed in 2000 by the Norton Commission on Strengthening Parliament, and later by Sir Malcolm Rifkind, and Lord (Kenneth) Baker. Most recently it has been proposed by the Conservative

Democracy Task Force, in their 2008 report on the West Lothian Question. All these bodies developed outline schemes for English votes on English laws, but none really addressed the detail of how to make the scheme work. That is what the new Commission will have to do.

The Task Force proposed that:

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

By limiting the Committee and Report stage of Bills to English MPs, this scheme would protect England from having measures that a majority of English MPs found unacceptable being passed by non-English votes. However, its provisions for the Third Reading stage would also protect a government from having measures relating to England which it found unacceptable foisted on it. In this respect the Task Force sought to modify previous party policy, and to address the criticism that full strength English votes on English laws would be unworkable. Both sides would have an incentive to bargain, with political compromise offering a way of resolving any potential constitutional crisis. As Lord Hurd had earlier put it: 'The government of the United Kingdom would have to ensure that its English measures were acceptable to enough English MPs – or else not put them forward. There would be nothing extraordinary in this process: it is called politics.' (Hurd 2000).

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

The political difficulty lies in making the case for English votes on English laws when the last election has solved the political problem. The coalition government has a comfortable majority of MPs in England: 340 against Labour's 191. It risks looking defeatist if it seeks to inoculate itself against a future scenario when it has lost its majority again. It will also face the charge that it is creating two classes of MPs, ending the traditional reciprocity whereby all members can vote on all matters. By ending the equal voting rights of all MPs, the Conservatives could no longer claim to be Unionist, but would risk being perceived as an English party.

6.3.3 Terms of reference for the Commission

Much will depend on the terms of reference of the commission on the West Lothian question, its members and its chair. If the government wants it to focus on the Conservative agenda, it should be directed to devise a workable scheme for English votes on English laws in the House of Commons, and to ignore any wider solutions. It might also be sensible to make it a parliamentary commission, like the Wright committee, with parliamentary clerks able to advise on all the complications of parliamentary procedure; and Parliamentary Counsel to advise on what counts as an 'English law'. The chair should be a Conservative MP, committed to devising a workable solution. The committee needs to be all-party, and needs to include MPs from Scotland, Wales and Northern Ireland, because of the knock-on consequences of English legislation for the other parts of the UK (for example, an increase in student tuition fees).[4] The committee should not be frightened of compromise solutions, and experimental or pilot phases to test how its proposals might work in practice.

Ultimately whether any changes result will depend on the attitude of the Liberal Democrats, and their willingness to support what may prove to be an unworkable policy. Nick Clegg is the lead minister in the government, as the Minister in charge of political reforms, but Sir George Young will be an important voice on the workability of any solution, as Leader of the House of Commons.

[4] A partial answer here would be institutional reform of how the block grant works to limit the direct impact of decisions for England on public spending in Scotland, Wales and Northern Ireland: see section 6.1. This is pretty much cost-neutral, so could be delivered in the short term.

7 Europe: Treaties, Referendums and Sovereignty

Coalition commitments

We will ensure there is no further transfer of sovereignty or powers over the course of the next Parliament.

We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a 'referendum lock'. We will amend the 1972 European Communities Act so that the use of any *passerelle* would require primary legislation.

We will examine the case for a UK Sovereignty Bill to make it clear that ultimate authority remains with Parliament.

7.1 Referendum requirement for future EU Treaties

The Conservatives had promised a referendum on the Lisbon Treaty. The origin of the coalition government's policy of a 'referendum lock' is to be found in a speech given by David Cameron after ratification of the treaty, setting out the Conservatives' new policy on Europe:

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

7.1.1 Approval of EU Treaties

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

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

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

7.1.2 Will the new law be effective?

There are two questions here:

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

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

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

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

7.1.3 Which Treaties will be subject to the referendum requirement?

How will the new law identify which future treaties are subject to the referendum requirement? The coalition agreement specifies 'any proposed future treaty that transferred areas of power, or competences'. Not all EU Treaties necessarily involve transfers of power. So future accession Treaties will not be caught (e.g. Croatia); nor will those reorganising functions within the EU; or making changes in voting arrangements; or changes like the introduction of one Commissioner per member state.

There are also constant additions to the treaties already concluded by the European Community, Euratom or by the European Union with non-member States. Presumably these would not be regarded as increasing EU powers and so would also not be caught

by the referendum requirement. In practice, the powers of the EU have also grown through decisions of the ECJ, and through 'creeping competence'. These jurisprudential and incremental increases in the power of the EU would not be caught by the referendum requirement.

At its strongest, the transfer of power would mean conferring fresh powers in an area where previously the EU has had no competence. But in some cases the transfer of power may be relatively insignificant: does this justify holding a referendum? It may not be easy to define which treaties 'transfer power or competences to the EU' so as to require a referendum. And the government will be asked, who will decide? Will it be left ultimately to the courts to determine whether a Treaty comes into the defined category? Or will it be for ministers to certify: and can a ministerial certificate be put beyond challenge?

7.1.4 Restriction of *passerelle*

The coalition agreement also aims to prohibit the use of any *passerelle* as a bridge for the subsequent transfer of powers without further primary legislation. This also derives from Conservative concerns expressed by Cameron after the Lisbon Treaty:

> But people will rightly say that the Lisbon Treaty does not just transfer powers to Brussels today. It allows further powers to be transferred in the future, because it contains a mechanism to abolish vetoes and transfer power without the need for a new Treaty. We do not believe that any of these so-called ratchet clauses should be used to hand over more powers from Britain to the EU. Furthermore, we would change the law so that any use of a ratchet clause by a future government would require full approval by Parliament (Cameron 2009).

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

7.1.5 When would the future referendum be held?

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

7.1.6 What if the people voted No?

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

1. Do you wish the UK to remain a member of the EU?
2. On the assumption of continued UK membership, do you approve the UK's accession to the latest EU Treaty?

7.2 UK Sovereignty Bill

The idea of 'examining the case for a UK Sovereignty Bill' also derives from Conservative policy. In his same post-Lisbon Treaty speech, Cameron included a further commitment:

> Because we have no written constitution, unlike many other EU countries, we have no explicit legal guarantee that the last word on our laws stays in Britain. There is therefore a danger that, over time, our courts might come to regard ultimate authority as resting with the EU. So as well as making sure that further power cannot be handed to the EU without a referendum, we will also introduce a new law, in the form of a United Kingdom Sovereignty Bill, to make it clear that ultimate authority stays in this country, in our Parliament.
>
> This is not about Westminster striking down individual items of EU legislation. It is about an assurance that the final word on our laws is here in Britain. It would simply put Britain on a par with Germany, where the German Constitutional Court has consistently upheld - including most recently on the Lisbon treaty - that ultimate authority lies with the bodies established by the German Constitution. (Cameron 2009).

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

7.2.1 What is the objective?

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

7.2.2 What would a Sovereignty Bill say?

Drafting concentrates the mind. Is the objective something like the following, declaring to the courts that Parliament can if it wishes direct them not to apply EU law?

> This Act recognises the Queen in Parliament to be the primary source of law in the UK, and the ultimate source of all legal authority.
>
> If at any time Parliament decides to legislate in a way which is incompatible with EU law, and expressly so declares by disapplying the relevant provisions of the European Communities Act 1972 or the European Union (Amendment) Act 2008, the UK courts shall give effect to UK and not EU law.

7.2.3 What are the likely obstacles?

There will be three major sources of opposition, assuming the government has a sufficient majority to get its Sovereignty Bill through the Commons. The first is the House of Lords. The bill will be referred to the Lords Constitution Committee and to the EU Committee. Both committees are likely to report against the bill; the first on legal and constitutional grounds; the second because of the damage the bill would to the UK's standing in Europe. The government might seek to invoke the Salisbury convention; but although the convention applies to legislation included in a governing party's manifesto, it is less certain whether it applies to items in a coalition agreement. In the previous Parliament the Liberal Democrats said they no longer subscribed to the Salisbury convention. If the Lords decided to oppose the bill, the government might need to invoke the Parliament Acts to force the bill through.

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

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

7.2.4 Examining the case for a UK Sovereignty Bill

Finally, by what process will the new government 'examine the case for a UK Sovereignty bill'? The options include

- Internal Whitehall review, reporting to the Cabinet Committee on Europe
- Parliamentary review, by the EU Committee in the Commons or the Lords
- Independent review by a group of experts.

William Hague as Foreign Secretary is in the lead on this policy commitment. Which option to choose depends on what he and the government hope to achieve. The safest option is an internal Whitehall review, but that will not convince the Conservative Eurosceptics, who believe the FCO is irredeemably soft on Europe. A parliamentary committee which includes some Eurosceptics might be the best option: they would be able to make their case, but would be in a minority.

8 Electoral administration and regulation of political parties

Coalition commitments

We will reduce electoral fraud by speeding up the implementation of individual voter registration.

We will also pursue a detailed agreement on limiting donations and reforming party funding in order to remove big money from politics.

We will fund 200 all-postal primaries over this Parliament, targeted at seats which have not changed hands for many years. These funds will be allocated to all political parties with seats in Parliament, in proportion to their share of the total vote in the last general election.

8.1 Individual voter registration

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

The Conservatives and Liberal Democrats have criticised the long time scale, and want to speed up the process. There are three obstacles to doing so. The first is that it will require fresh legislation to depart from the gradual and voluntary approach in the 2009 Act. The second is an increase in the initial cost. The voluntary programme of IER is estimated to cost £45m in 2010-11, £30m in 2011-12, and £20m pa thereafter. Making the process compulsory would cost more initially, with £60m in Year 1, but overall the costs would be halved. The third difficulty is that compulsion from the start might damage public confidence in the new system, and put at risk the accuracy and integrity of the electoral roll. The Electoral Commission will be consulting about their evaluation approach, but they will be concerned not to lose voters off the register, to maintain integrity of the registration process and the confidence of electors, and to ensure that personal data is properly managed and protected.

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

8.2 Funding of political parties

The continuing reliance of the political parties on big donors can be seen from the latest declarations made by the parties to the Electoral Commission. In the first quarter of 2010 the Conservative party reported receiving donations totalling £12m, the Labour party £4m and the Liberal Democrats £2m. Almost 40 per cent of the Conservative party's donations came from companies, and 70 per cent of Labour's from trade unions. The Labour party reported loans outstanding of £10m, the Conservatives £3m and the Lib Dems £0.4m.

The big imbalance in the finances of the political parties is a serious impediment to reaching agreement. Five years ago, when the Conservatives were much weaker financially as well as electorally, they were more willing to engage in talks about party funding. At that time there were three reviews of the funding of political parties: by the Electoral Commission (2004), the Constitutional Affairs Select Committee (2006), and Sir Hayden Phillips (2007). Building on the previous reviews, Phillips concluded that the status quo was no longer sustainable. He recommended

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

The Phillips report was followed by inter party talks, with a draft agreement published in August 2007, but the talks were suspended in December. There had been two main obstacles: the Conservatives wanted the £50,000 cap on donations to apply to trade union contributions to the Labour party; and Labour wanted action to curb Lord Ashcroft's special fund for marginal constituencies. Specifically, Labour wanted the regulation of candidate spending to be brought into line with national spending in terms of the regulated period. This was in response to concerns over high levels of spending in marginal constituencies before the regulated period.

Phillips' main recommendations were broadly similar to the Conservative submission (*Clean Politics*: March 2006). But it is less likely now that that a Conservative-led government would want to implement the Phillips report. Conservative party finances are much healthier, and they will not want to propose additional state funding at a time of public spending cuts.

The Liberal Democrats have a much stronger interest in getting an agreement on party funding, but for them the corollary of limiting big donations is an increase in state funding. If it proves impossible to reach cross party agreement on a party funding regime which applies to all political parties, the Lib Dems may seek to negotiate an arrangement which allows them to retain some of their Short money. Short money is payable to the opposition parties in Parliament, with similar funding (Cranborne money) supporting the opposition parties in the Lords. In 2009-10 the Lib Dems received £1.75m in Short money, and £230k in Cranborne money (the Conservatives received £5m and £625k).

A report on 19 May suggested that the Liberal Democrats were hoping to get some continued funding, on a reduced basis. Michael Crick reported on his blog a statement from a Liberal Democrat spokesman saying:

> The current system of Short Money does not account for the complexity of situations where there is not a majority government. We are looking to … ensure that, as the smaller of the two coalition parties, the Liberal Democrats are able to maintain their operational independence in parliament.

But when he was asked about this at Business Questions on 3 June, the Leader of the House Sir George Young stated simply 'Short money is available to Opposition parties; it is not available to Government parties' (Hansard 3 June 2010 col 591).

8.3 Increasing party primaries

This proposal comes from the Conservative interest in using 'open primaries' to engage non-party members in the selection of party candidates. The Conservative policy is summarised in Figure 8.1 below. They pioneered the first open primary in Totnes in July 2009, when a local GP Dr Sarah Wollaston was selected, defeating a Conservative councillor and an elected Conservative mayor. She has since become an MP. From over 100 applicants the Conservative constituency association short listed three, and then all 68,000 voters in Totnes were sent postal ballot papers to select the candidate. 17,000 ballot papers were returned, half of them for Dr Wollaston. The primary cost £38,000, spent on distributing the ballot papers and paying an independent firm to supervise the count. In a second all-postal primary run by the Conservatives in Gosport in December 2009, 12,000 people voted for Caroline Dinenage to become the Conservative candidate. She has also since become an MP.

The proposal is to target safe seats, where the selection of the dominant party's candidate is often tantamount to election of the local MP. But there may be resentment from other political parties at being told by the Conservative party how to run their selection processes. Within political parties there may be tension between party headquarters and local constituencies of the kind which surfaced when the Labour party imposed all women shortlists on selected constituencies. Many party activists will be opposed, because election of the party candidate is one of the few real powers they have. And as primaries are extended, concerns may surface about their fairness. Because these are effectively private elections, there is no means of enforcing spending controls on the candidates; and with an all postal ballot, the risk of fraud increases, with none of the checks which are possible in public elections. Academics studying the effect of open primaries in other countries have noted that these can undermine party cohesion and accountability, as they weaken the links between representatives and local party members, and ultimately party leaders.

Figure 8.1 Conservative policy on all postal primaries
(Conservative party, 2010)

We will fund 200 all postal primaries over the next Parliament. These funds will be allocated to all political parties with seats in Parliament that they take up, in proportion to their share of the total vote in the last General Election. At an estimated cost of £40,000 per primary, this gives a total cost of £8 million, or £1.6 million a year over the course of a five year Parliament. To allow for differences in parties? timing, any money not used in the first year will be rolled over into the next year's pot. It would, of course, be up to the parties which constituencies they chose to use their allocation of primaries in.

In each constituency, the local party will sift through applications to produce a shortlist of not more than four candidates. Every voter, regardless of political allegiance, will receive a ballot paper and a freepost envelope to return it in. Candidates will be given 20 days between their short-listing and the close of voting and will be asked to observe a £200 cost limit when campaigning.

9 Freedom of information and Transparency

Coalition commitments

We will extend the scope of the Freedom of Information Act to provide greater transparency.

We will require public bodies to publish online the job titles of every member of staff and the salaries and expenses of senior officials … and organograms that include all positions in those bodies.

We will require full, online disclosure of all central government spending and contracts over £25,000.

We will create a new 'right to data' so that government-held datasets can be requested and used by the public, and then published on a regular basis.

We will regulate lobbying through introducing a statutory register of lobbyists and ensuring greater transparency.

9.1 Extending the scope of FOI

The main way of extending the scope of FOI is by applying it to additional bodies. Section 5 of the FOI Act allows the government to extend FOI to other bodies. On 30 March 2010 the Justice Minister Michael Wills announced that FOI would be extended to ACPO, the Financial Ombudsman Service, the Universities and Colleges Admission Service (UCAS), and Academy schools, on the basis that they all perform functions of a public nature. The Order still needs to be laid and debated by Parliament. The intention was for the Order to commence in October 2011.

The Conservatives have proposed extending the list of section 5 bodies considerably further by adding Network Rail, Northern Rock, the Carbon Trust, Energy Saving Trust, NHS Confederation, Local Government Association and Traffic Penalty Tribunals (Conservative party, 2010). They spoke of extending FOI to these bodies 'within weeks of the general election', but there will need to be consultation, the organisations are likely to resist, and those which are to be brought within FOI will need time to prepare.

If the same logic of taxpayer funding is applied to the government's proposals for free schools, they too should come within FOI. That could be done by the legislation for free schools including them within Schedule 1 of the FOI Act. The next big decision about the scope of FOI is whether to extend it to private contractors who build and maintain hospitals, schools, prisons and leisure facilities. But they do not perform 'functions of a public nature'; and since the new government is committed to a smaller state and less regulation, it will probably not wish to do so.

9.2 Online publication of government contracts, spending and salaries

This derives from a commitment given by David Cameron in his speech 'Giving Power to the People', in which he made two commitments to increase government transparency.

> We will publish every item of government spending over £25,000. It will all be there for an army of armchair auditors to go through, line by line, pound by pound, to hold wasteful government to account … And we're going to publish online all public sector salaries over £150,000 (Cameron, 2009; 2009b).

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

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

Cameron hopes that greater transparency will lead to spending restraint and lower public expenditure (Cameron 2009b). There have been no evaluations of the American initiatives, but the Texas state comptroller claims savings of $2.3m (an amount which could well be less than the cost of creating the accountability portal). So there is no evidence that these initiatives can generate significant reductions in public expenditure. Nor will greater transparency necessarily help to increase trust. Because the cases that get publicised tend to be negative examples of inefficiency and waste, greater transparency can actually lead to a decrease in trust (Hazell, Worthy and Glover 2010).

9.3 Publish government datasets

This also derives from American example: a commitment to publish government datasets.

> we will create a new 'right to data' so that further datasets can be requested by the public … This information will be published proactively and regularly - and in a standardised format so that it can be 'mashed up' and interacted with. (Cameron 2009).

Here the American precedent is the new federal website data.gov, which lists government datasets by agency and by category. It was launched in May 2009, initially with 47 datasets, but after its first year had 273,000 datasets. People can visit the site and overlay one dataset on another (mashups), or compile national or local maps to show comparative data on clean air or political donations or crime:

> With so much government data to work with, developers are creating a wide variety of applications, mashups, and visualizations. From crime statistics by neighborhood, to the best towns to find a job, to seeing the environmental health of your community – these applications arm citizens with the information they need to make decisions every day (data.gov Home page).

The British government followed suit in January 2010 with the launch of data.gov.uk, advised by Sir Tim Berners-Lee and Prof Nigel Shadbolt. They have brought together over 3000 datasets from across government which can be re-used by businesses and the public. Like its American equivalent, the site displays Apps created by users; and users can request new datasets. The crucial decision was whether to include Ordnance Survey mapping data, with a consequential loss of revenue. Ordnance Survey had forecast in 2009 that moving to a free model would cost between £500m and £1bn over the next five years. But in April 2010 they released 10 datasets online under a new initiative, OS OpenData (www.ordnancesurvey.co.uk/oswebsite/media/news/2010/April/OpenData.html).

The Conservatives had proposed a legally enforceable right to data, with a Right to Data Act giving a right of appeal if public bodies refuse requests for datasets (Conservative party, 2010). They may now be concerned about the implications for the public finances if all government datasets with a commercial value are made available free of charge. The implications for Trading Funds are discussed at http://www.appsi.gov.uk/2009/11/26/AnnouncementGreaterAccessToOrdnanceSurveyData

9.4 Statutory register of lobbyists

In his first speech as Deputy Prime Minister on political reform, Nick Clegg said on 19 May

> Not all lobbying is sleazy. Much of it serves a hugely important function, allowing different organisations and interests to make representations to politicians. But let's get real: this is a £2bn industry … (Clegg 2010).

Proposals for a statutory register of lobbyists are to be found in the Public Administration Committee report *Lobbying: Access and Influence in Whitehall* (HC 36, December 2008). PASC reported widespread concern that there was an inside track, largely drawn from the corporate world, who enjoyed privileged access and disproportionate influence. The solution was greater transparency, through registers of lobbyists, and their lobbying activity. PASC proposed a register of lobbying activity provided for in statute, independently managed and enforced, to include information provided by both lobbyists and those being lobbied.

This information would include:

- the names of the individuals carrying out lobbying activity and of any organisation employing or hiring them, whether a consultancy, law firm, corporation or campaigning organisation.
- in the case of multi-client consultancies, the names of their clients.
- information about any public office previously held by an individual lobbyist
- a list of the interests of decision makers within the public service (Ministers and senior public servants) and summaries of their career histories
- information about contacts between lobbyists and decision makers—essentially, diary records and minutes of meetings.

The PASC report has an Appendix giving details of the statutory regulation of lobbyists in Australia, Canada, the EU and the US. Their experience illustrates some of the issues to be worked through: of scope and thresholds, means of enforcement, costs of regulation, independence of the regulator, risk of bureaucratic overkill. The government will also need to decide whether to put the Advisory Committee on Business Appointments on a statutory footing, which they will need to do if they wish its advice to be binding rather than merely advisory. If its advice is to be binding there have to be sanctions for non-compliance, and sanctions have to be backed by law.

10 British Bill of Rights

Coalition commitment

We will establish a commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties.

10.1 All party support for British bill of rights

Both the Liberal Democrats and Conservatives had a commitment to introduce a British bill of rights. But the coalition government's policy represents a compromise by the Conservatives, because their commitment had been to repeal the Human Rights Act, and replace it with a British bill of rights which might be 'ECHR minus' rather than ECHR plus (Hazell 2010 at 63-4). The wording of the coalition agreement ('a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights') makes it quite clear that any British bill of rights must be ECHR plus.

A British bill of rights had been supported by all three of the main political parties (JUSTICE 2007), and the Brown government had done some preliminary work on it, issuing a Green Paper in 2009 (Ministry of Justice 2009). It is also the policy of Parliament, where the Joint Committee on Human Rights has strongly recommended the adoption of a British bill of rights, with a much more detailed report than the government, including a draft bill (JCHR 2008). But underneath this apparent agreement there are big differences of view between the political parties, and between individuals within the same party, about what a British bill of rights might contain, and how to get there.

10.2 British bill of rights: Contents

10.2.1 Additional legal and political rights

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

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

10.2.2 Social and economic rights

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

10.3 British bill of rights: Process

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

The new government has realised that to engage the public and develop better public understanding of the issues it cannot simply be a government-led exercise. But it is not yet clear whether the government's planned commission is to draft a British bill of rights, or to advise on the modalities of drafting one. Ken Clarke, previously said to be sceptical about a British bill of rights (*Daily Telegraph* 27 June 2006) is now in charge of the policy, and the terms of reference and membership and timetable of the commission will give some indication of how vigorously he wants to take it forward. In terms of public engagement, there is no single answer to how to engage effectively with the public in such a big constitutional exercise. The Australian state of Victoria did so through an expert four-person committee, which conducted an intensive six-month consultation based on the government's preferred model. The JCHR concluded that an independent body should lead the consultation process, to command public confidence. It might also be more imaginative and energetic than a government-led exercise (JCHR 2008, ch 9). So the government has got the first step right, in deciding to establish a commission; but it needs to think through what the commission's task is going to be, and to allow stages in the process for government, Parliament and possibly further commissions (see timetable in s 8.5 below).

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

nationalists, who will stand by the commitment in the Belfast Agreement that Northern Ireland have its own Bill of Rights.

10.4 British bill of rights: Entrenchment

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

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

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

When the Human Rights Act was introduced entrenchment was considered difficult if not impossible. Attitudes are changing; and the Conservatives are themselves proposing entrenchment for other measures (see chapter 7). If entrenchment is desired, the first mechanism is preferable for a strong form of entrenchment, and the fourth for a weak form. Special majorities are so far unknown in the UK; and a referendum seems too high a threshold for what may sometimes be minor amendment.

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

10.5 Timetable for developing and adopting a British bill of rights

In the past David Cameron and Dominic Grieve have both emphasised the need for a very widespread process of public engagement, which must not be rushed. There is also the need to consult the devolved administrations. A possible timetable for a thorough and highly consultative process is set out below. If there was a desire to move faster, then publication of a draft bill for pre-legislative scrutiny could be dropped. But a lot turns on the work of the initial commission: if it is more of an expert than a consultative commission, there may need to be a second commission to engage in widespread public consultation once the government's have started to firm up.

Date	Stage in Process	Comments
2010		
	Decide terms of reference and timetable for independent commission. Establish commission	This may take 3-6 months
2011		
spring	Commission publishes interim report	Not compulsory, but a growing practice of commissions, to test out their initial thinking
autumn	Commission publishes final report	
2012		
spring	Government publishes White Paper	
summer	Devolved governments and assemblies are consulted	To establish the strength of support or resistance from Scot, Wales and N Ireland
autumn	JCHR inquiry and report on White Paper	To establish the strength of parliamentary support for the White Paper proposals
2013		
spring	Govt introduces draft British bill of rights to Parliament; referred to JCHR	To give the JCHR a second bite
summer	JCHR reports on pre-legislative scrutiny	
autumn	Bill of rights introduced to Parliament	
2014		
summer	Bill of rights passed	There was a 2 year period between passage and commencement of the Human Rights Act. Because of the 10 year experience of the HRA, one year's preparation should suffice for the BBOR
2015		
Summer	Bill of rights implemented. If timetable slips, this could be target date for passage of the bill of rights	15 June is the 800th anniversary of Magna Carta in 1215

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