

Constitution Unit

Monitor 62 / February 2016



The Lords: Crisis? What crisis?

As soon as the Conservatives narrowly won the 2015 general election it was easy to predict trouble ahead between the new government and the Lords (see our blog [here](#) and [Monitor 60](#), pages 6–7). While during the coalition years the Conservatives could largely rely on support from Liberal Democrat peers, they are now heavily outnumbered in the second chamber. This uncomfortable position – which has long faced Labour and Liberal governments – is a new one for a Conservative government.

Tensions were already apparent in the initial rash of [government defeats](#) in the Lords. By the middle of October there had been 17, compared to just three in the equivalent period under the coalition – much to ministers' frustration.

But tension peaked over decisions on the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations, taken in the Lords on 26 October. The regulations implemented significant changes to the tax credits regime, which the government estimated would save £4.4 billion; but did so via 'secondary' rather than 'primary' legislation. On such measures the Lords retains an absolute veto, which is in practice very rarely used. After a lengthy and heated debate, peers voted not to reject the regulations outright, instead deferring their approval. This was an innovative means of stalling the process without explicitly using the veto.

The government's public fury [began in advance of the vote](#). [Anonymous briefings](#) suggested that a defeat would result in 'foods' of new Conservative peers being created, or even in the 'suspension' of the House of Lords. Immediately after the defeats two things occurred. On 28 October ministers announced a review of the Lords' powers over delegated legislation, to be conducted by former Conservative Leader in the chamber Lord Strathclyde. On 25 November the Chancellor announced the abandonment of the proposed tax credit changes. Had the government responded by asking the Commons to vote for the changes (and had it won), the Lords would almost certainly have backed down.

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But peers' resistance stemmed partially from knowledge of [widespread unease among Conservative MPs](#). Lobbying by backbenchers was clearly crucial both to the Lords defeat, and to George Osborne's subsequent climbdown.

The [Strathclyde report](#) was published on 17 December (for a longer analysis of its contents and implications see [here](#)). It proposed three options for the Lords' power over secondary legislation: that the chamber should be removed from the process completely; that the existing conventions of restraint should be reaffirmed via parliamentary resolution; or that the government should amend the Statutory Instruments Act 1946 to ensure that any Lords veto could be overridden by a subsequent House of Commons vote. The third of these was his preferred proposal.

Tangled up in this row was not only the Lords' power over secondary legislation, but the Commons' financial primacy. Ministers claimed that peers had overstepped the mark by blocking a policy with such major financial implications. The Strathclyde report proposed reviewing the use of Commons-only procedures in such circumstances. These little-understood waters were further muddied by claims in early December of Commons financial privilege on the Lords amendments seeking to give 16–17-year-olds the vote in the EU referendum (see [here](#) and page 11).

These events have opened up uncomfortable questions, not only for the Lords but also the government. When the Lords [debated the Strathclyde report](#) on 13 January, there were claims that ministers are under pressure to implement major policy changes via secondary legislation, seemingly to avoid parliamentary resistance. Such claims – which reached the [front page of *The Independent*](#) on 19 January – are greatly exercising the Labour opposition. Various peers cited the [2014 Hansard Society study](#) showing that powers delegated to ministers have become ever more wide-ranging, and that the system is unnecessarily complex; this urged a major root and branch review of delegated powers. Meanwhile, threats of 'flooding' the chamber with Conservative peers highlighted the Prime Minister's untrammelled power of appointment, and his potential to manipulate the Lords' membership to his own ends. Indeed, since all peerages are formally bestowed by the monarch, this demonstrated how the Queen [could potentially be placed in a very uncomfortable position](#) indeed.

In the Lords debate, former Lord Chief Justice Lord Judge expressed strong concerns about the extent of delegated power, as did current Chair of the House of Lords Appointments Commission Lord Kakkar (both Crossbench). There were also various criticisms from senior Conservatives. Lord Higgins suggested that the Treasury was 'trying to pull a fast one' by putting such major policy change into secondary legislation. Lord Cormack noted that the tax credit defeat had been a good news story for the Lords (in a period when its media profile has otherwise been unremittingly bad – shown [here](#)). Lord Forsyth retrospectively thanked those sponsoring the defeats for getting the Chancellor out of a political fix, while Lord Norton argued that the Strathclyde report was based on a false premise (expanded [here](#)). The 2006 [Joint Committee on Conventions](#) – whose conclusions were approved by both Houses – explicitly stated that the veto could be used in 'exceptional circumstances' (as it had been in both 2007 and 2012). By the end of the debate it was unclear what convention the government believed had been breached, with Lords Leader Baroness Stowell seeming to imply that use of the veto would have been preferable to the kind of delay motion employed.

Commons Procedure Committee inquiries

The Procedure Committee has set itself an ambitious programme. As well as monitoring the implementation of EVEL (see above), it will conduct a [sCp5#nquiriyinqtooprivate](#)

Lords changes

Amidst the high-profile arguments with the government (see front page), various important changes have occurred in the Lords. On the same day as the tax credits votes, 26 October, the first ever woman bishop was introduced as one of the 26 Lords spiritual. Rachel Treweek takes her seat as the Bishop of Gloucester. In December the Procedure Committee [proposed changes to the leave of absence procedures](#) so that peers must explicitly state in their applications that they reasonably expect to return to active membership in the future – with an intention that those who cannot will instead take permanent retirement. This is likely to reduce the number of members on leave of absence (currently standing at 31). The outcome of the Lord Speaker's group on reducing the size of the House (reported in [Monitor 61](#), page 4) was still awaited at the time of writing.

Beyond membership, there are various procedural innovations. On 29 October the Liaison Committee [recommended establishment of an International Relations Committee](#) – in response to peers' long-held desire for a committee on foreign affairs. This was agreed on 10 November, and will take effect from the 2016–17 session. On 13 January a [major report](#) was published by the Leader's Group on Governance of the House, chaired by Baroness (Gillian) Shephard of Northwold. This proposes changes to the domestic committees, with abolition of some committees (e.g. Refreshments, Works of Art) in favour of a simplified structure, topped by a new senior committee chaired by the Lord Speaker. This would bring the Lords' arrangements into closer line with recent changes in the Commons. The report is yet to be debated.

Rebuilding the Palace: restoration or reform?

Unnoticed in the short-term horizon of political news, a momentous project is getting underway. The Palace of Westminster [is falling apart](#), and this Grade 1 listed building forming part of an UNESCO World Heritage Site, with a million visitors a year, cannot be patched and repaired indefinitely.

Senior officials _____

Executive



Cabinet committees and task forces

The Conservative government has fewer cabinet committees than its coalition predecessor, but many more implementation task forces. There are nine cabinet committees, of which the main ones of constitutional interest are the Constitutional Reform Committee and the European Committee on the EU Referendum, which is chaired by the Prime Minister. Reflecting his central role in the government, the Cabinet Office minister Oliver Letwin chairs the Constitutional Reform Committee and the Home Affairs Committee, and he is a member of every single cabinet committee, and of all the task forces except one. The full list of cabinet committees can be accessed [here](#).

Special advisers and extended

One of the many government documents published on 17 December, the last Commons sitting day before the Christmas recess, was a [list of special advisers and their salaries](#). This data was released six months later than the [equivalent list](#) published by the coalition government, which appeared a month after the coalition was formed in June 2010. The latest list shows that the new government has 93 special advisers, of whom one third (32) work in 10 Downing Street. The next largest group are in the Treasury, where the Chancellor of the Exchequer has ten: six special advisers and four more on his Council of Economic Advisers.

Half the cabinet (ten ministers) now have three special advisers rather than two. Oliver Letwin is the only cabinet minister to have none. [Extended ministerial offices](#) (EMOs), under Exception 4 to the Civil Service recruitment principles, have been established in the Cabinet Office, DEFRA, DCLG, the Department for Education and the Scotland Office; but we do not know how large those EMOs are, or how many additional appointments have been made.

Ministerial Code changes

In October the [new version of the Ministerial Code](#) was published, leading to an outcry at the omission of previous words reminding ministers of their duty to comply with international law and treaty obligations, and to uphold the administration of justice. The new version simply says that there is an 'overarching duty on ministers to comply with the law and to protect the integrity of public life'. This led the former Treasury Solicitor Sir Paul Jenkins to [say it was disingenuous of the Cabinet Office to present the changes as mere tidying up](#): he had seen at close hand 'the intense irritation these words caused the PM as he sought to avoid complying with our international legal obligations'. There followed [lively exchanges](#) on the UK Constitutional Law Association blog between critics and defenders of the change.

Freedom of information

As reported in [Monitor 61](#) (page 6) in the wake of [R \(Evans\) v Attorney General \[2015\] UKSC 21](#), and the [publication](#) of Prince Charles' so-called 'black spider letters' the government set up an [independent commission](#), headed by Lord Burns, to examine potentially changing the government veto power and the impact of FOI on decision-making and resources.

Since then the commission and its remit have been a source of considerable controversy. Its call for evidence received [30,000 submissions](#) and generated powerful opposition from civil society, the church and across the media including the [Guardian](#), [Daily Telegraph](#) and [Daily Mail](#). Opposition MPs reacted by [forming a cross-party counter commission](#) in November championing the expansion of FOI, and there was [vocal opposition](#) from within the Conservative party itself. ConservativeHome, seen as the voice of the grassroots of the Conservative party, is also opposed to any change and is [actually calling for the Act to be extended](#).

In December a [Sun editorial](#) quoted a 'senior Tory minister' as saying that 'nobody in the government wants to touch this now, it's a very hot political potato' and pointed out that the government itself has failed to present any evidence to the commission. In January it was [suggested](#) that any changes will be limited and that the Act may be extended to cover charities. Meanwhile under Scotland's separate FOI law covering devolved matters, there are [plans to consult on extending the Act to certain schools and prisons](#).

Our own [research](#) has found little solid evidence for some of the claims around FOI's negative impact. For more, see a new article by Ben Worthy and Robert Hazell, 'Disruptive, Dynamic and Democratic? Ten Years of Freedom of Information in the UK', available [here](#).

Individual electoral registration

The shift to a new system of electoral registration was completed in December 2015. The old system, under which one person per household registered all the eligible voters living there, has been replaced with individual electoral registration (IER). The move began in 2014. Initially, voters registered under the old system were 'carried over' to avoid large numbers of unintended disfranchisements. As reported in the [previous Monitor](#) (page 7), the government announced last summer that this transitional period would end a year earlier than the original plan of December 2016.

a 'reserved powers' approach to Welsh devolution by amending the Government of Wales Act 2006, and to devolve the limited range of further functions agreed through the 'St David's Day process'.

The bill outlines a highly complicated way of delivering reserved powers, largely because of its determination to maintain the status quo of a shared legal jurisdiction for England and Wales, and consequently to limit the extent to which the National Assembly can legislate on 'private law' or criminal law matters. A joint Constitution Unit/ Wales Governance Centre project has been considering it and published [its report](#) at the start of February, following the [earlier joint report](#) published in September 2015.

Criticism of the bill has been near-universal, from across the political spectrum as well as from professional organisations and civil society. It has included [the Welsh government](#), [the National Assembly's Constitutional and Legislative Affairs Committee](#) and many bodies in civil society. Perhaps the most damning criticism of the process came from the Assembly committee: 'a bill made for Wales not with Wales'. One body that has played a limited role in the debate has been the Commons [Welsh Affairs Committee](#), which had not yet reported by the end of January. It was due to be the key player in the process of pre-legislative consultation when announced by the Secretary of State, and concluded taking evidence at the beginning of December 2015.

Separately, in the [UK government's spending review and autumn statement](#), the Chancellor announced that the need for a referendum on the partial devolution of income tax will be removed, and that a 'Barnett floor' to protect the Welsh government's budget will be put in place (though [without specifying how that would work](#)).

What changes will be made to the draft bill, whether tax devolution will actually happen and in what way, remain to be seen. The ball is now back in the UK government's court. But the government has already missed its goals in two key respects. First, it is very hard to see how they will have a bill before parliament ahead of the Assembly elections in May 2016. That in turn will affect the timing of any significant change to the Assembly's powers. Second, there is no pressure on the Welsh government to make any move toward income tax devolution before that happens – necessary for Conservatives to be able to propose a tax cut in the Assembly elections. © 2015 The Constitution Unit, University of Oxford

The Agreement restored order to executive finances:
[next year's budget](#) is agreed. The provisions of the

New website on judicial power

A [new website](#) has been launched as part of Policy Exchange's Judicial Power project. The website, run by [Professor Graham Gee](#) and [Dr Richard Ekins](#), features frequent [blog posts](#) and [information about the project](#), which is seeking to understand and correct what the investigators consider to be an undue rise in judicial power.



Renegotiation of the terms of membership

The government has continued to work towards the referendum on the UK's membership of the European Union. This must be held by the end of 2017, but the Prime Minister has [strongly signalled](#) his preference for a vote in 2016.

Following several months of largely private negotiations with EU leaders, David Cameron set out his key goals for reform of the UK's relationship with the EU in a [letter](#) to European Council President Donald Tusk on 10 November. He said that he wanted change in four areas: protections for the interests and influence of non-Eurozone member states; an opt-out for the UK from 'ever closer union', alongside a stronger role for subsidiarity; and changes designed to reduce migration into the UK from other member states, notably through a four-year qualifying threshold for receipt of in-work visas. The PM indicated that, if satisfactory agreement was reached in all four areas, he would be 'ready to campaign with all my heart and soul to keep Britain inside a reformed European Union'.

Hopes were initially expressed that a deal could be struck on these matters at the meeting of the European Council on 17–18 December. Ahead of that meeting, [Donald Tusk wrote to Council members](#) reporting the results of bilateral discussions with all member states. He indicated that the most delicate area was 'the most delicate'; while agreement on

various changes was likely, there was 'no consensus' on the four

Discussions did take place at the December meeting, but without reaching conclusions. The [Prime Minister](#) following the meeting said only that there had been 'substantive and constructive debate' and that members would work towards 'mutually satisfactory solutions' at the next European Council meeting, on 18–19 February. On 2 February, [Tusk wrote to European Council members](#) setting out the draft of a proposed settlement. He and David Cameron hope this will form the basis for agreement at that meeting, which would allow the Prime Minister to call the referendum for late June. If resolution is delayed to the following Council meeting (on 17–18 March), then the earliest likely referendum date would be in mid-September.

Domestic developments

Meanwhile, domestic preparations for the referendum have been continuing. The enabling legislation – the [European Union Referendum Act](#) – received royal assent on 17 December. The most controversial point in its passage through the Lords (for its earlier Commons passage see [Monitor 61](#), page 12) concerned the franchise: ministers wanted to maintain the voting age at 18, but on [18 November](#) the Lords defeated the government to insert a threshold of 16. [Subsequently](#), however, the Lords narrowly decided not to insist upon this amendment after it was rejected by the Commons.

In early January, the Prime Minister [announced](#) that, while there will be a clear government position in the referendum, individual ministers will be allowed to deviate from that. This is the same approach as was adopted by Harold Wilson for the 1975 Common Market referendum. Ministers are bound to follow the government line of deciding which way to vote. Nevertheless, while David Cameron has increasingly signalled an expectation that he will campaign to stay in, Chris Grayling has [strongly](#) signalled that he will campaign to leave.

Beyond the current government, the pro-EU side received heavyweight support in December, when former Prime Minister [John Major](#) and former Conservative leader, Foreign Secretary, and Eurosceptic [William Hague](#) both said they would be voting to stay in.

In [Monitor 61](#) (pages 15–16) we introduced our new group of eight [Constitution Unit Fellows](#) – senior academics from outside UCL who will have strong links to the Unit and contribute to our research, publications, and events. In this and future issues a selection of them will provide updates on their research.

Justin Fisher: The impact of constituency campaigns on the 2015 general election

There is now a broad consensus that the campaigns which parties embark upon at constituency level can deliver electoral pay-offs. Broadly speaking, the more intensely parties campaign, the better they perform electorally. But the effects are not uniform. Campaigns tend to be more effective when elections are tighter, when parties are not particularly unpopular, and when the campaigns in the constituencies are co-ordinated and managed well by the parties at national level. Historically, Labour and the Liberal Democrats have been good at managing their campaigns and allocating resources in an electorally efficient manner. The Conservatives have tended to have had less success in this respect.

The constituency campaigning study, funded by the ESRC, measures campaign intensity by surveying candidates' election agents. The results are fascinating. 2015 was the election when the Conservatives really 'got

Bulletin Board

Events

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