

The Challenges Facing our Parliaments: How can we improve their performance?

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This article aims to cover a lot of ground, and in places skates lightly over some very big topics. I start by paying tribute to the achievements of the Australian Parliament in its first 100 years. Next I draw some comparisons between the New Zealand and the British constitutions. I then report on the constitutional revolution taking place in the United Kingdom. The British who have been a case of severely retarded constitutional development are rapidly catching up. But we have transformed our constitution without reforming our Parliament. And that brings me to my conclusion, and the theme for my title: why is it that Parliaments are so resistant to reform? And how can we set about improving their performance?

Australia's contribution to democracy

First let me pay tribute, in the hundredth anniversary year of the first Commonwealth elections in Australia, to the great achievements of the Commonwealth Parliament. It was the first national Parliament in the world to have been elected by universal male suffrage for both Houses: and from the second Commonwealth elections in 1903 by universal adult suffrage for men and women. The Australian Senate was from the start a directly elected second chamber. It ranks with the United States Senate in being one of the most powerful second chambers in the world; but direct election to the American Senate did not come until 1913. Third, in consequence of having such a powerful second chamber, the Constitution contains unique provisions for resolving a deadlock between the two Houses in the double dissolution procedure (section 57). The procedure is far from a dead letter, having

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been invoked six times in the first hundred years of Australia's Constitution, including four times in the past thirty years (1974, 1975, 1983 and 1987).

Since this year we celebrate the first elections, I want to dwell on Australia's contribution to voting and the franchise. In the conduct of elections Australia in some respects has led the world, and has certainly been well in advance of the United Kingdom. I should at this point acknowledge my debt to that great friend of Australia and elections specialist, Dr David Butler. He has charted all the innovations in democratic practice which were first introduced in Australia, and much later in the United Kingdom; and he has traced their origins back to the Chartists, who achieved little in Britain but whose ideas took root here, after they were transported to Australia. Five of the six original Chartist demands (universal suffrage, the secret ballot, equal electoral districts, no property qualification, and payment of members) are now almost everywhere accepted. It is notable that each of them was implemented in Australia well before the United Kingdom. Indeed the one Chartist demand which has nowhere been met (annual parliaments) has come closest to realisation in elections to the Australian Parliament, with the constitutional provision for electoral contests every three years.

Table 1
Innovation in elections in Australia and the United Kingdom

	<i>Date first introduced</i>	<i>Introduced in Commonwealth</i>	<i>Introduced in UK</i>
Secret ballot	1856 (Vic)	1901	1872
Voting on one day	1856 (Vic)	1902	1918
Fixed day of week for poll	1896 (SA)	1911	---
Ban on treating	1858 (NSW)	1902	1883
Postal voting	1890 (SA)	1902	1950

Australia leads the world with the secret ballot

Inspired by these Chartist principles, the first area in which Australian democracy left its mark across the world was in ensuring free and fair elections. Secret voting was introduced in Victoria in 1856, on a model which was adopted in the other colonies. It was widely copied in the United States and then in the United Kingdom as the 'Australian ballot'. Britain's Ballot Act of 1872 has had a long life, and the

essential provisions brought over from Australia in 1872 still regulate the casting and counting of votes in the UK.¹

Simultaneous with the secret ballot was the introduction of same day voting across the polity, in place of the unsystematised timetables of the old days. Australia introduced it almost immediately for the Commonwealth, but we had to wait until 1918 for this to be established in the United Kingdom. Australia was also early in the field in introducing a fixed day of the week (Saturday) for voting. Similarly with postal voting, introduced in 1902 at Commonwealth level in Australia, half a century later in the United Kingdom. And other innovations to make voting easier, voting before the day of the poll, or at mobile polling stations, again show Australia in the lead (1983), but with a lesser time lag before the United Kingdom catches up with our first experiments at the local government elections held in 2000.

Table 2
More Flexible Voting

	<i>Date first introduced</i>	<i>Introduced in Commonwealth</i>	<i>Introduced in UK</i>
Pre-poll voting	1983 (Aus)	1983	2000 (local)
Mobile polling stations	1971 (Qld)	1983	2000 (local)
Compulsory registration	1911 (Aus)	1911	1918
Compulsory voting	1914 (Qld)	1924	--
Machine counting of ballots	--	--	2000 (local)

Compulsory voting

Compulsory voting is another Australian innovation, introduced in Queensland in 1914 and in Australia in 1924. Despite the civil libertarian objections, it seems surprisingly popular with the Australian public: surveys show 70 per cent approval. It is even more popular with the politicians because it removes the burden of that central feature of electioneering elsewhere, getting your supporters to turn out and vote. Declining turnout is a growing cause of concern in all advanced democracies. Turnout at our local elections, long the lowest in Europe, is below 40 per cent. In the last European parliamentary elections in 1999 turnout fell to 24 per cent. At the last general election in June 2001 turnout fell by more than ten percentage points to 59 per cent, the lowest figure since 1918. These declining turnouts in Britain have

¹ Re-enacted most recently in the *Representation of the People Act 1983*.

brought compulsory voting onto the political agenda. An opinion poll conducted for the new Electoral Commission immediately after the 2001 general election found opinion split 49 per cent to 47 per cent over whether voting should be made compulsory. If the issue rises up the political agenda in the United Kingdom Australians will be called as witnesses in the British debate.

The Electoral Commission

I can find only one innovation — electronic counting of ballots — where the UK has led the way. We first tried it in the Greater London Authority elections in 2000. We must wait to see which country gets first to full electronic voting, or voting via the Internet. In future in the United Kingdom all this will be regulated by our new Electoral Commission, which came into being in early 2001, and will have lots to learn from its senior counterpart in Australia. The Australian Electoral Commission is an example to the world. One of the things we most admire is the boundary review in 1984 when it transformed the House of Representatives from 125 seats to 148, which involved redefining almost every constituency in the Commonwealth, but took a mere seven months. This is in stark contrast to the United Kingdom, where our last wholesale parliamentary boundary review took four years (1991–95), the one before that took seven (1976–83), and the current one is scheduled to take four or five years (2001–2005/6).

The Australian Electoral Commission is notable in many other respects: in the exemplary efficiency with which it compiles and maintains the electoral roll; in voter education, especially amongst the young, with its school visits and exhibitions, and those with special needs; and most recently in the world-wide development of election monitoring. Australia has done more than any other country in helping new democracies in the preparation of registers and the organisation of polling booths and vote counting. Australia has been among the world leaders in sending observers to monitor the fairness of those elections. I hope that as soon as our new Electoral Commission has found its feet they come to Australia to learn from these examples, and that in time we will be able to support Australia in some of those overseas missions.

Table 3
Extension of the Franchise

	<i>Date first introduced</i>	<i>Introduced in Commonwealth</i>	<i>Introduced in UK</i>
Universal male suffrage	1856 (SA)	1901	1885
Female suffrage	1894 (SA)	1902	1918

Universal suffrage	1894 (SA)	1902	1928
First female representative	1921 (WA)	1943	1919
End of property qualification	1856 (SA)	1901	1832/1918

Extension of the franchise

Australia moved to universal male suffrage and then to universal suffrage (aborigines excepted) long before the United Kingdom. South Australia led the way in 1856 with universal male suffrage. Female suffrage came early in local government, and was introduced at the legislative level in 1894, again by South Australia. It is notable how uncontentious was its adoption by the Commonwealth only two years after federation. In the British arguments about allowing women the right to vote during the next three decades Australia was much cited by the suffragettes as an example.

Women's representation was slow to follow women's suffrage. It was only in 1943, 24 years after Nancy Astor entered the British House of Commons, that Enid Lyons from Tasmania became the first woman member of the House of Representatives. In those same elections of 1943 Dorothy Tangney became the first woman elected to the Senate. As late as 1980 there was a House of Representatives with no women MHRs. However, in the 1998–2001 House there are 33 women MHRs — 22 per cent — which is better than the 18 per cent in our current House of Commons.²

Table 4
Fixed Terms and Referendums

	<i>Date first introduced</i>	<i>Introduced in Commonwealth</i>	<i>Introduced in UK</i>
State subsidy for campaign	1981 (NSW)	1984	--
Candidate's deposit	1872 (Qld)	1902	1918
Payment of members	1870 (Vic)	1901	1911
Fixed term parliaments	1995 (NSW)	--	--
First referendum	1898 (NSW)	1906	1975

² After doubling in the 1997 election, thanks to Labour's policy of all-women shortlists, the number of women in the House of Commons fell back slightly in 2001. Labour's 2001 manifesto contained a pledge to change the law to help increase women's representation.

The referendum

Last in my list of democratic innovations is the referendum. Australia has had more nationwide referendums than any country in the world except Switzerland. But Australia has beaten all other nations in its cautious attitude to constitutional change, with 36 of the 44 referendums being defeated. This is why Australia has been described as, constitutionally speaking, a ‘frozen continent’. In fact the Australian Constitution is not as rigid as that phrase implies. But it provides a marked contrast to the United Kingdom. Because if Australia constitutionally is frozen, the United Kingdom by comparison has become a molten cauldron or an erupting volcano.

A comparison between the New Zealand and British constitutions

Before I come on to the constitutional eruptions in the United Kingdom, let me offer some brief comments comparing the British and New Zealand constitutions. I am not going to attempt a systematic comparison. Rather I am going to offer some reflections, prompted by reading the papers from the April 2000 conference organised by the Institute of Policy Studies at Victoria University under the title *Building our Constitution*.³ I was struck by a number of parallels between the New Zealand situation and the United Kingdom, some of which will be very familiar, but some of which might spark something new.

Let me start with the familiar. We are two out of the three countries in the world without a written constitution: the third being Israel. In fact our constitutions are largely written, but in different documents at different times; strictly we should say they have never been codified into a single document.⁴ As a result our constitutions lack the checks and balances built into many written constitutions by the constitutional designers. This was exacerbated by the majoritarian voting system favoured in English speaking countries, known as first past the post, which delivers exaggerated majorities to the winning party. Our governments have typically enjoyed comfortable majorities, which has led single party governments to dominate the elected lower House, and be little troubled by opposition from a weak second chamber: so weak in the New Zealand case that the upper house was abolished in 1951 and, despite intermittent debate, has not been replaced.

The next set of similarities are also familiar: the remedies both countries have adopted to introduce some stronger checks and balances into the system. The main

³ Colin James ed., *Building our Constitution*, Institute of Policy Studies, Victoria University, Wellington 2000.

⁴ Private attempts have been made in both countries at codification: see the model Constitution Act of New Zealand in the Appendix of Geoffrey and Matthew Palmer, *Bridled Power*, Oxford University Press, NZ, 3rd edn 1997; and Institute for Public Policy Research, *A Written Constitution for the UK*, Mansell, 1993.

thing to note is how, as with Australia and voting reforms, New Zealand has been consistently in advance of the United Kingdom. New Zealand took the lead in introducing the Parliamentary Commissioner, known in both countries as the Ombudsman (NZ 1962, UK 1967); freedom of information legislation (NZ 1982, UK 2000); a justiciable Bill of Rights (NZ 1990, UK 1998); and proportional voting systems (NZ 1993, UK 1998, 1999). In the United Kingdom proportional voting has been introduced for the new assemblies in Scotland, Wales and Northern Ireland, and for elections to the European Parliament, but not yet for the House of Commons at Westminster.

But the next set of parallels are more speculative and may start to break new ground. They start with the proposition that both our constitutions include founding documents: in New Zealand the Treaty of Waitangi, in the United Kingdom the Treaty of Union of 1707 whereby Scotland, an independent state, agreed to merge with its larger neighbour England and Wales. Under the Treaty of Union the Scots preserved their separate judicial system, their separate civil and criminal law, their separate Church, the presbyterian Church of Scotland, their separate education system and system of local government. Although the Treaty of Union has been much amended by the Westminster Parliament, and some of its articles repealed, all these special features of Scottish government persist today.⁵

Scotland has only 9 per cent of the population of the United Kingdom, Wales 5 per cent and Northern Ireland 3 per cent. They are the original minorities in our multinational nation state. They have for some time had special treatment in the United Kingdom Parliament. For most of the past century Scotland and Wales have been over-represented at Westminster, with a quarter and a fifth more seats than they would be entitled to if we applied the English quota (Scotland has 72 seats when her strict entitlement would be 57; Wales 40 seats when the English quota would allow 33). They have special Ministers in the United Kingdom Cabinet: the three Secretaries of State, for Scotland, Wales and Northern Ireland. And they have special structures and procedures in the United Kingdom Parliament: the Scottish Grand Committee, consisting of all the MPs sitting for Scotland; Scottish Select Committee; and Scottish Standing Committee, for the committee stage of Scottish bills. There is a Welsh Grand, Select and Standing Committee; and a similar trio of committees for Northern Ireland. Westminster has been a three-in-one Parliament: it has been the parliament of the United Kingdom, but has special procedures whereby it also operates as the legislature for Scotland, Wales and Northern Ireland. Post-devolution — a story I shall tell in a moment — some of these Scottish, Welsh and Northern Irish procedures may become redundant. But at the same time Westminster will gradually become a four-in-one parliament, because it

⁵ In *MacCormick v Lord Advocate* (1953) Lord Cooper suggested that violation by Westminster of the fundamental terms of the Treaty of Union would be unlawful, but non-justiciable in a United Kingdom court.

needs to develop a more clearly defined and separate procedure when it operates as the parliament for England.

New Zealand readers will understand that I am offering points of comparison with the debate about Maori representation and whether that should take place in integrated or separate institutions. My next point about Maori representation and protection of minorities derives from recent thinking and developments in Northern Ireland. At present the Catholic nationalists are the minority community there; but if demographic trends continue the Protestant Unionists may find themselves in the minority within a couple of generations. That is what has brought the more far-sighted Unionist leaders to the negotiating table, and what led David Trimble to sign the Belfast Agreement on Good Friday in April 1998. The Belfast Agreement contains special safeguards derived from the consociational models of the Dutch political scientist Arend Lijphart, which ensure guarantees for the majority and the minority.⁶ The Executive will always contain Ministers representing the minority community, in proportion to their parties' strength in the Assembly. The First and Deputy First Minister are elected in a manner that requires the endorsement of both communities, ensuring that both First Ministers are broadly acceptable as well as representative of each community. And within the Assembly there is qualified majority voting to ensure that key decisions are taken on a cross-community basis. These are the election of First Minister, Deputy First Minister and Chair of the Assembly; approval of Standing Orders; and annual budget allocations. These must be approved not just by an overall majority in the Assembly; but this must include a majority of both nationalist and Unionist groups (parallel consent), or 60 per cent overall in the Assembly and 40 per cent of both the nationalist and Unionist groups (weighted majority).

My last reflection is provoked by reading Colin James' introduction to *Building our Constitution*, in the sections about multiculturalism and identity.⁷ The greatest identity crisis in New Zealand seems to be occurring in the majority community, as the Pakeha adjust to the renaissance in Maori identity and try to define who they are and what they stand for. Similarly in the United Kingdom devolution has triggered an identity crisis amongst the majority national community, the English. Devolution was a political response to an upsurge in assertiveness and confidence on the part of the Scots and the Welsh. As minority communities they have a clear sense of their identity, which they define *vis-à-vis* the majority: 60 per cent of Scots say they are Scottish not British, or more Scots than British, while only 12 per cent say the reverse.⁸ But the English majority are thoroughly confused, and always

⁶ Brendan O'Leary, *The British-Irish Agreement: Power-Sharing Plus*, Constitution Unit, University College London, June 1998.

⁷ Colin James, ed., *Building the Constitution*, Institute of Policy Studies, Victoria University Wellington, 2000, 19–21.

⁸ In response to the standard 'Moreno' questions to test multiple identities: see J. Curtice, 'The People's Verdict', in Robert Hazell *et al*, *The State and the Nations: The First Year of Devolution in the UK*, Imprint Academic, December 2000, 236.

have been, about our identity, because we conflate being English with being British and can not see the difference between the two. Devolution has led to a rash of pop psychology writing by journalists and academics about England and Englishness, which suggests the English have been provoked by devolution to go in search of our own identity: but I cannot claim we have found it yet. But that is not my field and I must get back to my main subject. I am a constitutional plumber, in my flights of fancy occasionally a constitutional architect. By this I mean that I try to design constitutional solutions which can give greater political voice to the different communities, while maintaining a stable state with strong political institutions at the centre. We have been doing some quite spectacular constitutional re-engineering in the United Kingdom, which I shall now come on to.

The constitutional revolution in the United Kingdom

Tony Blair has described his government's program of constitutional reform as 'the biggest programme of change to democracy ever proposed.'⁹ For once the politician's hyperbole was justified, because during his first term in government the British constitution has been transformed. We have held four referendums, all of them carried. They have been the precursor to introducing a parliament in Scotland, and assemblies in Wales and Northern Ireland; and a directly elected Mayor in London. By incorporating the European Convention on Human Rights into our domestic law we now have an enforceable bill of rights. We have reformed the House of Lords, by removing the hereditary peers; something which had eluded reformers in successive attempts going back to 1911. We have introduced a bewildering array of new voting systems, with three different forms of proportional voting being introduced in the new devolved assemblies, and a fourth in the elections for the European Parliament. We have just put in place in 2001 tight controls on party funding, and regulation of elections and referendums, to be policed by the new Electoral Commission. And we have a *Freedom of Information Act 2000*, enforced by an Information Commissioner.

Because of our unwritten constitution we have been able to do all this at what will strike Australians as quite indecent speed. Tables 5, 6 and 7 show the list of constitutional Acts passed in the first three sessions of Blair's new Labour Government.

Table 5
Constitutional Bills in Labour's First Year Legislative Program 1997–98

Devolution	<ul style="list-style-type: none"> • <i>Referendum (Scotland & Wales) Act 1997</i> • <i>Northern Ireland (Elections) Act 1998</i> • <i>Regional Development Agencies Act 1998</i>
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⁹ Speech to Labour Party conference, 4 October 1994.

	<ul style="list-style-type: none"> • <i>Government of Wales Act 1998</i> • <i>Scotland Act 1998</i> • <i>Northern Ireland Act 1998</i>
Europe (Amsterdam Treaty)	<i>European Communities (Amendment) Act 1998</i>
Incorporation of the European Convention on Human Rights	<i>Human Rights Act 1998</i>
Independence of the central bank	<i>Bank of England Act 1998</i>
Electoral Reform and party lists	<i>Registration of Political Parties Act 1998</i>
Elected Mayors	<i>Greater London Authority Referendum Act 1998</i>

A dozen in the first year alone. Strictly only nine of these 11 bills counted as first class constitutional measures, in the sense that their committee stage was taken on the floor of the House of Commons (the only way in our unwritten constitution by which we distinguish constitutional bills from ‘ordinary’ bills). Six of the bills were on what we call devolution. Three were relatively minor; the bills to authorise the referendums in Scotland and Wales, the elections in Northern Ireland, and the Regional Development Agencies which may be the first step towards regional government in England. But three are major, the three big devolution bills which involved the grant by Westminster of legislative power to the new Scottish Parliament and the assemblies in Wales and Northern Ireland.

Table 6
Constitutional Legislation in Second Session 1998–99

Electoral reform and proportional representation	<i>European Parliamentary Elections Act 1999</i>
Reform of House of Lords	<i>House of Lords Act 1999</i>
Elected Mayors	<ul style="list-style-type: none"> • <i>Greater London Authority Act 1999</i> • <i>Local Government Act 2000</i>

The other big change this session is the Human Rights Act. Australians will know from the debates of ten years ago what a big potential step this is; and New Zealanders will know from their actual experience of the last ten years of the *Bill of Rights Act* 1990. It represents a major constraint on executive discretion, and a significant shift in power from Parliament to the courts, which will put the judges and judicial appointments under the spotlight in a way which will be very new for us.

Table 7
Constitutional legislation in Third Session 1999–2000

Controls on party funding, creation of Electoral Commission, regulation of referendums	<i>Political Parties, Elections and Referendums Act</i> 2000
Freedom of information	<i>Freedom of Information Act</i> 2000
Cabinets and elected Mayors in local government	<i>Local Government Act</i> 2000
Removal of disqualification preventing Irish MPs sitting at Westminster	<i>Disqualifications Act</i> 2000

In the second session the pace of legislative change slowed but did not stop. The European Parliamentary Elections Act introduced regional list proportional representation in place of first past the post for European parliamentary elections. The Greater London Authority Act introduced the new elected Mayor for London. The *Local Government Act* 2000 will enable other towns and cities to opt for elected mayors, following local referendums. The first such referendums were held in June and July 2001 in Berwick-upon-Tweed, Cheltenham and Gloucester: in all three places the proposal for a directly elected mayor was defeated.

The big constitutional change in the second session is reform of the House of Lords. 90 per cent of the hereditary peers have been removed: 10 per cent were allowed to remain *pro tempore* as a concession to ease the passage of the bill. The Lords now consists of 700 members, unpaid, mostly part-time, and all appointed except the small rump of the hereditary peers. Blair has appointed just over 200 of these appointed peers, to redress the Conservative dominance, but has said that no single party should seek a majority in the Lords. He would prefer it to remain all appointed, but the Royal Commission which he established under Lord Wakeham to consider the next stage of Lords reform has recommended mixed composition, with a minority of elected members.¹⁰ In the last year of Blair's first term the next stage of reform appeared to be stalled, because the Government and Opposition could not agree on the proportion of elected members — should it be 16 per cent, as the Government favoured, or 35 per cent or more as favoured by the Conservatives?

¹⁰ *A House for the Future*, Report of the Royal Commission on Reform of the House of Lords, Cm 4534, January 2000.

But in the new Government's Queen's Speech in June 2001 there was the promise of legislation in the first session for the next round of Lords reform, after consultation.

There is nothing quite so big in the third session. The first bill, which establishes the Electoral Commission, is an interesting example of policy transfer from Australia. David Butler has long been an admirer of the Australian Electoral Commission, and an indefatigable campaigner for the establishment of an equivalent body in the United Kingdom. He will be particularly pleased that our new Electoral Commission has a very wide remit and powers. I wish I could say the same of our new Freedom of Information Act. It is not based on the Australian model. It would be a lot better if it were. Here we have learnt nothing from international experience, save in having an Information Commissioner to enforce the new regime. The United Kingdom Freedom of Information Act is a very restrictive piece of legislation. It will raise expectations which are not being matched by any additional resources, and I fear it will leave us with a lot of harassed officials and angry and disillusioned requesters.

Devolution to Scotland, Wales and the English regions

This quick canter over the Blair Government's constitutional reform program was to give the reader a sense of the whole. The next bit is also going to cover a lot of ground in a few words. Any one of these reforms deserves an article in its own right. I am going to dwell just on the biggest set of changes, represented by devolution, and then home in on the Scottish Parliament.

Devolution is not something invented by Blair. Indeed he is rather ambivalent about it. It has a long history in the United Kingdom, going back to Gladstone's attempts to grant Home Rule to Ireland in the 1880s and 1890s. With the partition of Ireland in 1920 devolution disappeared from the political agenda, but re-surfaced in the late 1960s in Scotland and Wales. It was then that the two nationalist parties, the Scottish National Party and Plaid Cymru in Wales, began winning by-elections and gave the Labour Party a severe electoral fright. The last Labour Government (1974–79) legislated for devolution in the Scotland and Wales Acts of 1978, but their proposals were defeated at referendums in 1979.

Thus it was that John Smith, Tony Blair's predecessor as leader of the Labour Party, described devolution as Labour's 'unfinished business'. Labour's manifesto in 1997 committed the party to legislating for devolution in Scotland and Wales in their first year, which they did. In its first year in office the new Labour Government unleashed five separate initiatives in devolution, with different sets of proposals

for Scotland, Wales, Northern Ireland, the English regions and London. Their cumulative effect will be to transform the nature of the United Kingdom as a multi-

national state, and turn us into a quasi-federation. But this speed came at a price. Each initiative has been planned with little or no regard to the other elements in the devolution package; and with no sense of the package as a coherent whole.

Scotland

Scotland has the most devolved power. The *Scotland Act* 1998 provides for the Scottish Parliament to be able to legislate in all matters except for the United Kingdom constitution, foreign policy, defence and national security, immigration and nationality, macro-economic, monetary and fiscal policy, regulation of markets, employment and social security. This leaves the Scottish Parliament with a wide range of legislative power, over the Scottish legal system and Scots civil law (the law of contract, tort, land law, family law, trusts etc); criminal law and the criminal justice system, prisons, police, prosecutions; health policy and the National Health Service in Scotland; agriculture, forestry, and fisheries; economic development, trade, inward investment, tourism; transport; education, from primary schools to universities; culture and the arts; protection of the environment and natural heritage; local government, housing, and land use planning.

It has been suggested that this is a wider range of powers than those enjoyed by the Australian states. Another significant departure is that the Scottish Parliament, like the other new assemblies in the United Kingdom, is elected by proportional representation, using the same voting system as in New Zealand. It has 73 single member electorates, but 56 additional members to provide proportionality. As a result in the first elections Labour did not win an overall majority. That makes a huge difference to the relationship between parliament and the executive. Australians will know that from the difference in the balance of power in the House of Representatives and in the Senate, and New Zealanders will know the difference from the MMP-elected parliaments of 1996 and 1999, where no single party had an overall majority. Whereas the House of Commons at Westminster, the product of a majoritarian electoral system, is an executive-dominated body, the Scottish Parliament is not. So Labour governs in coalition in Scotland with the third party, the Liberal Democrats, who ideologically are the equivalent of the Australian Democrats. The Scottish National Party forms the main opposition, and if the normal alternation takes place they are likely one day to form a government.

Wales

The Welsh Assembly is half the size of the Scottish Parliament. It has just 60 members: 40 constituency members, and 20 additional members to provide proportionality. Here too there is a coalition government between Labour and the Liberal Democrats. But they enjoy much less power than Scotland: executive power and powers of secondary legislation only, operating within a framework of primary legislation which will continue to be laid down by Westminster. This scheme of

executive devolution has been much criticised and seems unlikely to last. It is too heavily dependent on the degree of discretion conferred by Westminster, and is already causing a lot of conflict and confusion. A majority of the Assembly members in Cardiff want the Assembly to have powers closer to those of the Scottish Parliament, and this is likely to be recommended by an independent commission which will review the Assembly's powers in 2003.

Northern Ireland

Northern Ireland offers yet another different model. The Assembly has legislative powers similar to the Scottish Parliament, but because of the security situation prisons, policing and the criminal justice system are still reserved to the British government. Although Northern Ireland has half the population of Wales, its Assembly is twice the size, with 108 members, elected in six member constituencies by single transferable vote (STV). This large size is to ensure proportionality between the two deeply divided communities in Northern Ireland of the Protestant Unionists and the Catholic nationalists. There are special safeguards to ensure cross-community representation in the Executive and all the committees of the Assembly. The power-sharing Executive is elected to represent all parties in the Assembly, and there is a dual Premiership with First and Deputy First Minister elected to represent the two communities. An involuntary coalition imposed by law is not easy. There are four parties in the Executive. The normal rules of collective responsibility do not apply. The Democratic Unionist Party has two Ministers in the Executive but they boycott Cabinet meetings because they will not sit at the same table with Sinn Fein. The whole set-up is extremely fragile and it may be that enforced power sharing is simply unworkable.

The English regions

England has nothing like the devolved assemblies established in Scotland, Wales and Northern Ireland. In their 1997 manifesto Labour promised to introduce legislation to allow the people of England, region by region, to decide whether they wanted directly elected regional government. But the government got cold feet and instead has introduced eight Regional Development Agencies: these are economic development bodies which are appointed by Ministers and receive their funding and guidance from central government. At the 2001 election Labour repeated the promise to allow devolution on demand in the English regions. And the English are slowly waking up to devolution: since 1999 Constitutional Conventions have been established in five out of the eight English regions, to start developing plans for their own regional assemblies.

The dynamics of devolution

It should be clear from this description of the individual elements in the devolution program that there is no coherent pattern which binds the different elements together; and that devolution is unlikely to reach a steady state. What has been unleashed is a dynamic process which is evolving fast and will undoubtedly lead to demands for further change.

A rolling program. Some academic experts and politicians have proposed immediate introduction of a federal system for the United Kingdom, but the different starting points and different degrees of enthusiasm around the country suggest that a rolling program best fits the political realities. A rolling program of devolution will allow different parts of the United Kingdom to move at their own speeds depending on local demand. Scotland, Wales and Northern Ireland will set the pace; interest in the English regions may pick up as the bandwagon starts to roll.

A long timescale. In France and Spain it has taken 20 years to develop a regional tier of government, and the process is still evolving. In the English regions we may need to think in terms of a similar timescale.

Asymmetrical devolution. Devolution need not be uniform. Other European countries live with lopsided devolution. A federation like Australia exhibits asymmetry between the powers of the six states and the two territories. In our case devolution will need to embrace the different settlements for Scotland; Wales; Northern Ireland; and as between the different regions of England. The trick will be to identify and understand what items need to be held in common throughout the kingdom, as constants of United Kingdom citizenship; and what items can be allowed to vary.

The risk of leapfrog. There are difficulties involved in trying to hold the nation state together, while allowing greater devolution to some parts than others. One is the risk of leapfrog. In Spain and in Canada a ratchet effect is observable whereby the low autonomy regions are trying to catch up to the leaders, which provokes the leaders (Catalonia and the Basque region in Spain, and, in Canada, Quebec) to seek yet further autonomy to keep one step ahead. Our rolling program of devolution is beginning to stimulate similar demands in the United Kingdom: from the English regions for a piece of the action granted to Scotland and Wales; and from Wales for legislative powers on a par with Scotland and Northern Ireland. Will Scotland then demand more to stay one step ahead of Wales?

Can the devolved assemblies break from the Westminster mould

In the final part of this article I want to say more about the Scottish Parliament, and the aspirations of the devolved assemblies to be different from their creator at Westminster. The last time new parliaments were established in the British Isles was in 1920, with the creation of the new Parliament in Dublin and the Northern Ireland Parliament in Belfast. Both were miniature versions of Westminster, adopted *Erskine May* unthinkingly as their bible and became heavily dominated by their Executives. The creators of the new Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly were determined that their institutions should be different. In the words of the Scottish Constitutional Convention, they wanted to achieve ‘a way of politics that is radically different from the rituals of Westminster; more participative, more creative, less needlessly confrontational . . . a culture of openness.’¹¹

The Westminster mould

What are the characteristics of the Westminster mould which the new assemblies are so determined to break? The Westminster Parliament is characterised by a largely adversarial two-party system and by executive domination by the party in power, which is reflected in many of its structures and procedures:

- the government has a majority on all committees
- most committee chairs are held by members of the governing party
- committee members are effectively appointed by the Whips, and seldom selected because of any interest or expertise in the subject matter
- the government controls approximately 80 per cent of legislative time (depending on how many days Parliament sits) and initiates more than 90 per cent of Bills passed
- of non-legislative time only about 12 per cent (17 days for the largest Opposition party and three for the next largest) is allocated to the opposition.

As a consequence of these structures and procedures the failings of Westminster are widely recognised:¹²

- inadequate scrutiny of Bills, leading to poor quality legislation

¹¹ *Scotland's Parliament: Scotland's Right*, November 1995.

¹² See, for example, *Making the Law*, Report of the Hansard Society Commission on the Legislative Process, 1993; J. Garrett, *Westminster — Does Parliament Work?*, Gollancz 1992; Tony Wright, *Citizens and Subjects*, Fontana 1994; Peter Riddell, *Parliament under Pressure*, 1998 (2nd edn) *Parliament under Blair*, 2000; *The Challenge for Parliament: Making Government Accountable*, Report of the Hansard Society Commission on Parliamentary Scrutiny, 2001.

- Select committees of uneven quality which do not consistently hold the Executive to account
- inadequate scrutiny of public bodies and agencies
- weak Ministerial accountability to Parliament
- weak financial controls, particularly over spending plans and Estimates
- excessive secrecy on the part of the Executive
- failure to protect against abuses of power and breaches of human rights.

Can Westminster mend its ways?

The last item on the list will start to change following passage of the Human Rights Act, which is to be monitored by a new parliamentary Human Rights Committee. As for the second to last, I do not think our new Freedom of Information Act is going to make much of a dent on executive secrecy. But what about the first five items: will Parliament ever get its act together, or is it doomed forever to be dominated by an increasingly powerful executive? The situation at Westminster is bad, but I do not want to paint a picture of unrelieved gloom.

There are some rays of sunshine. In 2000 the Liaison Committee in the House of Commons, consisting of all the committee chairmen, issued an unprecedented collective protest against the way the Whips control appointment of members to committees, and argued for a new appointments panel of senior committee chairmen. The title of their report, *Shifting the Balance: Select Committees and the Executive* indicates their drift.¹³ The Government was dismissive in its reply,¹⁴ but the Liaison Committee returned to the charge with a report starkly titled, *Independence or Control?*¹⁵ The Government allowed a debate on the report but was desperate to avoid holding a vote: an indicator of the strength of parliamentary feeling on the issue.

Another ray of sunshine is that, following a report of a Hansard Society Commission on the Legislative Process,¹⁶ the Government is beginning to publish more bills in draft. And Parliament is developing pre-legislative scrutiny procedures, in which parliamentary committees take evidence from those likely to be affected by the draft bill, and from other experts, in a way which they do not normally do once the bill is going through the House.

¹³ Liaison Committee, *Shifting the Balance: Select Committees and the Executive*, HC 300, March 2000.

¹⁴ Government's Response to First Report from the Liaison Committee, Cm 4737, May 2000.

¹⁵ Liaison Committee, *Independence or Control?*, HC 748, July 2000.

¹⁶ Hansard Society, *Making the Law*, 1993.

The Government is also trying to ensure more sensible timetabling of the different stages during the passage of a bill, although it missed a golden opportunity to do so at the beginning of the 1997 Parliament, when it could have made the change with all-party support.¹⁷

In 1999 the Hansard Society established a second Commission, this time into the Scrutiny Role of Parliament, whose chair is Tony Newton, former Leader of the House of Commons, and of which I am one of two Vice-Chairs. Our report, entitled *The Challenge for Parliament*, was published in July 2001. We have found that reform of Parliament has lagged seriously behind the major changes in the executive branch of government. There is little collective or corporate ethos or leadership to remind MPs of their parliamentary as well as their party roles. MPs need to be given more opportunities and incentives to pursue their parliamentary roles. We recommend that scrutiny should be an integral part of the work of every MP; that all MPs should be able to serve on select committees; and that select committees should be asked to adopt a set of core duties by Parliament to ensure systematic scrutiny of the departments whose work they are holding to account. They should be invited to set objectives over the course of a Parliament, and a program of work for each session, providing a set of criteria against which their performance could be judged. And Parliament as a whole should produce an annual report, to enable us to judge its performance, and to give it a clearer sense of purpose and of collective and corporate responsibility in fulfilling that purpose.

What kind of objectives should select committees set for themselves? We suggest a proper balance of inquiries between administration, finance and policy; to acknowledge and report on all departmental reports, business plans and performance indicators; conduct a regular cycle of work on activities of the regulators, executive agencies, public and other bodies within the department's purview; and review progress by the department in following up the committee's previous reports. This is a substantial workload. It would require select committees to be enlarged, and to operate through a series of sub-committees, including a Finance and Audit Sub-Committee charged with examining the relevant department's budget and annual accounts. And it would require considerably greater resources.

We shall find out over the next couple of years whether our report is hailed as giving a new sense of purpose to parliamentarians, and a way of realising it, or dismissed

as a mystic vision, out of touch with the political and party realities. One thing that gives me cause for hope that we are not simply visionaries is the example now being set by the new devolved assemblies. Devolution in the 1990s was about more than recognising in institutional form the distinct territorial claims of Scotland, Wales or Northern Ireland. Accompanying appeals to national identity

¹⁷ Andrew Kennon, *The Commons: Reform or Modernisation*, Constitution Unit, January 2001, 7.

were promises of a 'new politics' which would embody inclusiveness, consensus, openness, transparency and accountability. Scotland exemplifies this most strongly, and is the case study presented here; but similar aspirations have been expressed in Wales and Northern Ireland.¹⁸

Shaping Scotland's Parliament

In November 1997 Donald Dewar, Secretary of State for Scotland, established a Consultative Steering Group (CSG) to 'take forward consideration of how the Scottish Parliament might operate'. The CSG had a wide membership, and drew upon expert panels and outside consultants: my own Constitution Unit, for example, was commissioned to do a comparative study of the checks and balances required in small single chamber parliaments (two of the parliaments we looked at were New Zealand and Queensland). The CSG published *Shaping Scotland's Parliament* in January 1999. It identified the following key principles for the Parliament:

1. The Parliament should embody and reflect *the sharing of power* between the Scottish people, the Parliament and the Scottish Executive
2. The Executive should be *accountable* to the Parliament, and the Parliament and Executive should be accountable to the Scottish people
3. The Parliament should *be accessible, open* and *responsive*, and should develop procedures which make possible a *participative approach* to the development, consideration and scrutiny of policy and legislation
4. The Parliament, in its operation and its appointments, should recognise the need to promote *equal opportunities* for all.

In a further research project the Constitution Unit is carrying out an audit of the devolved assemblies against the aims and objectives set for them, to assess to what extent they succeed in breaking from the Westminster mould. Thus in the case of the Scottish Parliament we shall be trying to assess to what extent it manages to live up to the brave principles set out above, and to what extent the realities of politics and the business of government dictate otherwise. To make the study more precise, we plan to break down the functions of the Parliament into the following classic functions of legislatures:

- Representation
- Legislation
- Deliberation
- Scrutiny

¹⁸ R. Wilford & R. Wilson, *A Democratic Design? The political style of the Northern Ireland Assembly*, Constitution Unit, University College London, May 2001.

- Budget setting
- Making and breaking governments
- Redress of grievances.

The Procedure Committee of the Scottish Parliament has also embarked on an enquiry to assess to what extent the Parliament has realised its original ambition to be

- democratic, inclusive and power sharing
- accessible, open and participatory
- responsive and accountable
- efficient, effective and modern; and
- to promote human rights and equal opportunities.

It is early days to offer a definitive report card, when devolution in Scotland and Wales is just two years old. Let me mention just a few of our initial findings. This is a selective list. But already certain features are markedly different from the Westminster Parliament.

No government majority

Because of the proportional voting system no single party has a majority in any of the devolved assemblies. Labour won a majority of the electorate seats in Scotland and Wales, fought under first-past-the-post; but the proportionality supplied by the additional members denied them an overall majority. In Scotland and in Wales Labour governs in coalition with the Liberal Democrats. In Northern Ireland there is a power-sharing executive of four political parties.

This has meant the assemblies are much less subject to executive domination than Westminster. The executive is not able to assume it will have its way: in Scotland, for example, the executive failed to kill off a Private Member's Bill in 2000 which had received support from three of the Parliament's committees.¹⁹ And in 2001 the executive had to back down over free personal care for the elderly, a decision which will prove very expensive in the years to come.

Powerful subject committees

The committees in Scotland are beginning to play a central role, in influencing policy making and in scrutinising the executive. The MSPs themselves all expressed preferences which committees to join: the Whips had less control than at Westminster. In committee it is often not possible to tell which party a member

¹⁹ The Poindings and Warrants Bill, introduced by the Scottish Socialist Tommy Sheridan MSP.

belongs to: they are developing strong loyalty to the committee, and do not simply follow the 'party line'. Some committees are struggling under the workload of a heavy legislative program as well as scrutinising the actions of the executive. The Presiding Officer during the first year authorised a doubling of research staff for the committees in Scotland.

Leadership of the presiding officer

The Presiding Officer is more hands-on in managing the business of the Parliament than is the Speaker at Westminster. In Scotland Sir David Steel chairs the Parliamentary Bureau, which includes representatives from all the parties, decides the forthcoming business and announces the weekly business. At Westminster the business is announced by the Leader of the House, after negotiation through 'the usual channels', that is, with the Opposition: the Speaker is more marginalised. In the Welsh Assembly the Presiding Officer is also emerging as a strong defender of the Assembly's rights. In Scotland and Wales the Presiding Officers have been firmly independent: in March 2001 Sir David Steel had to exercise a casting vote, and greatly upset the Scottish Executive by voting against them.

Scrutiny of the Budget

At Westminster scrutiny of the annual Estimates is a charade. In Scotland the Consultative Steering Group sought advice from a Financial Issues Advisory Group on how to introduce more effective scrutiny of the Government's spending plans, and one of the first measures passed by the Scottish Parliament is the *Public Finance and Accountability (Scotland) Act 2000*. There is a three stage budget process, starting with discussion of the spending strategy, with input from all the subject committees. Stage 2 involves detailed consideration by the Parliament of Ministers' spending plans, and Stage 3 is the passage of the annual Budget Bill.

Increasing public participation

Both the Scottish Parliament and the Northern Ireland Assembly have a Civic Forum to include representatives from a wide range of civic organisations as an additional sounding board and source of ideas. Some of the committees of the Scottish Parliament have appointed one of their number to be a Reporter, to reach out and seek views from those likely to be affected by the subject of their enquiry: especially those who might not normally think of submitting evidence to a parliamentary committee. And the Scottish Parliament has a Petitions Committee, which takes very seriously the public petitions received, sends them on to the subject committees, follows them up, and sends back replies to petitioners.

How can we improve the performance of our parliaments?

This selective list of some of the innovations in the devolved assemblies can only give a flavour of the new departures they are making. I have included it to make a serious point. As part of the new public management and the relentless quest for greater efficiency in delivering public services, there is growing interest amongst governments in measuring the effectiveness of their performance, and in developing benchmarks (including international benchmarks) for that purpose. I am not aware of any corresponding work being undertaken to measure the effectiveness of parliaments. I do not pretend it is easy to devise good performance measures, still less to apply them to the range of parliamentary activity; but I do believe the work is of equal importance.

Parliaments have a vital role to play in helping to ensure efficient and effective government, but they often do so in a haphazard and amateur way. In June 2000 at a meeting of the Canadian Study of Parliament Group in Ottawa I floated the idea of trying to develop a set of performance measures and benchmarks to help us to assess the effectiveness of parliaments. In my lectures to the Australasian Study of Parliament Group in Canberra, Sydney and Wellington in 2001 I repeated the suggestion, and launched the search for partners. What I hope to develop is a collaborative project in which we try to devise a set of audit tools which parliaments could apply to their activities, their working methods and their outputs, to help them improve their performance. We would not seek to promote any particular blueprint of institutional or procedural change. We would certainly not seek to impose a uniform model. Rather we would aim to provide a conceptual and practical tool kit which would enable parliamentarians to stand back and evaluate their performance, and to think through in a more structured and systematic way how things might be improved.

What I hope we might do initially is build up a network of interested practitioners (parliamentarians, parliamentary clerks and auditors) and academic experts on the workings of parliament, starting with Australia, Canada, New Zealand and the United Kingdom. This will deliver comparative experience of a maximum of 25 parliaments: nine from Australia (one federal, six state and two territory parliaments), 11 from Canada (one federal and ten provincial), four from the United Kingdom (Westminster and the three new devolved assemblies), and one in New Zealand. Not all will want to join such a project; but if we can find one or two partners from each country that is enough to make a start.

I am under no illusions about the ambition of such a project, in terms of its scope and in terms of the intellectual challenge. But it seems to me a fitting enterprise to link to the birth of three new parliaments in the United Kingdom, the centenary of the Australian Parliament, and the launch in 2001 of the *Australasian Parliamentary Review*. The nineteenth century saw the struggle for the franchise

and for free and fair elections, and at the beginning of this article I marked the signal achievements where Australia has led the way along that road.

The twentieth century saw the rise but then the decline of parliamentary democracy, as tight party discipline and executive domination have reduced much parliamentary activity to a ritualised rubber stamp. New Zealand has been through that experience, but now has a very different parliament compared with just ten or fifteen years ago. In Australia, Canada and the United Kingdom it has become a common litany to bemoan the failure of parliament to act as an effective check on legislation of the executive actions of government.

We must not give up on our parliaments. Parliamentarians may feel trapped and powerless; but we in the Study of Parliament Group can hold up a mirror to their activities, and show that there are ways forward. And from the comparative perspective of our three Groups, in our four countries of Canada, Australia, New Zealand and the United Kingdom, we should be well placed to develop a combined and systematic effort to understanding and improving the performance of our parliamentary institutions. I hope that by learning from each other's successes as well as failures we can help gradually to raise the game of all our parliaments.²⁰ ?

²⁰ Those interested in learning more about the collaborative project to develop performance measures for parliaments can contact the author at r.hazell@ucl.ac.uk.