



The Privy Council

Standard Note: SN/PC/3708

Last updated: 5 July 2005

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The Privy Council is an ancient and dignified institution of government, which has its origins in the earliest days of the monarchy. This standard note explains the origins of the Council and gives details of its functions and committees.

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A. Background

The Privy Council goes back to the earliest days of the monarchy, when it comprised those appointed by the King or Queen to advise on matters of state.¹ Monarchs would rule through the Privy Council without turning to Parliament, and under Edward I it was difficult to identify whether legislative acts emanated from the King-in-Parliament or the King-in-Council.² Throughout the 14th century, however, there was a great deal of friction between the Council and Parliament, and in the reigns of Henry IV and Henry V there is evidence of the Commons petitioning the King against the jurisdiction seized by the Council. By this time the Council was exercising judicial powers in relation to both criminal and civil litigation with enforcement of the criminal law (where offences against the State were alleged or officers of State were involved) carried out by the Court of Star Chamber. Parliament therefore objected that the Star Chamber was usurping the function of the common law courts. F.W. Maitland writes of the council at this time that:

The Tudor reigns are....the golden age of the Council: the Council exercises enormous powers of the most various kinds; but it is not an independent body – as against the King it has little power or none at all.³

By the reign of Henry VIII (1509 – 1547) the Council was made up of ‘Privy’ Counsellors – the elite King’s advisers – and Ordinary Counsellors – lawyers and administrators.

The Privy Council survived the 17th century conflicts, although its judicial arm, the Court of Star Chamber, was abolished in 1641. But in the 50 years after the restoration of the monarchy in 1660, the role of the Privy Council changed and it lost its position as the main political executive. Under William, the inner circle of the Council became known as the Cabinet Council. Through this Cabinet the King could exercise all his powers, although he had to appeal to the wider membership of the Privy Council in order to undertake acts which required Orders in Council, the formal means by which such prerogative acts came into effect. It was the Privy Council which determined the summoning and dissolution of Parliament, although as Hilaire Barnett states, ‘it seems clear that the King would act through Order in Council published after consultation with an inner circle of the Privy Council’.⁴

Although King William and Queen Anne⁵ attended Council meetings regularly, this did not continue during the reigns of George I and George II, as neither were particularly interested in English matters. The Cabinet therefore began to meet without the King, communicating its decisions to him afterwards; a situation continued under George III.

¹ <http://www.privycouncil.gov.uk/output/page1.asp>

² *Constitutional and Administrative Law*, Hilaire Barnett p246, 1995

³ *Constitutional History of England*, F.W. Maitland p256, 1948

⁴ *Constitutional and Administrative Law*, Hilaire Barnett p247, 1995

⁵ Soon after the Union of England and Scotland in 1707, the Scottish Privy Council was abolished and its functions were assumed by the Privy Council for Great Britain.

With the rise of the Cabinet system of government in the 18th century, the Privy Council gradually lost much of its powers.

B. Composition of the Privy Council

Membership of the Privy Council is today a titular honour, with the office recognised as a reward for public and political service. Appointments are made by the Sovereign on ministerial advice and are for life – there are no fixed numbers of Members. By convention, all present and past Cabinet Members are appointed to the Privy Council. Also included in the membership are members of the royal family, senior judges, two Archbishops, British Ambassadors, the Speaker of the House of Commons, Prime Minister and Cabinet Members, present and former leaders of the Opposition, and leading Commonwealth spokesmen and judges. The Council now numbers about 420 members,⁶ and members are entitled to the prefix ‘Right Honourable.’

On appointment a new Privy Counsellor takes the oath of allegiance, or affirms loyalty:

You do swear by Almighty God to be a true and faithful Servant unto The Queen’s Majesty as one of Her Majesty’s Privy Council. You will not know or understand of any manner of thing to be attempted, done or spoken against Her Majesty’s Person, Honour, Crown or Dignity Royal, but you will let and withstand the same to the uttermost of your power, and either cause it to be revealed to Her Majesty Herself, or to such of Her Privy Council as shall advertise Her Majesty of the same. You will in all things to be moved, treated and debated in Conscience; and will keep secret all matters committed and revealed unto you, or that shall be treated of secretly in Council. And if any of the said Treaties or Counsels shall touch any of the Counsellors you will not reveal it unto him but will keep the same until such time as, by the consent of Her Majesty or of the Council, Publication shall be made thereof. You will to your uttermost bear Faith and Allegiance to the Queen’s Majesty; and will assist and defend all civil and temporal Jurisdictions, Pre-eminences, and Authorities, granted to Her Majesty and annexed to the Crown by Acts of Parliament, or otherwise, against all Foreign Princes, Persons, Prelates, States, or Potentates. And generally in all things you will do as a faithful and true Servant ought to do to Her Majesty.

SO HELP YOU GOD

It requires those taking it to ‘keep secret all matters...treated of in Council.’ The Oath (or solemn affirmation for those who cannot take an Oath) is still administered, and is still binding, but it is only in very special circumstances nowadays that matters will come to a Privy Counsellor on “Privy Council terms”. These will mostly concern matters of the national interest where it is important for senior members of Opposition parties to have access to Government information.

⁶ See Appendix 1

C. Meetings

Meetings of the Privy Council are held in the presence of the Queen (or Counsellors of State if she is absent from the country or indisposed); the Council may meet wherever the Queen decides, although normally it will meet at Buckingham Palace. The business transacted is purely formal, approving and recording decisions already taken elsewhere (as with the Cabinet, most of its business takes place in discussion and correspondence between its Ministerial members and the Government Department that advise them).

Usually only three or four members are called to a meeting, and they will be the Ministers concerned with the matters to be transacted i.e. the Secretary of State will be present for decisions of the Privy Council regarding university charters. Meetings of the Council are very brief, and the Members usually remain standing. On rare ceremonial occasions a larger meeting, including members other than Ministers, is convened – for example, to proclaim a new monarch or to hear a monarch give consent to a Royal marriage.

Meetings are reported in the Royal Circular, along with the names of Members attending. The Orders made at each Council are in the public domain, and each bears the date and place of the Council at which it was made.

D. Functions

Despite the many powers conferred by statutes on individual ministers, the Order in Council remains a principal method of giving the force of law to acts of the government, especially the more important executive orders.⁷

Some Orders in Council are of a judicial character, formally announcing the judgement of the Judicial Committee. Apart from those Orders in Council which are made under the prerogative, as for the dissolution of Parliament, most are made under an Act of Parliament, for example, orders which make regulation under the Emergency Powers Act 1920 after a state of emergency has been proclaimed. These fall under the definition of ‘statutory instruments’,⁸ and are numbered and published in the annual volumes of Statutory Instruments.

As De Smith and Brazier write:

the reasons for giving Her Majesty power to make Orders in Council on certain matters instead of vesting a Minister with power to make regulations are partly traditional and partly psychological. It is more dignified and impressive for an independence constitution, or an instrument giving effect to an extradition treaty or creating new

⁷ *Constitutional and Administrative Law*, E.C.S.Wade and A.W. Bradley p260, 1993

⁸ see House of Commons Information Office Factsheet L7: Statutory Instruments

parliamentary constituencies or altering electoral boundaries, to be made by Her Majesty in Council.’⁹

E. Committees of the Privy Council

The majority of Privy Council functions are undertaken as committees.

The Privy Council has a miscellany of standing committees – the Universities Committee (reporting on petitions concerning Statutes of the Universities of Oxford and Cambridge and their colleges); a similar Scottish Universities Committee; a Baronetage Committee, the Political Honours Scrutiny Committee; and committees on the Channel Islands and the Isle of Man.

There are also *ad-hoc* committees, for example to consider applications by other institutions for Charters and Statutes. Royal Charters have a history dating back to the 13th century, and were originally granted to create public or private corporations (including towns and cities), and to define their privileges and purpose.¹⁰ It is a way of incorporating a body, turning it from a collection of individuals into a single legal entity.¹¹ Nowadays, although Charters are occasionally granted to cities, new grants of Royal Charters are reserved for eminent professional bodies or charities which have a solid record of achievement and are financially sound. In the case of professional bodies they should represent a field of activity which is unique and not covered by other professional bodies.¹²

The Privy Council has a role in areas of higher education, having responsibilities both under the royal prerogative and by statute. Older (pre-1992) universities operate under a royal charter, which sets out their overall constitution, and statutes, which give more details as to how the university should operate in practice. The Privy Council is responsible for advising Her Majesty on universities’ proposals to amend their charter, and itself approving amendments to the statutes.

Most newer (post-1992) universities and certain other higher education institutions operate under an Instrument of Government and Articles of Government. Any amendments to these documents need the approval of the Privy Council.

The Privy Council is responsible, under the *Further and Higher Education Act 1992*, for approving the use of the word ‘university’ (including ‘university college’) in the title of a

⁹ *Constitutional and Administrative Law*, Stanley De Smith and Rodney Brazier, p167, 1994

¹⁰ There are over 400 chartered bodies

¹¹ A body incorporated by Royal Charter has all the powers of a natural person, including the power to sue and be sued in its own right

¹² for details on how to submit an application see <http://www.privycouncil.org.uk/output/Page45.asp>. In the event that a Charter application were refused there is not right of appeal, but the applicant can enter into further negotiations with the Privy Council to attempt to rectify the areas of difficulty

higher education institution, and may also approve an institution as competent to grant degrees.¹³

The Privy Council is also responsible for some of the affairs of certain statutory regulatory bodies.¹⁴ Its role involves such matters as the appointment of lay members to these bodies and the approval of regulations.

The most important committee is the Judicial Committee. The Judicial Committee was established under statute by the *Judicial Committee Act 1833*, and its jurisdiction is regulated by statute, subordinate legislative instruments, and local constitutions and legislation. The Judicial Committee is composed of the Lords Chancellors, Lord President and ex-Lord Presidents of the Council, Lords of Appeal in Ordinary and the Lords Justices of Appeal, ex-Lord Chancellors and retired Lords of Appeal, senior judges or ex-judges of Australia, New Zealand and other Commonwealth countries, from which a right of appeal still lies.

It hears appeals from the superior courts of the Channel Islands, the Isle of Man, colonies and such independent Commonwealth countries as have retained the right of appeal from their own courts.¹⁵

It also has a place in the legal system of the United Kingdom. It can hear appeals from the decisions of certain professional disciplinary bodies. Under section 7 of the *House of Commons Disqualification Act 1975*, a member of the public may apply to the Judicial Committee for a declaration that a member of the House is subject to a statutory disqualification under that Act. The Crown may also, under section 4 of *the Judicial Committee Act 1833*, refer any matter to it for an advisory opinion.¹⁶

At present, it is also the court of final appeal for determining ‘devolution issues’ under the United Kingdom devolution statutes of 1998.¹⁷ However, under the *Constitutional Reform Act 2005*, this will change, with a transfer of devolution issues from the Judicial Committee of the Privy Council to the new court (‘the Supreme Court’).¹⁸ It will however retain its authority with regard to appeals from British colonies and Commonwealth countries.

The Judicial Committee has also in the past examined and reported on matters of constitutional importance, such as the legal basis of the practice of telephone tapping and matters affecting state security. A committee of six Privy Counsellors reviewed British policy towards the Falkland Islands leading up to Argentina’s invasion in 1982; after the Prime Minister had consulted with five former Prime Ministers to secure their consent, the

¹³ see <http://www.privycouncil.gov.uk/output/page1.asp>

¹⁴ for full list see <http://www.privycouncil.gov.uk/output/Page30.asp>

¹⁵ see Halsbury’s *Laws of England* 8(2), p 227

¹⁶ for a full list of the Court’s jurisdiction see <http://www.privy-council.org.uk/output/Page32.asp>

¹⁷ *Scotland Act 1998, Northern Ireland Act 1998, Government of Wales Act 1998.*

¹⁸ Section 40 (4) (b)

committee had access to the papers of previous governments and secret intelligence assessments.

F. Current Membership of the Privy Council

This may be found at <http://www.privacy-council.org.uk/output/Page76.asp> from the Privy Council website

G. Appendix Select Historical Bibliography

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