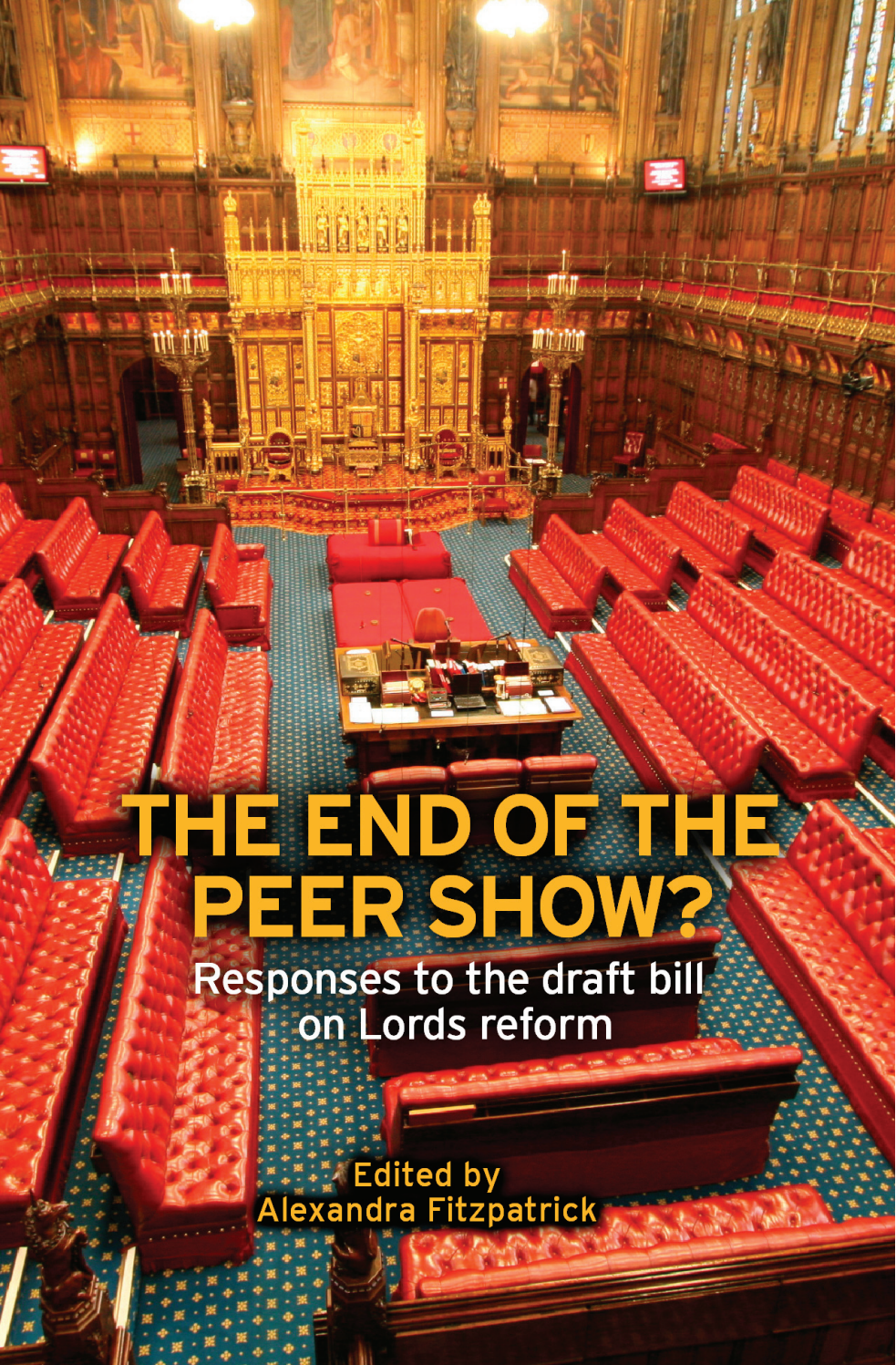

THE END OF THE PEER SHOW?

Responses to the draft bill on Lords reform

Edited by
Alexandra Fitzpatrick

First published in Great Britain in 2011 by
CentreForum,
6th Floor,
27 Queen Anne's Gate,
London SW1H 9BU
www.centreforum.org
© 2011. The essays in this collection are copyright of the author in each case.
The moral right of the authors has been asserted.

All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without the prior written permission of both the copyright owner and the publisher of this book.

ISBN - 1-902622-89-8

Printed in Great Britain by Contract Print, Corby, Northamptonshire.

Contents

Preface - *Chris Nicholson, CentreForum* 4

Introduction - *Alexandra Fitzpatrick, The Constitution Society* 6

Background

Meg Russell 15

Iain McLean 30

Patrick Dunleavy 41

The proposals in the draft bill

Government statement – *Mark Harper* 50

An opposition response – *Hilary Benn* 56

Responses to the proposals: the peers

Robert Maclennan 62

Frances D'Souza 70

Jan Royall 75

Richard Harries 82

Responses to the proposals: academics and politicians

John Baker 89

David Howarth 99

Graham Allen 109

Dawn Oliver 119

About the contributors

Graham Allen is MP for Nottingham North and Chair of the Commons Select Committee on Political and Constitutional Reform.

Professor Sir John Baker QC gained his LLB and PhD at University College London and was called to the Bar in 1966. He has been Downing Professor of the Laws of England, University of Cambridge, since 1998.

The Rt Hon Hilary Benn has been MP for Leeds Central since 1999. Formerly Secretary of State for International Development and for Environment, Food and Rural Affairs, he has been the Shadow Leader of the House of Commons since 2010.

Professor Patrick Dunleavy, consultant for the Royal Commission on the Reform of the House of Lords (1999), is Professor of Political Science at the London School of Economics and Chair of the LSE Public Policy Group.

Mark Harper, MP for the Forest of Dean since 2005, is minister for Political and Constitutional Reform.

The Rt Revd Lord Richard Harries, Bishop of Oxford between 1987 and 2006 and a member of the Royal Commission on the Reform of the House of Lords (1999), is Gresham Professor of Divinity.

David Howarth, MP for Cambridge between 2005 and 2010 and former Shadow Secretary of State for Justice, is Reader in Law at Clare College, University of Cambridge.

Lord Robert Maclennan, former leader of the Social Democratic Party, is Co-Chair of the Liberal Democrat Parliamentary Policy Committee on Constitutional and Political Reform.

Professor Iain McLean FBA, is an Official Fellow in Politics at Nuffield College and Professor of Politics at the University of Oxford.

Professor Dawn Oliver, a member of the Royal Commission on the Reform of the House of Lords (1999), is Emeritus Professor of Constitutional Law at University College London.

The Rt Hon Baroness Jan Royall, former Leader of the House of Lords, has been Leader of the Opposition in the House since 2010.

Dr Meg Russell, consultant for the Royal Commission on the Reform of the House of Lords (1999), is Deputy Director at University College London's Constitution Unit.

The Rt Hon Baroness Frances D'Souza has been Convenor of the Crossbench peers since 2007.

Preface

Chris Nicholson
CentreForum

UK politicians have been trying to reform the House of Lords to make it more democratic for the last hundred years. Is the latest attempt by the coalition government any more likely to succeed than previous attempts? Do we need a second chamber? If so, what should be its role? In the light of that role how should it be chosen? How do the coalition's proposals measure up against the various answers to those questions?

CentreForum are delighted to be co-operating again with The Constitution Society in producing this series of essays from a range of distinguished academics, commentators and politicians which attempt to shed light on these key questions.

In reading these essays I have had at the forefront of my mind a recent interview I had with a German journalist. She was writing an article on the coalition government's programme of constitutional reform and in particular the proposals for the House of Lords. I started by explaining how the House of Lords is currently chosen.

The 92 hereditary peers who were elected from amongst the former hereditary peers. The life peers and their ever expanding numbers due to the expressed aim for the House to be broadly representative of each party's vote share at the previous election. The cross benchers. The 'people's peers'.

The Lords Spiritual. As I explained, along with incidental facts; only the Lords Spiritual could 'retire' from the House, not even imprisoned Lords were expelled, she looked more and more incredulous. In the end she could not contain herself and burst out laughing. "And it is known as the 'Mother of Parliaments'!" she exclaimed.

I don't think we want to be a laughing stock. Most commentators are agreed that the status quo is not an option. But that is where the consensus ends. CentreForum and The Constitution Society hope that these essays will not only highlight the issues involved but also give various ideas as to some possible answers to the questions we have highlighted.

Introduction

Alexandra Fitzpatrick
The Constitution Society

The papers collected here are responses to the coalition Government's reform proposals for the House of Lords, published in May 2011. A full hundred years after the passage of the 1911 Parliament Act, central questions about the role and composition of the upper House remain unresolved. In the intervening century, successive generations of politicians and commentators have engaged in periodic debate around a familiar set of apparently intractable issues.

When The Constitution Society commissioned these essays we asked our contributors to focus on the specific proposals in the draft bill rather than on this broad narrative of incomplete reform. Our contributors are leading academics and parliamentarians with wide experience, representing opinion across the political spectrum.

The collection is roughly divided into four sections. First, a group of distinguished political scientists set the current proposals in a comparative international and historical context. Second, Mark Harper, Minister for Political and Constitutional Reform, makes the case for the coalition proposals and Hilary Benn replies from an Opposition perspective. Third, we hear from four prominent members of the current House of Lords, and finally from a cross section of politicians and academics with diverse and stimulating views.

The Constitution Society's principal objective is to stimulate and inform discussion about constitutional change. We hope that these commentaries will serve as a valuable resource both for the purposes of pre-legislative scrutiny and for the subsequent debate on whatever legislative proposals are eventually put before Parliament on this matter of paramount constitutional significance.

Government proposals

On 17th May 2011, the Government published a draft House of Lords reform bill and accompanying white paper.[1]

The coalition's Programme for Government had pledged 12 months earlier to "bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation"[2]. In-line with this commitment, the draft House of Lords Reform bill proposes a House of Lords consisting of 80 per cent elected members, with the remaining 20 per cent nominated by a statutory Appointments Commission to sit as cross-benchers. The draft bill includes the following key proposals for a reformed House:

- 300 members, each eligible for a non-renewable term of three parliaments
- 80 per cent of members elected using the Single Transferable Vote (STV)[3], electing a third of members

1 www.Cabinetoffice.gov.uk/resource-library/House-lords-reform-draft-bill

2 www.Cabinetoffice.gov.uk/news/coalition-our-programme-government

3 STV is a form of proportional representation in which voters rank candidates on the ballot paper in the order in which they would like them to be elected. To be elected, a candidate must achieve a target number of votes, calculated on the number of votes cast and the number of seats available. Any votes they receive over the target number are redistributed according to the preferences expressed on the ballot papers.

each time with elections normally taking place at the same time as general elections

- 20 per cent of members appointed independently to sit as cross-benchers
- multi-member electoral districts based on national and county boundaries
- a continuation of the presence of Bishops of the Church of England, reducing their number from 26 to 12
- members expected to work full-time in the House and receive a salary, allowances and a pension
- a transition to the reformed House staggered over the course of three electoral cycles, during which time some of the current members of the House of Lords would work alongside new elected and appointed members
- the powers of the reformed House of Lords and its relationship with the House of Commons to remain the same.

Published alongside the draft bill, the white paper sets out variations on these proposals which the Government would also consider including in final legislation. Also considered, for example, is the case for a 100 per cent elected chamber, different processes of transition to the reformed House and alternative systems of proportional representation, including the open list[4].

The draft bill and white paper will be considered by a joint committee of both Houses, made up of 13 peers and 13 MPs. Following this process of pre-legislative scrutiny,

4 Open list is a form of proportional representation which gives voters at least some influence on the order in which a party's candidates are elected.

the Government has committed to introducing legislation in 2012, with the intention of holding the first elections to the reformed House of Lords in 2015.

The responses

If there is a dominant thread running through most of the responses in this collection it is the difficulty – some would say the impossibility – of separating the debate about the composition of the second chamber from the question of its powers and function.

Reflecting the views of the majority of contributors, Jan Royall argues for the essential implausibility of the assertion in Clause 2 of the draft bill that;

> Nothing in the provisions of this Act about the membership of the House of Lords, or in any other provision of this Act... affects the primacy of the House of Commons, or otherwise affects the powers, rights, privileges or jurisdiction of either House of Parliament, or the conventions governing the relationship between the two Houses.

John Baker supports this view in especially forthright terms, describing this declaration of principle as in flat contradiction with the proposal for an elected House and warning of its likely impermanence since "a legal declaration of something contrary to general perception would be fragile."

Mark Harper justifies the government position on the grounds that the primacy of the Commons does not rest solely on the fact that the lower House is elected while the Lords is not. By contrast, Graham Allen portrays the proposal for a directly-elected House of Lords as a "constitutional time bomb" which will "explode traditional

understandings of the relationship between the two Houses of Parliament" , a view supported to some extent by many other contributors. Though divided on the question of whether the powers of the Lords should be extended or curtailed, there is a consensus that the creation of a more powerful second chamber should not be permitted merely as an accidental consequence of the introduction of an elective principle.

David Howarth argues that the draft bill fails to address "the central questions of policy" in the debate about the composition of the upper House, the responses to which necessarily inform any proposals for reform. With direct experience of the deputy prime minister's Committee on Lords reform, Jan Royall and Hilary Benn generally support David's assertion, expressing dissatisfaction with the way in which "big, fundamental questions" were left unresolved in the cross-party process set up to inform government proposals.

The breadth of opinion in this collection of responses reflects the general absence of consensus in contemporary politics about the authority of a reformed upper House, and the appropriate relationship between the two Houses. Several contributors highlight the apparent disjunction between the widely accepted principal role of the House of Lords – to revise and scrutinize - and the draft bill's underlying assumption that the House should be elected.

Dawn Oliver echoes others in emphasizing the importance of this revision and scrutiny function in the context of the uncodified UK Constitution and the consequent absence of any Constitutional or Supreme Court with jurisdiction to reject 'unconstitutional' legislation. Richard Harries argues that a House consisting largely of elected peers whose primary ambition is to make "a

political career" would prove incapable of carrying out this function. Concerned by the "inescapable loss of expertise and experience which would flow from the abolition of a deliberately appointed chamber", both Dawn Oliver and Robert Maclennan outline proposals for a supplementary extra-parliamentary body, described respectively as a "Scrutiny Commission" and an appointed "Council of State", to take over the revising function from an elected chamber.

Iain McLean, supportive of proposals for an elected House, is dismissive of these concerns. He argues that peers would have a different mandate if elected according to the government proposals, which have been developed precisely to prevent elected members from becoming "clones of the clowns in the Commons".

Other contributors stress the legitimizing effect of election. Mark Harper's exposition of the government position stresses the principle of "democratic authority" as an end in its own right. Hilary Benn supports the argument, seeing Lords reform as part of a broader campaign to "help restore trust in our politics". Frances D'Souza is more cautious, highlighting the risk that reform could produce "the image, rather than the reality, of democracy".

A number of contributors note a contradiction between the underlying principle of "democratic authority" and the detail of the government proposals. Patrick Dunleavy argues that the merits of election are undermined by a "dynamite cocktail" of other provisions. The single term limit and "hugely long term" remove all accountability, he argues, as "senators never have to return and face the voters who chose them, and are not removable in any way through popular action". Robert Maclennan suggests that this failure to make any provision for the accountability of

peers "appears to be deliberate", orchestrated "to prevent the balance of power tilting any further towards Parliament".

Concerns over detail interact with larger questions about the likely consequences of reform for the UK political system as a whole. David Howarth and Graham Allen, among others, suggest that a revitalized second chamber is a necessary step in a lengthier process of strengthening the position of the legislature against an increasingly powerful executive. In contrast, Frances D'Souza is concerned that the limited political independence of elected members would mean than a reformed House of Lords could no longer stand as a "bulwark against party politics".

The government's failure to address these fundamental questions, David Howarth argues, is indicative of a wider problem afflicting British constitutional reform, which proceeds "seemingly oblivious to any need for structural thinking". A number of contributors focus on the evolutionary and piecemeal nature of constitutional reform in the UK. Meg Russell calls on international experience to demonstrate the inherently difficult nature of achieving reform of second chambers; "Powerful second chambers may be popular with voters, but they tend not to be popular with governments", explaining why successful reforms tend to be "small and incremental". Jan Royall is careful to defend the Lords against the frequent accusation that it is resistant to change, arguing that it has seen "real, repeated reform" over the last century. John Baker agrees with David Howarth in his concern over the structural implications of such incremental reform. By not considering the direction towards which Britain's parliament might tend in the future, he warns that the reforms risk leading to a system which is "very close to absolutism".

Other contributors take the view that a comprehensive

constitutional settlement is politically unachievable and piecemeal change is unavoidable if reform is to proceed at all. Richard Harries, among others, stresses the need to "grasp the nettle of reform sooner rather than later". Hilary Benn's view that "The House of Lords - as currently constituted - is unsustainable", is supported by the majority of contributors, even those most passionately opposed to the government's proposals.

A century after the first Parliament Act, is this the moment for a final resolution of what has been described as the most important constitutional question of the present age?

BACKGROUND

Judging the white paper against international practice of bicameralism

Meg Russell

The House of Lords is in many ways a unique institution. But bicameralism - that is, the structuring of a parliament into two distinct chambers - is relatively common. In judging the white paper it therefore makes sense to consider how the government's proposals measure up against international (best) practice.

An excellent up-to-date source on parliamentary upper and lower chambers is the database maintained by the Inter-Parliamentary Union (IPU).[1] This confirms that in June 2011 there were 189 countries with a national legislature, of which 77 were bicameral. Bicameral legislatures exist in particular in more populous countries, and are common in Europe, the Commonwealth and the Americas. Many of these are well established, although others are relatively new - for example in the younger democracies in Eastern Europe.

This paper reviews key aspects of the government's proposals against bicameral practice in other countries. It is structured in three main parts. First, it considers the proposals for the composition of a reformed second chamber and the extent to which these have learnt from best

1 www.ipu.org/parline-e/parlinesearch.asp

practice elsewhere. Second, it considers the powers of the second chamber (which the government proposes to leave unchanged) and how these compare with international experience. Third, it reflects briefly on what other bicameral countries can teach us about the process of reform. It ends with some brief conclusions. In short, the paper concludes that the government's proposals for composition of the second chamber are quite carefully crafted to avoid various pitfalls encountered in other countries, but that the same degree of thought has not gone into the proposals regarding its powers. International experience - and British history - also suggest that reform is very difficult to achieve.

The composition of the second chamber

The white paper proposes to create a second chamber which is largely or wholly elected, with members chosen in thirds at each general election and serving 15 year terms. Elections would be held using a proportional system, probably the single transferable vote (STV), and members would be barred from standing for the House of Commons until four years after they had departed the second chamber. This section of the chapter reviews each of these elements of the proposals in turn.

A wholly or largely elected chamber

The House of Lords is now relatively unusual in including no elected members. The only other wholly unelected second chamber in a major democracy is the appointed senate of Canada. But that is not to say that the world's remaining second chambers are all elected, as it is common for such chambers to include at least some members who are not elected, or who are elected 'indirectly'.

Analysis of the IPU's database in 2009 showed that only

21 of the 75 second chambers then existing were wholly directly elected. In addition, 15 were wholly indirectly elected: for example by members of regional parliaments or local councillors. In total 38 of the world's second chambers - or just over half - were wholly elected in some way.[2] This contrasted with 17 second chambers which included no elected members.

Mixed membership of second chambers is relatively common, and this often takes the form of a majority of elected members with a minority appointed element. Some examples of current practice include:

- The Italian senate, which has 315 directly elected members, but where each president of the republic may also appoint five senators, and additional ex officio seats are reserved for former presidents.
- The Irish senate, where 49 members are elected (by a complex system combining both direct and indirect elements), and 11 members are appointed by the prime minister.
- The Indian senate, where 233 members are elected by members of state legislatures, while the constitution provides for 12 'distinguished' members to be appointed by the president from the fields of literature, art, science and social service.

In total, 31 of the 75 second chambers in existence in 2009 had mixed composition of some kind.

Renewal in parts, and long terms of office

The white paper proposes that members of the second chamber (both elected and appointed) be chosen in thirds

2 Including three chambers with a mixture of directly and indirectly elected members.

at each general election. Members would therefore serve relatively long terms, of probably around 15 years. Just as mixed membership is relatively common overseas, so are both of these features. Both have clear advantages.

Where second chamber members are elected, it is quite usual for these elections to be staggered, so that not all are chosen at once. For example in Australia, Japan and Chile half of the second chamber's members are chosen at each election. Similarly in the US, France, India and Argentina members are elected in thirds. These are not the only such examples. When members are chosen by some kind of indirect election, it is also very common for them not to all enter the chamber at once. Thus in Germany, Austria and Russia, where members are chosen by sub-national legislatures, they are renewed following each renewal of their electing body. Since regional elections are not all held on the same day, this results in renewal in parts. The same pattern is also common for unelected second chamber members. In Canada (where the senate was modelled to some extent on the House of Lords), there is an overall cap of 301 members, and a retirement age of 75. Each time a member retires, a new vacancy is created.

The benefits of renewal in parts are twofold. First, and most obviously, it creates a greater continuity of membership in the second chamber. It does not face the disruption of all of its members being elected at once, and the proportion of new members after each election may be lower than occurs in the lower House. This helps promote longer-term thinking. Second, it often means that the executive - even if it has the power to dissolve the lower House - cannot dissolve the upper House. This is one of the characteristics of the House of Lords which is perhaps little noticed when compared to the Commons. Both of

these features may bolster the strength and authority of the second chamber.

Partly as a consequence of renewal in parts, second chamber members also tend to serve longer terms of office than those in their respective lower Houses. In the US, Australia, Japan and France senators serve six-year terms, whilst lower House members serve respectively two, three, four and five years. Members of the French senate used to serve nine-year terms, with the chamber renewed in thirds, but this was reformed in 2004 to six-year terms elected in halves. In Brazil senators serve eight-year terms, whilst lower House members serve only four. Amongst appointed members terms can be even longer. Canadian senators serve until aged 75, irrespective of their age at appointment (this was an adjustment made in 1965, before which their appointment was for life). In Italy appointed members remain life senators.

The proposals for 15 year terms in Britain may thus be seen as a compromise between the existing system of life peerages and the kind of elected terms seen overseas. A crucial element of the government's proposals (referred to later) is that terms should be non-renewable. In this context, which does not commonly apply elsewhere, 15 year terms seem moderate to short.

Electoral systems, and constituency work

The white paper proposes that second chamber members should be elected via a proportional system, with the preferred system being the single transferable vote (STV). The choice of a proportional system is entirely consistent with one of the most important principles about the composition of second chambers: that they should not simply mirror the composition of the first chamber.

While the 'first past the post' system used for the House of Commons generally delivers single-party majorities, a proportional system (particularly when coupled with election in thirds) would make it unlikely that any party would gain a majority in the second chamber. This would ensure that the voices coming from the two chambers were distinct.

The government's preferred system of STV places the focus on individual candidates, rather than parties, and allows voters maximum flexibility in picking candidates that they support rather than voting for a party slate. This is appropriate in order to encourage individuality amongst candidates, and independence from the party machines. But such a system does also have its drawbacks. Any system (including STV, but also 'open' lists) that enables candidates to be distinguished from their parties naturally encourages competition between candidates from the same party for votes. When translated into the behaviour of members of parliament once elected, this encourages a focus on constituency work.

Another less noted feature of the current House of Lords, as compared to the House of Commons, is the fact that its members spend little or no time on such work, since they are not elected. Their attention is therefore focused instead on detailed legislative scrutiny and committee work, which is widely seen as beneficial. It therefore seems very undesirable that members of the second chamber should start to engage in constituency work. This would also be seen by many MPs as negative intrusion on their 'patch'.

One of the key countries using STV for parliamentary elections is Ireland, where MPs are famously constituency-focused to the point of being parochial, and the parliament is weak. In Australia a form of STV is used to elect the

senate, though in reality this functions as more of a party list system. Despite this variation, and despite the fact that senate constituencies are geographically vast (representing whole Australian states), senators openly engage in constituency work. Much the same has occurred in Scotland and Wales post-devolution regarding 'list' members, the parties encourage senators to set up offices in marginal lower House seats in order to build up an electoral profile.[3]

For several reasons it would be a negative development for such patterns to develop in a reformed House of Lords. This is the single strongest argument in favour of the government's proposal that terms in the second chamber should be non-renewable. Clearly members are more likely to nurture constituency work if they are going to run for re-election. Preventing re-election cannot eliminate this problem, but it would reduce it.

Inability to stand for the House of Commons

A final important aspect of the government's proposals is that second chamber members should be barred from standing for election to the House of Commons until at least four years after their term has ended (or they resign their seat). This would also have the effect of limiting the incentive to pursue constituency work in order to 'nurse' a Commons seat. In fact four years is a rather short period in this respect. Given that parties often select their candidates several years before a general election, it could be as little as

3 For a longer discussion of this issue in Australia and elsewhere see M. Russell, Reforming the House of Lords: Lessons from Overseas, Oxford University Press (2000), pp. 188-90. On Scotland and Wales see J. Bradbury and J. Mitchell, 'The Constituency Work of Members of the Scottish Parliament and National Assembly for Wales: Approaches, Relationships and Rules', Regional & Federal Studies, 17(1), 117-145 (2007).

a few months before a departing second chamber member who had nursed a seat was selected by a constituency party. Notably, the Royal Commission ('Wakeham commission') on Lords reform recommended a much longer 'quarantine' period of 10 years.[4]

This issue is important not only because of constituency work, but because of the potential effect on the type of members who stand for election to the second chamber, and therefore for its culture. In several overseas countries the second chamber is not (as conventionally applies) a senior and mature chamber, but risks degenerating into a launchpad for careers in the more prestigious lower House. This is the case in Ireland, where it is common for senators to run for election to the Dail. In 1997, for example, 16 senators out of 60 were elected as MPs. Similarly MPs who lose their seats often run for the senate, and sometimes return subsequently to the Dail.

A similar situation seems to now be developing in Canada, where senators are appointed by the prime minister. Two recent cases should appear so alarming to British readers that they are worth quoting in some detail. First, here is a description of the recent political career of Fabian Manning:

> From 2006 to 2008 he was the Conservative Party of Canada Member of Parliament for the riding of Avalon. After his defeat in the 2008 federal election Manning was appointed to the Canadian senate on January 2, 2009. He resigned his senate seat on March 28, 2011, to run for election in his former riding of Avalon in the 2011 federal election, but was unsuccessful. Despite the loss,

4 Royal Commission on the Reform of the House of Lords, A House for the Future, Cm4534 (2000).

> prime minister Steven Harper announced his intention to re-appoint him to the senate.[5]

Similarly, Larry Smith:

> On December 18, 2010, he was summoned to the Canadian senate on the advice of prime minister Steven Harper and sat as a Conservative. Following his appointment to the senate, Smith announced his intention to seek the nomination to run as a Conservative candidate in... the [2011] federal election. ... Smith was defeated in his attempt to enter Parliament... and it was announced on May 18, 2011, he would be re-appointed to the senate.[6]

These examples should, I hope, be sufficient to demonstrate why a bar on immediately standing for the House of Commons is a very desirable element of any set of House of Lords reform proposals. The danger of omitting this feature (or setting a period of exclusion that is too short) is that a 'revolving door syndrome' develops between the first and second chambers. This would be completely contrary to the kind of long-term thinking and independence of spirit which is generally seen as desirable in second chambers, and which is currently associated with the Lords.

Powers of the second chamber

As far as composition is concerned, we therefore see that the government's proposals do much to avoid the kind of problems that have been counted overseas, and to build on good practice. The same degree of care does not however seem to have been applied when it comes to thinking through the powers of the reformed second chamber.

5 en.wikipedia.org/wiki/Fabian_Manning (accessed 23 June 2011).

6 en.wikipedia.org/wiki/Larry_Smith_(Canadian_politician) (accessed 23 June 2011).

There appears to be a degree of confusion within government about the likely effects of these reforms on the relationship between the two chambers of parliament. When introducing the proposals in the House of Commons Nick Clegg said:

> My view is that the fact of greater election to another Chamber does not in and of itself mean the balance between the two Houses is seriously disturbed.[7]

This is consistent with Clause 2 of the government's draft bill, which states that:

> Nothing in the provisions of this Act about the membership of the House of Lords, or in any other provision of this Act... affects the primacy of the House of Commons, or otherwise affects the powers, rights, privileges or jurisdiction of either House of Parliament, or the conventions governing the relationship between the two Houses.

These sentiments were however repeatedly contradicted by Lord Strathclyde when introducing the proposals in the House of Lords. For example his statements that:

> There is a rationale for an elected House: it is... to make the powers of this House stronger and to make this House more assertive when it has that authority and the mandate of the people.
>
> I fully expect the conventions and agreements between the two Houses to change... it would be very strange if they did not do so... it would mean a more assertive House with the authority of the people and an elected mandate.[8]

7 House of Commons Hansard, 17 May 2011, column 164.
8 House of Lords Hansard, 17 May 2011, columns 1277 and 1279.

In defence of his position, Nick Clegg has claimed evidence from overseas. When appearing at the House of Lords Constitution Committee on 18 May he suggested that:

> ... there are a number of bicameral systems in democracies around the world that perfectly manage an asymmetry between one chamber and the next, even though both might, in many cases, be wholly elected.[9]

This may be true, but these other bicameral systems do not manage asymmetry in the same way as the UK. On this point it is important to note that the formal powers of the House of Lords are actually relatively great in comparative terms. Under the terms of the Parliament Acts the Lords has the power to delay most bills for around a year, and has a complete veto over bills starting their passage in the House of Lords (and over secondary legislation). The fact that the House of Lords is generally considered weak depends not on the powers set down in the Parliament Acts, but on how little these are used in practice. Most of the time the House of Lords is instead restrained by the conventions that operate between the two chambers. These in turn depend on allegations of its lack of legitimacy when it seeks to stand in the way of the elected House of Commons. Whilst a similar pattern is seen with respect to some other second chambers (notably the appointed Canadian senate) it is far more usual for these chambers to be restrained by their actual formal powers - rather than by conventions that these powers should not be used.

In parliamentary systems such as that in the UK (i.e. where the government is dependent on the confidence of

9 Evidence to the House of Lords Constitution Committee, Question 217, 18 May 2011.

parliament), it is common for the powers of the second chamber to be much more limited than those of the House of Lords. This applies even where such chambers are wholly elected. For example:

- In Poland and the Czech Republic objections by the second chamber may be overridden immediately by an absolute majority in the lower House.
- In Spain the same applies, or if an absolute lower House majority is not obtained, the first chamber may override the second chamber by a simple majority after a two month delay.
- In Japan the second chamber may be overridden immediately by a two-thirds majority in the first chamber.

Each of these examples, and various others, gives a very significant advantage to the lower House when disputes occur between the two. Nonetheless, Japan has been subject to much instability in recent years at times when the government has been short of a two-thirds lower House majority, and reform of the second chamber has been much discussed.

There are many elected second chambers with roughly co-equal powers to their respective first chamber. Most of these, however, exist in presidential systems where the executive does not depend on the confidence of parliament. The obvious example is the US, but similar arrangements exist in countries such as Argentina and Brazil. Examples of powerful elected second chambers in parliamentary systems are more unusual. One such example is Italy, where the two chambers have identical powers. But they also have largely identical compositions, as they are elected by very similar systems. Because the party balance in the

two chambers is similar there is relatively little friction between them.

The most obvious comparator for the UK is Australia, where the lower House is elected by a majoritarian system (the Alternative Vote) and the second chamber by a proportional system which usually results in the balance of power being held by independents and small parties. Here the senate has an absolute veto over most legislation. It is a much more assertive chamber than the House of Lords, and not afraid to use its powers. One of the only restraints on the senate is the government's ability to claim that it is 'illegitimate' because every Australian state - despite massively different populations - has an equal number of senators (as in the US). This raises some questions about whether it has the moral right to block government legislation.

Australian scholars talk of the 'mandate wars' between the two elected chambers.[10] Given that one chamber has a more proportional membership, but the other represents population more closely, there is no obvious winner. In the UK the government's proposals for 15 year non-renewable terms, election in thirds, and retention of a 20 per cent appointed element are designed in part to ensure that the second chamber does not have equivalent legitimacy to the House of Commons. But given that it would be elected by a proportional system, Australian-style arguments would probably develop here.[11] The resulting more assertive second chamber might not be a bad thing, and

10 M Russell, 'Reforming the House of Lords', p.228-9.

11 For a more detailed discussion of this point see M Russell, 'Lords reform: principles and prospects', lecture given in the House of Lords at the invitation of the Leader of the House of Lords (13 November 2007) available at www.ucl.ac.uk/constitution-unit/research/parliament/House-of-lords

the Australian system generally functions well. But it is a change that we should go into with our eyes open.

Second chamber reform

In a review of lessons from other bicameral systems it is finally worth considering what these systems have to teach us about the process of reform. One notable feature is that second chambers - whether elected or appointed, or composed through some other means - are generally controversial. This derives from their role, which is fundamentally to question the decisions of the first chamber and political executive, who themselves are elected by the people. We should not assume that it is just the peculiar composition of our second chamber that makes it susceptible to criticism.

Calls for second chamber reform are widespread in other countries. For example in Canada there have been demands to reform the appointed senate for almost 150 years. In Italy there are calls to reform or abolish the second chamber, as it is essentially identical to the first. The Irish senate is attacked for being weak and ineffective, while its Australian equivalent is controversial (particularly in the eyes of government) for being too powerful. Nonetheless, despite these long-running reform debates in numerous countries, second chamber reform is relatively rare. In part this is because many countries have more 'rigid' constitutions than ours, which require some special mechanism to change. But in large part it is due to an inability to agree on what is the proper composition and role of these institutions. Powerful second chambers may be popular with voters, but they tend not to be popular with governments. And yet it is governments which must bring forward reform.

The ongoing debate in the UK about House of Lords reform is therefore not unusual. Throughout the 20th century the parties failed to agree on the appropriate composition and powers for a second chamber. In practice those reforms which succeeded were small and incremental: the reduction of Lords powers in 1911 and 1949, the creation of life peers in 1958 and the removal of (most) hereditary peers in 1999. Though difficult in itself, it may prove easier to reach agreement on the next small step towards Lords reform than on any major package.

Conclusions

This paper has argued that the government's proposals for the composition of a reformed second chamber have been quite carefully thought through, and seek to build on the best, and avoid the worst, of practice in other bicameral systems. Discussions are far less developed, however, on what we might learn from other countries about the powers of a reformed second chamber, and indeed what it is appropriate for those powers to be. International experience also teaches us that second chamber reform is difficult, though other second chambers are often subject to calls for reform. The House of Lords is, as suggested at the start of this paper, indeed a somewhat unique institution - but perhaps not as much as we might think. In particular, Britain is very far from unique in being engaged in a long, and potentially unending, debate about the options for second chamber reform.

Dr Meg Russell is reader in British and comparative politics and deputy director of the Constitution Unit at the department of political science, University College London.

1647... 1911... 2011: what are the lessons of previous attempts to reform the House of Lords?

Iain McLean

House of Lords reform is not a new idea. Debating the constitution of an English republic with senior Army officers in Putney Church in October 1647, Colonel Thomas Rainborough memorably said:

> for really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, Sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government

The Levellers, of whom Rainborough was one, argued that sovereignty lay only with the people. Parliament was their agent and acted only as far as the people authorized it to. Furthermore, some things, such as freedom of religion, were beyond parliament's power to curtail. The Levellers' solution to the problem of the House of Lords was to abolish it.

The idea of popular sovereignty revived thirty years later with the writings of John Locke. But the 'Glorious Revolution' of 1688-9, of which Locke was the ideologue, put parliamentary, not popular, sovereignty firmly in the saddle. Convention parliaments met in both Scotland and

England. Both offered the throne to William and Mary, on (different) terms, which they accepted. Thus monarchs were subject to Parliament. Parliament could change the terms of accession, as it did in 1701 and 1707, and again in 1936.

Rainborough's theory of popular sovereignty went underground in the UK, though of course not in the USA, whose constitution claims to speak in the name of "We the People". Through the 19th century this led to an intellectual vacuum. In whose name did the House of Lords speak? In whose name was it entitled to speak?

For some Victorians, the answer to both questions was the same: for landed property and the established Church. For many of their Lordships, these facts were self-evident and self-justifying. But not for all. The Duke of Wellington, no less, as leader of the Lords in the great administration of Sir Robert Peel (1841-6), warned his peers not to obstruct repeal of the corn laws in 1846, even though they hated it. It would be dangerous, said the Iron Duke, for the Lords to oppose both the Commons and the executive. By the strength of his towering personality, he got a landowning House to vote to repeal protection to landowners.

His successors tried less hard, or not at all. From Wellington's time until 1911, the Lords caused no trouble to Conservative governments, but considerable trouble to Liberal governments. They protected the interests of land and church effectively, giving way only when the party that won a Commons election had done so with a clear mandate for a particular reform: as in 1868, when the Conservative leaders in the Lords accepted that the Liberals had won an election on a definite promise to disestablish the Anglican church in Ireland, which was done in 1869 with the Lords standing by.

Soon after that, the Conservative leader in the Lords (and future prime minister) Lord Salisbury codified this into a doctrine that still stands, although it is now tottering. He expressed it with his usual candour to a colleague:

> The plan which I prefer is frankly to acknowledge that the nation is our Master, though the House of Commons is not, and to yield our opinion only when the judgement of the nation has been challenged at the polls and decidedly expressed. This doctrine, it seems to me, has the advantage of being: (1) Theoretically sound. (2) Popular. (3) Safe against agitation, and (4) so rarely applicable as practically to place little fetter upon our independence.

This is the core of the Salisbury (now Salisbury-Addison) doctrine. In 1945, the election of a majority Labour Government put the Conservative leader in the Lords, Lord Cranborne (soon to become the 5th Marquess of Salisbury) in the same position as his grandfather in 1868: of having to handle the relations between an overwhelmingly Conservative Lords and a left-wing Commons. Lord Cranborne made an agreement with Lord Addison, the Leader of the House and leader of its tiny Labour contingent, which Cranborne explained in a Lords speech in August 1945:

> Whatever our personal views, we should frankly recognize that these proposals were put before the country at the recent General Election and that the people of this country, with full knowledge of these proposals, returned the Labour Party to power. The Government may, therefore, I think, fairly claim that they have a mandate to introduce these proposals. I believe that it would be constitutionally wrong, when the country has

> so recently expressed its view, for this House to oppose proposals which have been definitely put before the electorate.

This 'Salisbury-Addison convention' is generally interpreted to imply that the Lords do not vote on second or third reading against a government manifesto bill, and that they do not agree to 'wrecking amendments' to such a bill.

What, if anything, does Salisbury-Addison mean now? The Liberal Democrats say they were never party to it and do not consider themselves bound by it. And is the 2010 Coalition Agreement a government manifesto, or something else? The feisty House of Lords in the 2010 Parliament has not hesitated to lunge at promises in the Coalition Agreement. In autumn 2010 the Lords almost defeated the bill to equalise Commons constituencies and to provide for the referendum on Alternative Vote. In 2011 they defeated a proposal for elected police commissioners and look set to defeat, or heavily amend, the proposals for an elected House in the 2011 white paper and the ensuing joint committee. All of these were in the coalition agreement: therefore Salisbury-Addison does not seem to apply, and it will have to be rewritten, whether or not an elected House ensues from the 2011 white paper. The white paper interprets Salisbury-Addison more expansively than either the 3rd or the 5th Marquess:

> [*W]hether or not a bill has been included in a Manifesto, the House of Lords should think very carefully about rejecting a bill which the Commons has approved* (Cm 8077/2011, para. 6).

The Labour filibuster in the Lords against the Parliamentary Voting System and Constituencies bill in late 2010 shows that many Labour peers, at least, do not accept that

interpretation. Their actions invite Conservative peers to reject the government interpretation of Salisbury-Addison when a bill they dislike comes to them from a future Labour-controlled Commons.

But the present House emanates from a crisis that broke out when neither the 3rd nor the 5th Marquess of Salisbury was leading the Conservative peers. In 1909 the Lords rejected Lloyd George's 'People's Budget' by 350 votes to 75, contrary to the understanding that the Commons has a monopoly of supply. Roy Jenkins remarks that 'as is so often the case when the House of Lords is engaged in reaching a peculiarly silly decision, there were many comments on the high level of the debate'. After two general elections, both won by the Liberals and their allies, and two threats of creation of peers (as had been threatened in 1832 to get the Lords to accept the First Reform Act), the Parliament Act 1911 confirms the Commons' monopoly of supply; provides that a bill passed unaltered by the Commons in three (since 1949 two) consecutive sessions may become law without Lords' consent; but specifically excludes a bill to lengthen the life of a parliament from being passed without Lords' consent.

The act opens with a notorious preamble:

> And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:
>
> And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act

> appears for restricting the existing powers of the House of Lords:
>
> Be it therefore enacted ... as follows.

A century later, the substitution has not been brought into operation. Why? The first answer is that preambles of acts have no legal force. It is often said that the 1911 Preamble was worded as it was only to placate the faction in the Government that really cared about an elected upper House. Three important changes have come, in 1949, 1958, and 1999. But none of them creates a second chamber constituted on a popular instead of hereditary basis.

The Parliament Act 1949 reduces the Lords' veto from three offers of a bill to two. The Lords remain decisive towards the end of every parliament – the 1949 act just reduces that period by a year. Life peers arrived first in 1958, and with them the first attempts to rebalance the overwhelmingly Conservative composition of the House. All incoming (and most outgoing) prime ministers have created peers of their own party, and usually a proportionate number from the opposition parties. As a result, most members of the Lords now take a party whip.[1] By the House of Lords Act 1999, most hereditary peers left the House, leaving 92 who are replaced by by-elections among the hereditary peers of each party, with only peers who are members of the House eligible to vote.

Why then has the 1911 preamble not been enacted into binding law? The first reason lies in the act itself. Even as

1 As of May 2011, the numbers, excluding peers on leave of absence or otherwise disqualified from voting, were: Labour 243; Conservative 218; Liberal Democrat 92; other parties including DUP, UUP, UKIP, Plaid Cymru, "Conservative Independent" and "Labour Independent" 13. Party peers comprise 553 out of 789 active peers (72 per cent). There are no Scottish National Party peers. About 200 peers are former MPs.

amended in 1949, the Parliament Act gives the Lords a veto over non-financial legislation for the last 18 months or so of every parliament. Turkeys do not vote for Christmas. The House of Lords has never voted by majority for its own supersession by an elected House.

The best-known attempt since 1911 to secure an elected House fell foul of this fact. A scheme for an elected House was devised by the Labour government of 1966-70. With many other preoccupations, the bill was not ready for its Second Reading until February 1969. As amusingly related in the sponsoring minister's (Richard Crossman) diary, many of the Cabinet and many of his own MPs were uninterested or hostile. An alliance of extremes killed the bill. Michael Foot, on the Labour left, wanted the complete abolition of the Lords. Enoch Powell, on the Conservative right, wanted it to remain unaltered. Their weapon was time. As Parliamentarians, Foot and Powell knew that the 1911 clock was ticking: not only on the Lords reform bill but on every bill that the Labour government wanted to get through the Conservative Lords. Therefore they need not defeat the bill in the Commons, only delay it. The Cabinet dropped the bill in April 1969 in order to preserve scarce parliamentary time for its industrial relations reforms, which were also defeated, later in the same year.

In order to rely on the Salisbury-Addison convention, then, a party must put a commitment to an elected upper House in its manifesto; must win an election; and (just as important) must legislate early in its term. (The 1969 bill would, theoretically, have been covered by Salisbury-Addison. But dissension in the Commons led the Government to withdraw it. By spring 1969, even if passed by the Commons, the Lords could have killed it by delaying it until parliament was dissolved for the 1970 general election).

The Liberals and predecessors have been in favour of an elected upper House since 1911; but, having few seats in the Commons, they have never until 2010 been able to get that commitment taken seriously. Labour enthusiasm for an elected Parliament was higher under Keir Hardie than under Tony Blair. The Blair government commissioned the (Wakeham) Royal Commission, which reported in 2000 in favour of a relatively small elected element. Recent Labour manifestoes, up to 2005, called for a more representative upper House but did not call for it to be elected. Its 2010 manifesto did. The Conservatives joined the party in 2005 and 2010. The Commons have held two multi-option votes. In 2003, they managed to defeat every option, including the status quo. Parliamentary rules therefore delivered the status quo. In 2007, they voted alternatively for an 80 per cent elected and a 100 per cent elected House. The Lords themselves have always voted to remain unelected.

For at least 150 years, the commonest argument in favour of an unelected upper House has been that the Lords are a fount of wisdom. As the front page of the UK Parliament official website describes the House, it is

> A forum of expertise, making laws and providing scrutiny of Government.

In a memorable phrase, the Conservative peer Lord Howe of Aberavon (the former Sir Geoffrey Howe, a Cabinet minister under Margaret Thatcher) has said that an elected House of Lords would be "clones of the clowns in the Commons".

Would an elected House cease to be a forum of expertise? The answer must depend on the sort of elected House it is. The 2011 proposals, building on a consensus among

party leaders[2], envisage a House that would either be 80 per cent or 100 per cent elected. The Conservatives prefer 80 per cent; the other two main parties, 100 per cent. In the former case, non-party appointments would be made by a statutory Appointments Commission, and the prime minister's powers of patronage would entirely disappear.

For the sake of argument, let us assume, with Lord Howe, that almost all party members of Parliament (both Houses) are clowns, and that expertise lies almost entirely with the non-party members. As to expertise, therefore, an 80 per cent elected House would not differ very much from the present House, which is 72 per cent composed of peers taking a party whip. One difference would be that non-party peers could be explicitly chosen for their range of expertise, as that could be a standing instruction to the Appointments Commission. Also, elected party peers would be, on average, younger than the existing appointed party peers.

Another possible response to Lord Howe is that members elected by a different electoral system and under different rules to MPs would not be clones of anybody. The 2011 scheme envisages that elected members would come from perhaps a dozen large constituencies. They would be elected by proportional representation for a single long, non-renewable term (the white paper suggests 15 years), and would be ineligible to run for the Commons until five years after the end of their term. Terms would be staggered, with a third of elected seats coming up at each general election – which, if the current fixed-term parliaments bill

2 The scheme derives from a plan advanced by the Conservative frontbencher Lord Mackay of Clashfern, and taken forward by the Labour Justice Secretary Jack Straw and prime minister Gordon Brown. It has also been widely discussed in the academic literature.

proceeds, would normally be every five years.

The successive party and cross-party committees that have developed this scheme have done so to avoid clown-cloning (though they would presumably not have used Lord Howe's colourful language). The electoral system means that a wider range of parties would be represented than in the Commons, and that no party would ever have a majority of the elected senators. The staggered terms would mean two things at least: that not all expertise would disappear on the same day in the event of a big swing in public opinion; and that the mandate of the Commons would always be more recent, so that the senate would be restrained from saying "we are *more* democratic than you".

The long, non-renewable, quarantined term would likewise do a couple of things. It would make party Senators immune from their party whips' threats to vote for their party if their conscience or expertise demanded otherwise (for the whips' threats are threats of deselection, and the Senators could not be reselected in any case); it would also signal that this is not a career path for people who want to be the prime minister, or to harass him at prime minister's Questions. Therefore election to the senate might appeal to people who, although they were party members, were not interested in becoming clones. Experts, perhaps?

The reception of the 2011 white paper, in both Houses and in much of the media, was hostile. A martian listening to the debates would be surprised to learn that an elected upper House was in the manifestoes of all three major parties in 2010. The papers were full of articles, often by non-elected peers, explaining that a non-elected House was the best way to preserve the forum of expertise that the Lords say they are. But they would say that, wouldn't they? The argument is not proven. But it is not self-evident that

an elected House would be less expert than the present one. It would also advance Thomas Rainborough's dangerously radical belief that the poorest he that is in England has a life to live, as the greatest he, and therefore each of them has a right to be governed only by those they have consented to govern them.

Iain McLean is Official Fellow in Politics, Nuffield College, and Professor of Politics, University of Oxford.

Nearly right, but easily improved

Patrick Dunleavy

The coalition government's draft bill on Lords reform shows tremendous progress in coming up with a workmanlike road to reform. Nick Clegg now has a set of reform proposals that are four fifths of the way to being a coherent, principled and genuinely worthwhile reform - and one that meets the pledges made to the electorate at the 2010 general election by the top three political parties. My table below shows how far the coalition's thinking has come, and yet what further movement it still needs to achieve a fully democratically accountable upper chamber.

The coalition's draft bill

The essence of the government proposal is to elect the vast bulk of the reformed chamber in large constituencies, using the regional seats already employed for electing the UK's members of the European Parliament. One of the options still to be debated by the coalition parties is whether the new senate should be 100 per cent elected, or have only 80 per cent elected members, with the remaining fifth appointed by a non-partisan commission. The proposals for electoral arrangements strongly resemble the detailed schema for electing the Lords that Helen Margetts and I set out for Lord Wakeham's dreadful Royal Commission on the Lords in 1999, which ignored all elections to create the current all-appointed House.

Table 1: Comparing the status quo, the government's draft bill and the changes needed for a fully democratic senate

	Current House of Lords	Government draft bill for reformed House	Change still needed for a fully democratic senate
Number of members	789 – many of whom never show up to debates, and many more of whom speak only a handful of times, ever	300 plus	180 to 220
How do members get there?	All appointed (plus remnants of hereditary peers)	Either: 80% elected and 20% appointed by non-political commission Or: 100% elected	100% elected
Years in legislature?	Until death	Three general election periods, (i.e. from 6 to 15 years)	Two general election periods, (i.e. 4-10 years)
How many times can you stand for office?	See above – you only exit when you die	Once only – you can never be re-elected	Twice –you can be re-elected once
When are new members added?	Whenever the government needs to win votes	One third of members are elected at a time	Half of members are elected at a time
System of election used?	None	Either: List proportional representation system Or: Single Transferable Vote (STV)	Simple to use, List PR voting system
Who do members represent?	Themselves	Government standard regions in England, and the nations of Scotland, Wales and Northern Ireland, that is multi-member constituencies of between 1.5 and 8 million people, as for MEPs at present	
Election timing	Never	On the same days as general elections	
Timetable for reform	Never	2015 – first elections 2025 – fully reformed	2015 – first elections 2020 – fully reformed

The draft bill proposes to create a strongly static balance of parties in the new House by suggesting that members are only elected a third at a time, which in turn means that to get proportional elections a large senate of 300 plus members is needed. (Given the size of the smallest UK regions, you cannot elect much less than 100 members at a time and still represent a fair balance of votes in each region). Each member would be elected once only and would never be able to stand for re-election, that is, a single term limit. The government's intention here is clearly to try and create an upper House where elected legislators are not tied in loyalty to their political parties. More independent-minded legislators are seen as being the ones we need for a senate that is still essentially intended to serve as a revising and scrutinizing chamber.

Yet, single-terms of office are a highly unusual requirement, found in very few other legislatures across the world. The main case is the Mexican legislature, where single term limits are widely blamed for corrosive corruption, because a legislator who cannot be re-elected has nothing to lose from being corrupt. Now the British political elite are always quick to suggest that nothing like this can possibly happen here, not with 'people like us' around. But the expenses scandals around MPs and peers in the last two years strongly indicates the contrary – that is you place people in temptation's way, a goodly proportion of them will follow Oscar Wilde and succumb. So the government's single-term proposal is a constitutional risk of the first order, one that the UK should not take.

The government proposes that elections will take place on the same day as general elections, because that will maximize the number of people who will vote in the new senate elections, a strong democratic rationale. However,

the top three parties (Conservatives, Labour and Liberal Democrats) also know that the general election context is the most favourable for them. In particular, it tends to strongly suppress votes for the UK's smaller fourth, fifth and so on parties – whose votes would clearly be higher if senate elections took place on a fixed four year term, like those for the Scottish Parliament, Welsh Assembly and Greater London Authority.

Electing on general election days means that the government's draft bill cannot specify exactly how long a member of the new senate will sit for. If a general election takes place inside of two years, then they do not trigger an election of the next wave of senators due to be replaced. But once a parliament has gone beyond two years, that counts for this purpose. And of course each parliament can only last a maximum of five years. So depending on how things work out, an unlucky senator could sit for as little as six years, while a lucky one (who lasts through three five-year parliaments) could be there for a decade and a half. This would be a hugely long term during which senators never have to return and face the voters who chose them, and are not removable in any way through popular action. (In fact, if a tranche of senators got really lucky and interspersed five year parliaments with a couple of near-two-year short parliaments at the right times, they could stay in the upper chamber for almost *19* years).

Put such huge periods in office with the draft bill's single term limit for senators and we run the risk of creating a dynamite cocktail of provisions. In (re)writing a constitution we absolutely must plan for all contingencies, not just those deemed likely. So we need to allow for rogue legislators, and groups of sophisticated rogue legislators, as much as for well-behaved ones – and for extraordinary

situations as well as for routine times. The new senate would have proper rules of conduct for the first time, and senators would be removable if misconduct were clear and *proven*. But the organization of ongoing corrupt practices is easy to do inside strong rules – as the UK has repeatedly proven with the effective purchase of honours, including seats in the House of Lords. We should not risk constituting a whole upper House where every member knows that they will never have to face the voters again, and that they could last in power for a decade and a half with only a modicum of guile and skill.

Improving the government's proposals

If the remaining problems with the current draft bill are obvious, they are also easily solved. The key thing is to reduce the size of the senate to its smallest feasible scale, which is around 180 to 220 members – which minimizes both the total number of elected politicians at Westminster and the costs of an elected upper House. The chamber can also be very safely elected a half at a time (not in thirds) because the government has accepted the need for proportional representation elections. And under any realistic scenario, in today's multi-party politics, two PR elections in the UK are never likely to result in an upper House with a clear overall majority for any one party.

Even if we assume (as we should) that the top three parties (or four parties in Scotland, Wales and Northern Ireland) will do well in senate elections held on the same day as general elections, under PR a party can only win an absolute majority if it is doing incredibly well – and it would have to do that twice in a row. Inherently, a PR-elected upper chamber is likely to be permanently 'hung',

creating the optimal conditions for it to operate its revising chamber role effectively. Governments will need to have rational argument and evidence on their side to carry through their legislation, but the Commons will retain the ability to enforce a majority party's view – especially if five year Parliaments become the norm as the coalition expects.

Electing members in halves also means that the term of office for senators would fall to between four years (if they held office in two short parliaments only) and ten years (if they held office for two full term parliaments). This reduction also opens up the chance to get rid of the highly objectionable single term limit, and to opt for the term limit widely seen as optimal in US politics and in academic analyses also – namely two terms. That means that senators would have the chance to be re-elected once, but they could not go on and on, as MPs do, and so would not be professional career politicians and nothing else.

In terms of the electoral system to be used, the government's draft bill suggests that the Single Transferable Vote (STV) could be used in the large regional constituencies and technically this is (just) feasible. However, the white paper is clear that the government also considered and could live with a system of open list PR elections – which allows voters to scan a list of candidates offered by each party in the large regional constituencies and to vote individually for the candidate they most prefer, using a single 'X' vote. Here voters can rearrange the order in which candidates get elected from each party's list. (This is unlike the UK's European Parliament elections, which use a 'closed list' PR system where the order of candidates is set by the political parties alone). Each party then wins seats off their reordered list of candidates in proportion to their

share of the vote.

An open list PR system means that voters are ultimately in control. Parties have strong incentives to select their most popular candidates to head their list – this is always the best strategy for any party trying to maximize its votes in a PR election. Open list PR provides a strong protection against parties trying to pack their lists with 'hacks' or 'has-been' politicians, and instead to seek popular and credible candidates. It also creates a strong basis for individual senators to seek re-election on their own, distinctive record of voting independently for the public interest.

So there are three highly compelling reasons for the Liberal Democrats to back off, and not to insist on reform going down the STV route – opting instead for the government bill's alternative option of open List PR. The first is that this is far simpler for voters to operate and to count, and a version of List PR already works well for the UK's European Parliament elections. The second reason is that if senate elections are held on the same day as general elections, having two 'X' vote elections (open list for the senate and first past the post for the Commons) would be strongly preferable for voters – while mixing up numerical voting for the senate (STV) with 'X' voting would be highly confusing. The Scottish Parliament elections of 2008 coincided with new STV local elections for Scottish local governments, and created unprecedented problems that should never have been allowed to happen. Finally, of course, voters have just strongly rejected numerical preference voting for AV in the May 2011 referendum, so that the Liberal Democrats would be well advised not to try again with STV.

The only other change needed is for Nick Clegg and the Liberal Democrats to take their courage in their hands

and to insist at their party conference in September that only a 100 per cent elected senate will be democratically credible and acceptable to public opinion. An 80 per cent elected upper House would undermine the whole point of elections by creating a completely unaccountable and irremovable sub-set of legislators, again opening the way for the taint of corruption and social exclusion that has so disfigured the Lords over many decades. The Liberal Democrats should concede on open list PR elections and not STV, but demand in return that the new senate is a wholly elected chamber.

Patrick Dunleavy is professor of Political Science and Public Policy at the London School of Economics.

THE PROPOSALS IN THE DRAFT BILL

The government's view of House of Lords reform

Mark Harper MP

The government believes that people have a right to choose their representatives. That is the most basic feature of a modern democracy.

The House of Lords is well known for its wisdom and expertise. However, it is undermined by the fact it lacks democratic authority as it is not directly elected by the British people.

The government published proposals on House of Lords reform on 17 May 2011, as a draft bill and accompanying white paper. Consistent with the government's Programme for government, the proposals provide for a wholly or a mainly elected second chamber, with elections using a system of proportional representation.

At the last general election each major party committed to a democratically elected second chamber. After the election, the deputy prime minister established and chaired a cross-party committee which met from June to December 2010. This committee considered all the issues in relation to reform of the House of Lords.

The government believes that scrutiny of the draft bill should continue to be taken forward on a cross-party basis. A joint committee of both Houses will undertake pre-legislative scrutiny of the draft bill and white paper.

The House of Lords would maintain its current role. It would continue to be a revising chamber, scrutinising legislation and holding the government to account.

The government proposes that the members of the reformed House would be elected or appointed in thirds at the time of elections to the House of Commons. If there was an election to the House of Commons less than two years after the previous election to the House of Lords, there would not be an election to the House of Lords. In line with many second chambers around the world it would be smaller than the first chamber. The government proposes a reformed House of Lords of 300 members who would be expected to attend the House of Lords on a full-time basis when it is sitting. A House of this size would be able to carry out the same range of work as the existing House. Currently many of its members have outside commitments or do not attend regularly.

Members would sit for a single non-renewable term of three parliaments. Single non-renewable terms would enhance the independence of members of the reformed House of Lords. They would be able to take a long-term view without constantly considering the implications of their actions on their prospects for re-election. MPs would continue to be accountable to the electorate – a factor which helps maintain the primacy of the House of Commons.

The draft bill sets out how a chamber which is 80 per cent elected and 20 per cent appointed would work, as this is the more complicated of the options. The accompanying white paper does not however rule out a wholly elected House of Lords if there is a consensus for that at the end of the scrutiny process.

The government is committed to a system of proportional representation for elections to the reformed House of Lords.

Proportional representation systems are based on multi member constituencies. They allow the number of seats gained by each party to closely correspond to the number of votes cast for that party at an election. The government believes that a proportional system will help the reformed House of Lords perform the same role as at present but with clear democratic legitimacy. It will also differentiate the reformed second chamber from the House of Commons in two ways. First, electing members to the reformed House of Lords by a proportional system makes it likely that, as now, no single party will have a majority, enhancing the scrutiny function. Second, the electoral districts proposed for the reformed House of Lords will be different from the constituencies which MPs are elected to represent. If 80 members were elected at each election, that would mean roughly 570,000 voters to each member, compared to the approximately 75,000 voters represented by each MP. Differences like these would ensure that the mandate for members of the House of Lords is complementary to the important work carried out by MPs and their link with their constituents.

The bill and white paper set out how a Single Transferable Vote (STV) electoral system would work. STV is a form of proportional representation in which electors may vote for individual candidates using numbered preferences. Votes for one candidate can transfer to other candidates where they can no longer influence the result, either because they are held by a candidate who already has enough votes to be elected, or because they are held by a candidate who, at a certain point, has too few votes to compete with other candidates.

STV offers a clear link between voters and individual candidates as candidates are elected solely on the basis of the

votes they themselves achieve. The government considers that STV can therefore help to preserve the independence of thought that is one of the best things about the existing House of Lords. However, the white paper acknowledges that a list-based system would also fulfil the coalition agreement commitment to a proportional electoral system, and is open to views on whether such a system should be used.

The government proposes that the multi-member electoral districts would be recommended by a panel of independent experts. The district boundaries would be permanent with the number of seats reallocated every 15 years according to electorate.

If the House of Lords were to be 80 per cent elected, a statutory appointments commission would handle nominations of the 20 per cent appointed members, who would be expected to be non-party political.

If the House were not wholly elected, there would be a continuing role for some Church of England bishops, eventually reducing to a maximum of 12 in number. They would not count towards the 20 per cent appointed members, but would be supernumerary. There would be no other specific religious representation.

Members would receive a salary and pension, to be set by the Independent Parliamentary Standards Authority. The draft bill includes provisions for resignation, expulsion and disqualification. The tax-deeming rules which already apply would continue. The link with the peerage would be broken; this would revert to being just an honour. There would be no re-election or re-appointment for those who had served a full term. There would be a cooling-off period of four years during which former members of the Lords would be ineligible to stand for election to the House of Commons.

The government proposes a long period of transition over three elections during which existing peers would remain as transitional members. The draft bill sets out one option - one third of the existing members of the House would leave at the time of the first election, and a further third at the time of the second election, with the remaining peers going at the time of the third election. The draft bill does not spell out how the members would be chosen; it is left for the House of Lords and the parties to decide. The white paper includes two other options – reducing the House to its final size of 300 immediately, or allowing all existing members to remain until the third group of elected members arrive.

Much of the debate following the publication of the draft bill and white paper has focused on the powers of the House of Lords and its relationship with the House of Commons.

Many parliamentarians have claimed that a House of Lords which is wholly or mainly elected would challenge the primacy of the House of Commons. However, the primacy of the House of Commons is not solely based on the fact that it is elected and the House of Lords is not. The Parliament Acts of 1911 and 1949 provide the basis of the relationship between the two Houses, but this relationship is also governed by convention. Primacy also rests in the fact that the prime minister and most of the government are drawn from the House of Commons.

The government does not plan to make any changes to the formal powers of the House of Lords. The Parliament Acts will remain in place. The draft bill includes a provision which states that nothing in the bill will affect the respective powers of the two Houses and the relationship between them and that the House of Commons would remain the

primary House of Parliament. The government believes this is the best way of ensuring that the powers of the House of Lords and the way they are exercised should not be extended.

Other features of the reformed House of Lords – its size, electoral cycle, voting system, and the terms of its members - would keep it distinct from the House of Commons.

The government believes that the package of proposals it has put forward will give the House of Lords democratic legitimacy, but enable it to preserve the best features of the present House, while maintaining a clear distinction between the composition of the House of Lords and the House of Commons so that they remain complementary.

We are embarking on the next stage of a debate which has been ongoing for over a hundred years. Pre-legislative scrutiny will allow those inside and outside of parliament to continue to debate all the issues. The joint committee will report early next year. The government will continue to listen and act as far as possible on the basis of consensus. However, the government is determined to act and to introduce a government bill next year, with a view to the first elections taking place in 2015.

Mark Harper MP is the minister for Political and Constitutional Reform.

The case for an elected House of Lords

Hilary Benn

"Labour clears the way!" This was the slogan on a famous pre-war election poster, which showed working people walking through the entrance to parliament. It was in keeping with the tradition begun by Keir Hardie, Labour's first MP. Arriving at the House of Commons after his election in 1892, it is said that the doorkeeper peered at his clothes and asked airily "Are you working on the roof?" "No," replied Hardie, "I am working on the Floor". Both are a reminder that Labour's commitment to a wholly democratic parliament has been as long-standing as our existence as a party.

The lesson Labour learnt on constitutional reform – sometimes the hard way, as in the 1970s, but with more success during our recent period in government – is that difficult questions cannot be avoided. Enduring and successful change to the way in which we choose those who make our laws requires determination to act in the face of those who will always argue that the system works perfectly well and so there's no need to change it.

The House of Lords - as currently constituted - is unsustainable. It now has 828 members, and while it remains unreformed each successive government will want to appoint additional peers to ensure a better balance.

And at the very time when the House of Commons is to be reduced – wrongly, in our view – from 650 to 600 members, the prime minister has in his first year of office created 117 new peers. Indeed he has appointed more peers, more quickly than any other post-war prime minister. So unless we do something, the House of Lords is going to become of unmanageable size.

So there is a powerful pragmatic argument for Lords reform, but it is dwarfed by the argument of principle in favour of this long-overdue constitutional change.

Labour has a proud record on constitutional reform. Before 1997 there was no parliament in Edinburgh or assembly in Cardiff. London didn't have a Mayor. Hereditary peers still held the balance of power in the House of Lords. Proportional representation was confined to the continent. There was no Freedom of Information Act. And the Human Rights Act had not been incorporated into UK law.

We started the process of House of Lords reform. Our House of Lords Act 1999, which removed most of the hereditary peers, was the most substantial change to the upper House in nearly a century. So to claim, as some do, that we did nothing when we were in government is to rewrite history.

In pursuit of second stage reform, we enabled the House of Commons to vote on degrees of election, and MPs responded by voting for both an 80 per cent and 100 per cent elected second chamber. Our 2008 white paper, 'An elected second chamber: further reform of the House of Lords' set out a way forward that had been worked through with all parties. In the 2010 general election, Labour's manifesto commitment to Lords reform was clear:

> "We will ensure that the hereditary principle is removed from the House of Lords. Further

> democratic reform to create a fully elected Second Chamber will then be achieved in stages... We will consult widely on these proposals, and on an open-list proportional representation electoral system for the Second Chamber, before putting them to the people in a referendum."

Together with Sadiq Khan and Jan Royall, l sat on Nick Clegg's cross-party committee on Lords reform in the run-up to the publication of the draft House of Lords Reform Bill. We agreed on a number of things, but the outstanding unresolved questions were whether the new House would be wholly-elected or not, what the relationship between the two Houses should be, and whether we would hold a referendum on this important constitutional change.

Now the bill has appeared, we see that Nick Clegg has failed to have the courage of his own convictions. He has said many times that he supports a 100 per cent elected upper House. It was in his election manifesto, but that is not what the coalition's draft bill provides for. It flunks the fundamental question of a wholly elected second chamber.

Nor has the bill resolved the relationship between the two Houses. Despite the declaration in Clause 2 that nothing in the bill "affects the primacy of the House of Commons" or "the conventions governing the relationship between the two Houses", it is inevitable that the relationship will change. And yet this fundamental issue, too, is not addressed.

I much admire the work that the House of Lords does, and I have particular respect for the work of my Labour colleagues. They are able, committed and very effective, as are the cross-benchers. I support having two chambers; it is a really important part of the checks and balances in our system. But I also support a fully-elected second chamber

– hopefully including some of those who now serve in it - to revise and to scrutinise, but ultimately to accept that the House of Commons should have the final say.

The choice we face is simple; is it to be the status quo or change? Sixty one other countries have democratically-constituted second chambers, and I thought we had long ago won the argument that those who govern us should be elected. Indeed, how - at the beginning of the 21st century - can anyone argue for reform of the second chamber without being in favour of democratic election?

And yet, like all previous debates on Lords reform, we still hear arguments as to why the Lords should not be changed. Some of these arguments have barely altered since the time of the 1832 Reform Act. Indeed to listen to those who express the view that only appointment can ensure that the Lords has the right people with the right experience, it sounds remarkably like an argument against having an elected House of Commons! Or those who cry 'now is not the time' – the last refuge of those who do not want to debate the issue - or 'it's all too difficult'.

Lords reform is part of what we need to do to help restore trust in our politics which, as we know, is a long-standing problem. Ed Miliband summed it up in January this year:

> "We all know politics is too remote from people's lives, and that needs to change. We need to be in touch with people, and to understand people's concerns and aspirations for the future."

One of the ways we can do this is to have strong political institutions able effectively to exercise power on behalf of the electorate; instead, the deputy prime minister is settling for a 'that's enough' Lords reform, without giving the people the chance to express their view on what – by

any measure – will be a major constitutional change. That's why I remain committed to a referendum, in due course. On a matter of such democratic importance, we should have the confidence to trust the people.

Reforming our parliament and creating an elected second chamber must be an issue of principle, and cannot be a matter of mere tactics. At a time when people are taking to the streets across the Middle East and north Africa demanding to have a say in who represents them, how could anyone contemplate reforming our system on any other basis than full democracy?

So a decade into the 21st century, it is clear the government doesn't have a serious proposal on Lords reform. And as parliament considers this bill, I hope it will remember Labour's call to 'clear the way' and decide to make our parliament a wholly democratic body with all of our lawmakers elected by the people we are here to serve.

The Rt Hon Hilary Benn MP is Shadow Leader of the House of Commons.

RESPONSES TO THE PROPOSALS:
THE PEERS

Lords reform reviewed

Robert Maclennan

Discussion is the best kind of democracy. That wise opinion of John Stuart Mill is ample justification for bi-cameral parliamentary government. The reform of the House of Lords by the Asquith government one hundred years ago was intended to remove the power of the second chamber to block decision making by the government, not to close down discussion. In that aim the reform was successful. And discussion can lead to change of mind. In a recent five-year period 40% of the amendments to legislation passed by the House of Lords against the initial wishes of the government were ultimately accepted by the government. Such outcomes have rarely been subjected to criticism and, no doubt, justify the accolades of the present prime minister and his deputy that "The House of Lords works well … and its existing members have served the country with distinction." The question which must, therefore, be answered about the coalition government's proposed changes in the composition of the House of Lords is "How will the proposed new second chamber work better than the present one?"

It is instructive to consider the constitutional context in which the draft bill to provide for a "wholly or predominantly elected" House of Lords is published. By the end of the twentieth century the good governance of the United Kingdom was perceived to be threatened by

the growing extent of the exercise of centralised executive power. In a unitary state where the government wields the prerogative powers of the crown largely unchecked by parliament, where the electoral system can sustain in office for a long time the same political party with the support of only a minority of the electorate, where the membership of the House of Commons is increasingly professionalised and with the preferment of its members depending upon the patronage of the prime minister, the trends are troubling. Cabinet government itself has been seen to be eroded by the personalisation of power and what has been called "sofa government". In consequence, constitutional reform, or "modernisation" as it was comfortably described became a hotter political topic than usual.

By the end of the 1990's steps were underway to devolve power, to open up government processes to scrutiny through freedom of information, to effectively protect human rights, to secure the separation of the highest court of the realm from the legislature and to strengthen the independence of judicial appointments. At the same time parliament began again to reconsider its own composition, processes and conventions. The Commons' Administration Committee, chaired by Tony Wright, pushed to strengthen the independence of the House Committees from executive influence. The dominance of the hereditary membership of the House of Lords was greatly diminished by the 1999 act. It can be seen that the central thrust of the reforms was to redistribute power and to strengthen the checks and balances of our Parliamentary democracy. The continuance of this process is the real opportunity to be pursued in pushing forward further parliamentary reform, including the reform of the composition of the second chamber. As the proposals stand, however, they would fall far short of

securing these purposes.

The paradox at the heart of the coalition government proposals is the extraordinary utterance that "The powers of the second chamber and, in particular, the way in which they are exercised should not be extended." What, then, is the point of the proposed changes? The compliment is paid to the House of Lords that it has "served the country with distinction". Its "lack" to which the Government draws attention is "sufficient democratic authority"; but it is proposed that the Lords, having been given sufficient democratic authority, must do no more and do it no differently.

Those who have long favoured an elected second chamber have done so because they have seen it as a contribution to strengthening the hand of the legislature over the executive arm of government. In particular, some have observed that although the House of Commons is wholly elected it is itself capable of behaving like a well-trained poodle and of performing at the command of the government. A second chamber, or senate, wholly elected by a different voting system from that of the House of Commons, in tranches and at different times from the Commons, could indeed call governments to refrain from precipitate or ill-considered action. The authority of the senators, stemming from their democratic election, would reasonably entitle them to pit their judgment against that of the government in the full knowledge that, like the government, they themselves would be held to account by the electors for their actions. The fear of gridlock between executive and legislature can be exaggerated, for if there is openness of reasoning between the arms of government and the balance of argument is finely drawn then normally deference to the executive is to be expected in a parliamentary democracy.

There is a second good reason for giving legitimacy by direct election to the second chamber and that is to enable the workload of parliament to be spread across the two chambers. The House of Commons is heavily over burdened. The advent of IT has added greatly to the accessibility of MPs whose duties are, properly, seen as being to represent every interest touched by government and the public authorities. The increase in the constituency workload is matched by an increase in MPs' direct engagement in oversight of the executive through membership of the growing number of departmental and other standing committees of the House. The increase in the volume of legislation brought to parliament also bears down heavily on its Members and the consequent increasing practice of timetabling legislation in the Commons does result in matters being less considered there and, not infrequently, passed to the Lords without full scrutiny of all clauses of bills. The time is surely ripe to acknowledge that spreading responsibility, even primary responsibility, across two elected chambers would help to ensure better governance by enabling both Houses of Parliament to focus their attention and, in combination, to scrutinise more effectively the wide spectrum of public decision making. There might, for example, be sense in retaining the primacy of the House of Commons over money bills but also in giving primacy to the second chamber to scrutinise legislative proposals from the European Union. Prerogative powers of appointment and treaty ratification could be overseen by either chamber.

Regrettably, these opportunities are not opened up by the coalition Government's proposed reform of the House of Lords. Indeed, they are explicitly blocked. The coalition "does not intend to amend the Parliament Acts or to alter the balance of power between the Houses of Parliament."

Thus, even the delaying power of a second elected chamber would not be increased. It must be doubted that an elected second chamber would agree to play second fiddle for long. It can be reasonably anticipated that, just as there has been continuing tension between devolved governments and central governments over the distribution of power between them, there would be conflict almost immediately about the limited scope of the second chamber's powers initiated by those legitimately elected to serve in it. For example, the conventions which have normally constrained the House of Lords from rejecting secondary legislation which has been approved by the House of Commons would be seen for what they are – conventions capable of being overturned. The proposed bill does not resolve questions of the relationship between the two chambers. It will entrench conflict.

Another oddity of the proposals to enhance "the democratic authority" of the second chamber is the failure to make any provision for the accountability of its members. This appears to be deliberate. The provision that elected members may serve only once and may do so for fifteen years, or for even more if they are elected at the beginning of a parliament which does not run its full term, is to deprive their electorate of any hold on their members. It must be questioned how long the conferral of "democratic authority" can last. Moreover, the government has stated that it "expects members of the reformed House to be full-time parliamentarians" but there is no provision to ensure this.

A criticism is made that present House of Lords members do not themselves participate in all the business of the House. Many, if not most of them, are engaged in external, but often highly relevant professional or business

activities, and when matters arise on which they can speak and offer advice with the authority which comes from knowledge, they do tend to be present. Others have expressed concern that full-time professional politicians, members of an elected second chamber, are less likely to be able to contribute such knowledge to public debate. That argument may have contributed to the coalition government's proposal that sixty of the three hundred members of the second chamber should be appointed also to serve for terms of fifteen years, to retain some appropriate expertise. That provision, however, would appear less apt to secure relevant knowledge of matters under discussion than to maintain the public and parliamentary perception that the second chamber had less democratic authority than the House of Commons. It might, as the coalition appears to wish, prevent any party from being strong enough on its own to block a government proposal in the partially elected second chamber. Ministers in proposing reform of the House of Lords have called for "sufficient" democratic authority for the new chamber. That begs two questions: 'what is sufficient?' and 'sufficient for what purposes?' – it appears that the design is intended to prevent the balance of power tilting any further towards parliament.

Those who advocate the election of the second chamber must face up to the huge changes which it would make to the performance of its roles. The inescapable loss of expertise and experience which would flow from the abolition of a deliberately appointed chamber ought to be addressed by those of us who favour an elected second chamber. It is that expertise and the evidence of the commitment to public service of the members of the House of Lords which is widely acknowledged as giving it its distinctive justification. A possible contribution to answering this conundrum

would be to recognise the case for the appointment of a Council of State comprising a membership drawn from those who are recognised to have achieved eminence and who have made a contribution across a wide range of positions in civil society. The role of such a Council of State would be advisory, but it would have a prescribed place in the governance of the country and, in particular, in the legislative process. Its members would be equipped to offer not just particular specialist knowledge, which can be sought and obtained by the elected chambers, but the cross-disciplinary experience which can draw to the attention of those determining public policy factors and opportunities which might otherwise be overlooked. Such people are often reluctant to seek elected public office, although some of them might have done. They are not necessarily partisan in their viewpoints but have insights, experience and commitment to public welfare which is of continuing relevance and value. Some might be chosen because their knowledge is unlikely to be directly represented in an elected chamber. Sitting on a continuing basis, such a Council of State would have an identity and the gravitas to draw public and parliamentary attention to issues and possible resolutions of problems which otherwise might not be considered in the hurly-burly of political life.

The 'Mother of Parliaments' at Westminster has in the past provided a model for many other legislatures. It is worth noting, however, that most of the second chambers in other democracies are not only elected but are substantially smaller than the proposed House of Lords. Whether directly or indirectly elected they are on average less than one-third of the size of what the coalition has proposed for Britain. The relatively small size of those chambers would seem not to diminish their standing. Indeed, it might be

argued that smaller elected bodies achieve more eminence and influence and would thus be more attractive to aspirant politicians. If, however, the coalition's proposals are enacted then the membership of the new second chamber will be a mixture of people with remarkably diverse status. There will be 'transitional' peers, i.e. those waiting to be dropped at successive elections, appointed peers, a handful of ministers seconded by the government to the second chamber, elected peers and twelve bishops. It is hard to see how such a galère of members would strengthen the coherence of the second chamber or persuade the public of its 'democratic authority'.

The virtue of evolutionary constitutional change is often extolled by British commentators. The package of proposed reforms of the House of Lords gives little real hint of the direction towards which Britain's parliament might tend. It might indeed, due to its ineffectuality, lead to uni-cameral government. In other countries such as Sweden and New Zealand this is now the norm. But such a development in Britain with our propensity to promote central control, fortified by an electoral system which does not tend to spread power across parties, could lead to a dangerously unchecked presidential system. It is good that the debate has begun and it is to be hoped that the Joint Parliamentary Committee scrutinising the bill will not be unduly confined by its terms.

Lord Robert Maclennan is co-chair of the Liberal Democrat Parliamentary Policy Committee on Constitutional and Political Reform.

The cross benches: hanging on

Frances D'Souza

The Government's white paper and draft bill has proposed an 80 per cent elected and 20 per cent appointed House and perhaps the Cross Benches should be grateful that they are being allowed to remain as appointed members, albeit much reduced in number.

Some have argued – many of them cross benchers – in favour of a hybrid House believing it would bring a freshness to the House and at the same time satisfy the public. The latter may well be true – although there is no clear evidence that this matter is at the top of the public agenda.

Let us consider how a 20 per cent appointed element might be perceived by the remaining 80 per cent elected members. Possibly as a relatively unimportant rump that would in time (and probably sooner rather than later) disappear. Let us further suppose that in a politically balanced House of approximately 300 members, the 60 appointed members managed to determine the outcome of important votes. If the government of the day was regularly defeated by this means, would it die in a ditch to retain the appointed element? I think not. At the same time it would be difficult to hold to the argument about the necessity of an appointed element of experts unless this group was able to distinguish itself by upholding principles and at times arguing against the consensus on the basis of technical

and/or scientific knowledge. But by distinguishing itself the appointees run the risk of being perceived as troublesome and, for that reason alone, to be dispensed with.

I cannot be persuaded that once elections start that they will ever be contained. All members will be elected, as will all post holders, perhaps even the senior administrative staff. Does it matter? To my mind it does. Elections are equated with democracy and democracy with elections, it was ever thus. But democracy is both more and less than elections, it is essentially a process. The concern is that once you have elections then the vital supporting institutions of democracy will receive less attention. How many countries are there that proclaim democracy because they have parliamentary elections but meanwhile rig elections, censor the press, harass the judiciary and detain activists without charge? What are the 'institutions' that will entrench democracy in the House of Lords? If we wish to maintain a second chamber *different* from the House of Commons, where should the constraints lie? Who or what will ensure that draft legislation is scrutinised and amended for the public good and not to ensure adherence to party policies? At present this balance is achieved by relatively light whipping in the House of Lords as compared to the Commons, by the absence of a guillotine, by the strong influence of external specialist organisations, by the presence of world class experts on the stuff of a given bill and, perhaps one can add in most cases, by a lifetime of experience in the professional, business, diplomatic or academic world. Can this bulwark against party politics be maintained under a fully or partially elected system? It is unlikely.

The new democracy of an elected Lords could, if enacted, be the downfall of any genuine holding of the government to account. This seems rather a high price to

pay in order to achieve the image, rather than the reality, of democracy. Finally to end this part of the diatribe – if indeed the government and aficionados of a wholly elected House believe it to be the only democratic solution then why allow a 20 per cent elected element at all? Does this not wholly undermine the principle that presumably underlies the proposed reform bill?

Nevertheless the government white paper and draft bill is a document we should take seriously – it is after all signed by the prime minister and the deputy prime minister. That said, a number of contradictions and gaps in the text of both the white paper and the draft bill will need forensic scrutiny. I would like here to focus on just one aspect – the premise that elections are necessary because of the perceived democratic deficit in the House.

It is widely accepted within the House of Lords that its major function is to revise and scrutinise legislation. The issue therefore has to be; what can be done that would enhance this important function and make it more effective? The answer which this white paper and draft bill appears to offer is – elections.

Let me recap - we have our main function (scrutiny) and we have what should be the main purpose of the proposed bill (enhanced effectiveness) and we are now adding to the mix the democratic element. So the next question is; are elections the only way in which to achieve a democratic element to address what the government apparently sees as a democratic deficit? My response to both these questions is that I do not believe that there is a democratic deficit or that elections are the only form of democracy.

This needs justifying. How do the Lords reflect the wishes, needs or rights of the wider public and how can they do it better? And how does the public influence the

work that this chamber undertakes? Paragraph 216 of the Report of the Leader's Group on Working Practices is on this point worth paraphrasing:

> "the diversity and range of interests of Members of the House of Lords, as well as their active involvement in the world beyond Parliament, mean that for many outside organisations and groups it is easier to establish relationships with Members of this House than with MPs. Such relationships complement those between MPs and constituents."

This I feel accurately reflects the huge outreach that the House of Lords has on a daily basis with hundreds of special interest groups. Furthermore much of the wisdom that is brought to bear on legislation in the upper House is minutely informed by these specialist groups. It could, I think, be fairly argued that there is already a democratic procedure whereby the wider public can and does lobby members of the House and does succeed in improving legislation to meet the needs of that public on an almost daily basis. This is not to be sniffed at!

Of course it is the case that MPs bring their constituents' concerns to parliament, but I would guess that there is greater opportunity to change legislation based on the expertise of specialist groups in the House of Lords because it is less political, because it is less fiercely whipped, because it does not have to deal with the concerns of individual constituents each and every day, *and because* it is not elected.

The upper House (and one can never tire of repeating this mantra) is different from the House of Commons in almost every respect, but this difference stems from its function. You cannot make it similar to the lower House and

continue to believe or hope that its functions will somehow be improved. They won't, they will be undermined, and so severely that the growing belief that this bill is about abolishing the House of Lords gains more credence every day.

In the last few month reforms to many of the institutions in this country that the public hold dear, including voting mechanisms, public bodies, education and the NHS, have gone before the House of Lords which has in many cases upheld the concerns, and even the wishes of the public. What comes to mind is Clause 11 and Schedule 7 of the Public Bodies bill, which sought to abolish the forestry commission, the Chief Coroner and associated offices amongst other organisations. It was the Lords that took the public concern on board and acted upon it. I do not think you can argue that the House is undemocratic when it so clearly acts in the public interest.

Other mechanisms whereby the public voice is heard in the Lords Chamber include the introduction of private legislation supported by community organisations who cover significant sectors such as the disabled, refugees, victims of forced marriages and of slavery, the unfairly defamed or dangerous dogs.

I have said little about genuine reforms that would make for a more effective House of Lords. I wish to make it abundantly clear that there is ample room for reform on matters such as retirement, appointment procedures, increasing pre- and post- legislative scrutiny and cross-cutting select committees but elections are the one thing that the House really does not need.

The Rt Hon Baroness Frances D'Souza is Crossbench Convenor in the House of Lords.

House of Lords: further reform

Jan Royall

Reform of the House of Lords is 100 years old this year. At the moment of the 100th birthday of Lords reform, the coalition government is bringing forward its proposals to transform the current House – in effect abolishing it, according to critics of the plan – by finally making the election of its members the basis for the bulk of its composition. An elected House of Lords has been the dream of many on the left for the past century – though some on the left, let alone the other parts of the political spectrum, believe this is an unthinking dream which will in fact debilitate future Labour governments. The arguments are familiar. Will the Conservative-Liberal Democrat coalition end them, by securing a change which has evaded constitutional reformers since 1911?

A hundred years ago, the House of Lords was a rather different place in comparison to its current incarnation. Then, it was mainly a hereditary body. Now, it is primarily an appointed one. Then, it was a House populated by aristocrats. Now, it is a House of experts, from the sciences, from medicine, from business, from the arts, from academia, as well as from politics. Then, it had the power to veto both the government's legislation and budget. Now, it can delay bills for a year and has no financial powers at all.

The House of Lords is sometimes castigated as resistant

to reform, with members of the House characterised as roadblocks to reform. In fact, the House of Lords has seen real, repeated reform: in 1911 with the removal of its fiscal powers and the shifting of its right to veto to a right of delay; in 1949 with further changes to its delaying powers; in 1958 with the introduction of life peerages; in 1963 with changes to peerage succession; in 1999 with the removal of the majority of hereditary peers; in 2004 with the separation of powers between the legislature and the judiciary with the ending of the Lords as the final court of appeal and the establishment of a new Supreme Court. These are evolutionary changes. Changes over a long period of time, certainly. But regular, repeated reform.

Of course, for some, this run of reform is too slow. Some want further reform, faster reform. But the House of Lords is an important part of the checks and balances of our constitution. Reform of it is difficult. There are complex and thorny issues involved - issues which merit careful consideration.

In all this, where is the public? A familiar and probably entirely true point made by many MPs and ex MPs, from all parties, is that at no point, over many years' campaigning, did a single voter questioned on the doorstep ever mention reform of the House of Lords. Reshaping our constitution, getting the process and the institutions right, including the House of Lords, is undeniably important. But such reform does not rank high in the public's priorities. The outcome of the referendum on the alternative vote could not have demonstrated that more clearly. The public's concerns remain constant: jobs, the economy, health, education, crime, immigration - prospects for their own future, and the future of their children and families and communities. Politicians, academics and commentators who concentrate

on issues like constitutional reform more widely, and in this case further reform of the House of Lords, need to remember that. That applies in particular to members of the House of Lords. We must not be obsessed with ourselves and our future. We have a proper working job to do, on all sides of the House: scrutinising government legislation; holding the government of the day to account; and debating the issues of the day. The House of Lords must be about more than House of Lords reform.

My party, the Labour party, has long been committed to reform of the House of Lords. In 1910, our manifesto shouted: "THE LORDS MUST GO" (the capital letters are from the original). In our 1945 manifesto, we said: "We give clear notice that we will not tolerate obstruction of the people's will by the House of Lords." In 1964, our manifesto said: "We shall not permit effective action to be frustrated by the hereditary and non-elective Conservative majority in the House of Lords." In 1997, our manifesto said: "The House of Lords must be reformed", and proposed both an initial, self-contained reform to remove the right of hereditary peers to sit and vote and a joint committee of both Houses of parliament to propose further reform. In 2010, we proposed "further democratic reform", to be achieved in stages, with the promise to put such proposals "to the people in a referendum".

That was the case I argued as a member of the so-called Clegg Committee, an informal Cabinet Office committee set up under the chairmanship of the deputy prime minister, Nick Clegg, following the formation of the coalition government after the inconclusive result of the 2010 general election. Labour decided to take part in the committee's work. I believe it was right to do so. Because of reshuffle changes following the election of Ed Miliband

as Labour leader in September 2010, I was in fact the only Labour figure who served throughout the committee's work.

It was an unsatisfactory process. The committee was charged with bringing forward a bill. It did not do so. In its seven meetings – a further meeting was scheduled for December 2010 but in fact never took place – many of the most tangled, difficult and intractable issues around the question of further reform of the House of Lords were either only cursorily considered, or not considered at all. Many of the officials servicing the committee were not only seasoned Whitehall warriors but were familiar – often deeply familiar – with every jot and comma of the arguments over further reform of the Lords. But that extensive wisdom and knowledge was barely used by the committee. Nick Clegg gives the impression of being a man in a hurry. Perhaps understandably so: as someone who entered parliament only in 2005, who became - to the surprise of many, if not most - deputy prime minister in 2010 and who, despite measures like declaring early on in their term that the next general election would be in 2015 and following that up with legislation for fixed-term parliaments, has no real idea when the coalition will extend to, he may need to be in a hurry. Accordingly, he pressed ahead through the committee for reform, but in doing so, did not secure the support of the cross-party participants for what he eventually brought forward in May 2011, six months after the final meeting of the group. At no point did the Clegg committee ever see a draft bill, or a draft white paper. Consequently, at no point did the Clegg committee endorse or approve a draft bill, or a white paper. The government's draft bill and white paper is not the product of the cross-party Clegg committee. It is a government

bill. Indeed, given its manifest lack of support from Conservative MPs, peers, members, supporters and voters, it is in fact a Liberal Democrat bill. It does not have the support of Conservatives. According to newspaper survey evidence, it does not even enjoy unqualified support from the Liberal Democrats: a survey by The Times newspaper in June 2011 showed Liberal Democrat peers, for instance, pretty close to being evenly divided not on whether the House should be 100 per cent or 80 per cent elected – but on whether it should be elected at all.

Many Labour peers are clearly against an elected House of Lords. As leader of the opposition in the Lords, I know that, and recognise that, and respect that. Many Labour peers, with long and deep experience of politics, passionately believe that the introduction of direct elections to the House of Lords would damage the House, damage politics and damage the constitution – and, especially, would damage the prospect of future Labour governments successfully securing their own legislative programmes.

We may indeed have our differences over Lords reform, and in particular the question of direct elections. But in gauging the response to the government's draft bill and white paper, my own judgement is that Labour peers are united in their opposition to the government's bill. Even for a government apparently so wedded to bringing forward bad legislation which it then quickly has to revise – a trait it is fast adopting as its specialist subject in politics – this is a bad bill. Bad because it doesn't and won't do what it says on the tin. I do not believe that it will achieve further reform of the House of Lords. The processes and the politics which surround it will not, in the final analysis, allow that to happen.

Take, as a specific example, the assertion on the face

of the bill that nothing in the bill affects the primacy of the House of Commons. No matter how fervent such an assertion this is, it is no more than that: an assertion. The legitimisation which election is designed to provide for the House of Lords in a modern democracy automatically places those elected on a similar – indeed, given the method of election (STV) and the length of the period of election (15 years), some would argue a superior – footing to those elected to the House of Commons. A directly-elected House of Lords directly impacts upon the primacy of the House of Commons. In bringing forward the draft bill and white paper, the government has put commons primacy in play.

Because the basic fact about all House of Lords reform is that its real impact is not, in fact, on the House of Lords, but on the House of Commons. Direct elections to the Lords will increase its legitimacy and increase its power. For power to accrue to the Lords, for power to flow to the Lords, it has to flow from somewhere. The somewhere it would flow from is the House of Commons. The power of elected MPs would be reduced by the power flowing to elected peers. The government's bill simply ducks these and other crucial questions about Lords reform. What is the role of the House of Lords? What should be the role of a second chamber? What powers should a reformed House of Lords have? What powers does the government want a reformed House of Lords to have? What will be the conventions which govern the relationship between the two chambers? What happens to the current conventions which govern the relationship between the two chambers? Should that relationship be codified?

These are big, fundamental questions. They are questions with which constitutional reformers and

successive governments have grappled for years. What is simply not adequate, not sufficient, is to do what this bill tries to do: simply to put them aside, as though they do not matter. They do matter. They are, and must be, at the heart of any proper attempt at further reform of the House of Lords. They will have to be properly addressed, properly considered and properly resolved before any bill to reform fundamentally the House of Lords either should or, in my judgement, would be enacted by parliament.

They are not the only ones. Whether the 1911 and 1949 Parliament Acts could be used by the government to force through lords reform is a contentious and complex question which many legal experts believe cannot apply. The questions of type and method of election, of period of term, and of the role of elected members are all important, and – like the key questions about the relationship and the conventions between the two Houses of parliament – all unresolved.

Reform of the House of Lords is an issue which has outlasted many politicians, and defeated many men in a hurry. In that time, the House of Lords has seen considerable change. The House of Lords now is a very different place than it was pre-1911. But it was Lords reform which in 1911 helped wreck the ascendancy of Herbert Asquith's Liberals. Time will tell if history is about to repeat itself.

The Rt Hon Baroness Royall of Blaisdon is Leader of the Opposition in the House of Lords.

The draft bill and the Royal Commission: agreements and disagreements with Wakeham

Richard Harries

The Royal Commission on the Reform of the House of Lords, chaired by Lord Wakeham published its report 'A House for the future' in 2000. It was the result of a year's serious work by a distinguished panel, yet until now it has not been to the forefront of debate. The reason is clear. When it was first published the House of Commons and the House of Lords took diametrically opposed views, the one wanting an all elected House, the other an all appointed one. The Wakeham Commission, which proposed a hybrid, satisfied neither. Indeed the one point on which the two extremes could agree was a rejection of any hybrid.

Despite this, many members of the Royal Commission remained quietly confident that if there was to be any reform there would have to be a return to some of the fundamental points made in its report. It is now striking how many of the proposals in the bill coincide with those of the commission, though, as I will show, how fundamental is the one key difference.

First, there is total agreement about the role and powers of a reformed Lords. The Commons would remain the primary House with the Lords there to scrutinize legislation

and, if necessary, delay it and force the Commons to think again for a limited period.

Secondly, there is total agreement about the most radical change: the separation of membership of the chamber from the peerage. The peerage would revert to being an honour.

Thirdly, there is agreement that the length of office should be 15 years, in order to ensure that the Lords take a long term view rather than a short one with a view to re-election. There is one difference here. The Wakeham Commission did allow for the possibility, in rare circumstances, for a person to be appointed for a further term. The draft bill does not. I think that is a mistake. Suppose someone is elected or appointed at the age of 25, after 15 years they will only be 40, and if they are making a key contribution it seems a loss to forbid them under any circumstances to continue. The appointments commission would make a judgement about the continuing value of their contribution.

There was also agreement that there should be such an independent statutory appointments commission responsible for recommending independent crossbench peers to the prime minister for nomination to the Queen. However, the Royal Commission also foresaw a wider role for the appointments commission. It would keep a watch on the ethnic and gender balance of the House and also ensure that the balance reflected that of the previous general election. The latter role is obviously not appropriate if the membership is totally or predominantly elected.

There is also agreement that the number of bishops should be reduced, though here again there is an element of disagreement. Wakeham wanted the number reduced from the present 26 to 16, but suggested that there could be leaders from other Christian or faith communities appointed. The draft bill proposes to reduce the number

of bishops to 12 (which actually represents a higher percentage of its proposed much smaller House than the 26 do for the present large one) – but there is no proposed place for other representative religious leaders.

There is also agreement that change from the present system should take place in three stages over a period of time.

One significant difference which has a bearing on the major difference is the size proposed. Wakeham proposed a House of about 550, the draft bill one of 312. Although the present House is absurdly large and certainly needs drastically reducing, not least in the light of the fact that the Commons itself is reducing, 312 is too small. It would mean that, for example, there could no longer be a wide representation of different professions and walks of life amongst the independent cross benchers, who are making an increasingly significant difference to the House.

Another significant difference, which again has a bearing on the fundamental divide is the question of money. The Royal Commission proposed a flat *per diem* allowance, such as the House has in fact recently adopted. The draft bill proposes a full salary and pension arrangements for all members. The underlying philosophical difference is clear. The Royal Commission envisaged a larger House made up of people of experience who would not necessarily see it as their sole occupation. The draft bill envisages a smaller House all of whom would be full time, even the independent cross bench peers.

This leads to the most fundamental disagreement, one which nevertheless points up a hardly less fundamental agreement – the fact that it will be a hybrid House. This, which was so scorned before by all parties, and may yet be again, is a key part of the draft bill. The divide of course is

that the bill proposes an 80 per cent elected House and a 20 per cent appointed one, whereas the Royal Commission proposed the possibility of 65, 87 or 197 members being elected in a total House of about 550, obviously a much smaller percentage even if and when the full total of 197 had been achieved.

The members of the Royal Commission were strongly divided in their initial view on the issue of elected/appointed. Although there was no final agreement on this, with a range of possibilities being offered, it is significant that there was agreement both about a hybrid House and one which had a large percentage of appointed members. It holds out some hope that there can be some significant shifting of ground in the wider constituency of parliament as a whole now.

Although initially in favour of an all appointed House for all the usual reasons, I supported an elected percentage because I thought this would be a way first of all to ensure that the regions were better represented, and secondly to offer another way into the Lords for those who might not fit easily into other categories. The issue of democratic legitimacy, which looms so large in the minds of many who argue in favour of elections, was not a factor in my own decision. There are many forms of legitimacy, and election is only one. Provided the primary House is fully elected and their political will prevails in the end, that is what matters. If the independent cross bench peers have been appointed by an appointments commission set up and monitored by parliament and if the appointed political peers have been nominated by parliamentarians who have themselves been elected and such appointments are monitored by the independent appointments commission, that, in my view, is appropriate legitimacy.

I have already noted above that one of the reasons for having a larger House is to ensure that there is a wide range of expertise and experience on the cross benches. Another reason is that amongst those making the most valuable contribution to parliament at the moment are former MPs, including a good number of former members of the Cabinet. They do not necessarily want to be there for every day the House sits, but their experience is invaluable. This would all be lost to decision making if the political element was fully elected. Elections would of course bring in young, ambitious people who wanted to make a political career. But at the heart of the House of Lords is a great deal of the wisdom that comes with age and experience – not least political experience. This can only continue to be the case if a significant percentage of the political element is appointed, not elected. This does not rule out an elected political element, which the Royal Commission proposed and I support, but there would be a huge loss if the only politicians in the House were those who were elected, for they would mostly be at the beginning of their careers.

There are some differences between the draft bill and the Royal Commission on the form and timing of elections, but the Royal Commission was not adamant that there was one ideal option, and this is a detail, albeit an important one, which need not take away from the fact that both the draft bill and Wakeham propose an elected element.

Although the House of Lords is in fact working well, from the point of view of its long term health I believe that reform is very necessary, and we need to grasp the nettle of reform sooner rather than later. With a view to that, it is well worth considering the proposals in the draft bill and comparing them with those in the report of the Royal Commission. As the above argument shows, I

hope that despite the positive features of the bill, it will still be modified in the direction proposed by the Royal Commission.

The Rt Revd Lord Richard Harries is Gresham Professor of Divinity.

RESPONSES TO THE PROPOSALS: ACADEMICS AND POLITICIANS

Appointment or election?

John Baker

The future of the House of Lords is the most important constitutional question of the present age, because if it is resolved badly there may be little left of a British constitution at all. A constitution, whether written or unwritten, serves three fundamental purposes. It defines the way in which power is to be lawfully exercised by the government of the day. It imposes limits on that power, so as to prevent absolutism and preserve basic values. And it provides some means of holding governments to account for the exercise of their power. In the very recent past it has become a regrettable assumption by those in government that they have been given an absolute power by the electorate during their term of office, including the power to change the constitution as a matter of routine, picking off one topic after another in no obvious order, without any joined-up thinking about the whole machinery. Although this is a recent and unprecedented phenomenon, it is easy to see how it has come about, because the unwritten British constitution provides no special procedure for constitutional reform. But it threatens to undermine the constitution itself. If it were to result in a form of parliament which meekly enacted whatever the government laid before it, without demur, we would be very close to absolutism. Our only safeguard then would be the right to a general election. And how safe would that be? It would only need

the pretext of a convenient emergency to remove it.

In recent years one of the strongest safeguards against absolutism and improper legislation has been the House of Lords. This may seem a strange twist of history, but history does not always run in straight lines. Since the introduction of life peerages in 1958, and the removal of most of the hereditary peers in 1999, the House has gained a new confidence and an enhanced role in checking, controlling and improving legislation. Moreover, as Lord Simon of Glaisdale said as long ago as 1993, the House of Lords has become "effectively the only place in which the legislature can curb the power of the executive". These have been welcome – indeed essential – developments, given the inability of the Commons to carry out those constitutional functions. How, then, have the Lords managed to achieve what the 'democratic' Commons cannot? The main reason, obviously, is that peers are less beholden to the party machinery and therefore more independent of government. This can be readily demonstrated by the House's record over the last ten years. And if we seek an explanation for this independence, the answer is equally obvious, namely that peers have tenure and that many of them are not career politicians. These are advantages generally recognised even by those who propose an elected House, save perhaps by those in government who secretly do not want the second chamber to show independence.

The principal objections to the present House of Lords are not to its independence of spirit but to its size, and to the system of selection by the prime minister. Although the majority of peers are well-chosen from persons of distinction in various walks of life, peerages are also honours, and they have been used by prime ministers to reward second-rate or even distinctly unsavoury politicians

who, far from bringing special distinction to the upper House, have rather tended to bring it into disrepute. There seems to be little disagreement that these are the principal issues. Assuming that they are, we should consider carefully whether election, the course favoured by the government, is a sensible solution. It is by no means obvious that it is.

The optimum size of the House is not an abstract question which can be answered merely by making a direct comparison with the Commons, or with other legislatures, or by measuring the available bench-space. It depends upon whether it is thought appropriate, as at present, for the House to include essentially part-time members, or persons whose membership is seen as purely honorific and who are not expected to participate in its work. Those are separate categories, because the latter category could be removed without altering the character of the House, whereas the former could not. Whatever view is taken of this, it is a secondary question, to be addressed only when the method of selection has been resolved.

The more serious problem, arising from bad appointments, could be resolved without abandoning the breadth of experience and expertise which is a strong and unique characteristic of the present House. The straightforward solution would be to remove ministers entirely from the selection process and transfer the power of selection exclusively to an appointments commission. The prime minister could continue to recommend names to the Queen, in accordance with the advice of the commission, but would not have the authority to do so without the sanction of the latter. This intermediary role would have to be preserved if peerages were conferred on the persons appointed to the upper House. There is a strong case for the appointed members to be made peers

even if peerages will no longer themselves carry a seat in the legislature. It would be perfectly compatible with continuing to confer other peerages purely as honours, since a distinction between sitting and non-sitting peers has already been made with the removal of hereditary element. But, whatever the formal role of the prime minister might be in advising the Queen, the selection problem would be solved merely by transferring the selection of names to an independent commission. This was the conclusion reached after very careful thought by the distinguished members of the Royal Commission chaired by Lord Wakeham in 2000 on the Reform of the House of Lords (Cm 4534). The appointments commission would, of course, become a very important body, but there is a precedent for that in the new system for selecting judges. It would be an expert body, and expected to develop a detailed and systematic knowledge of the field of suitable persons for appointment, liaising with professional and other relevant bodies.

Although almost everyone is agreed on the merits of the broadly constituted House of Lords that we have at present – leaving aside the dubious political appointments and (for some) the remaining hereditary element – the leaders of the three principal political parties have decided that those advantages must be abandoned because an unelected House has no 'democratic legitimacy'. They therefore favour election, not so much as a solution to the perceived problems but as an end in itself. It is unusual for the political parties to agree on so fundamental a question, especially given that there are strong feelings about it in the country. A possible explanation for this remarkable accord is that the concept of 'democratic legitimacy' is a self-serving doctrine calculated to ensure that in practice only full-time politicians would achieve membership of either

House. Even if that is too cynical an explanation, it can hardly be doubted that the result would be just that. Few candidates other than career politicians would be likely to stand for election for a position which would require electoral campaigning – a process in which the political parties would wield exactly the same kind of influence as they do in elections for the Commons – and would also require them, if successful, to give up their ordinary careers. Most of the selecting would inevitably be done by the political parties who fund the campaigns, not by the people who vote. And the politicians elected after such a process, if not already committed party activists, would probably feel some obligations to the party which propelled them into their paid positions. Even if they were released from strict subservience to the whip by the grant of tenure, they would be likely to submit to party discipline either out of gratitude (or habit) or in the hope of preferment. In other words, it would not be surprising if an elected House of Lords acquired in a substantial degree all the defects of the House of Commons while losing most of its present advantages.

A very strong argument would be needed to justify moving to such a system. But no such argument has been made by those who propose it. It seems that the magic word 'democracy', like the magic phrase 'separation of powers', has but to be uttered and argument becomes superfluous. It ought not to be necessary to urge that, however important those concepts may be, they are not precise in content, and that the mere incantation of their names ought not to stifle serious thought. Are we really forced to accept an admittedly undesirable result, which would in all probability destroy the usefulness of the second chamber, on the sole ground that it is the inexorable requirement of a vague theory of

'democratic legitimacy'?

It has not been explained by anyone why the House of Lords ought to be a 'democratic' body, in the sense of being elected. It cannot force legislation on the Commons but can only delay and improve. It does this most importantly in protecting the people against infringements of human rights and the rule of law; but it has also achieved a significant role in scrutinising and improving legislation, which is increasingly introduced with little care or thought by ministers hungry for headlines. Time and again, when the previous government refused to modify proposals which seriously threatened the rule of law or constitutional proprieties, it was the House of Lords which came to the rescue. It is of course generally accepted, and is enshrined in the Salisbury Convention (which the House of Lords observes), that a government is entitled to have parliament pass into statute the principal measures which were outlined in its party manifesto before a general election. But that does not mean, and democracy does not require, that they are entitled to enact those measures in a manner contrary to our traditions of justice, fairness and clarity. It cannot be supposed, without evidence, that the electorate would have wanted that. Even if there were such evidence, there are some values which ought to be protected against sudden change by majority vote, most obviously the protection of minorities, but also the rule of law itself. Most other civilised nations in the world have written constitutions which prevent elected governments from enacting whatever measures they wish in whatever manner they wish. They would be very shocked to be told that they were not democratic countries. So long as we do not have a written constitution, that work has to be done by parliament, which means in reality the House of Lords,

and by the superior courts.

The increasing boldness of the courts in the wake of the Human Rights Act 1998 is a mixed blessing and not universally admired. But even the strongest advocates of judicial activism would have to admit that it is only needed where Parliament fails. It must be far more desirable for legislation to be put right before it is enacted than challenged in the courts afterwards. Most ordinary citizens do not have the means or the time to launch proceedings for judicial review, and in any case the available armoury is imprecise and can cause all the collateral damage of a blunderbuss. For this reason alone, it is quite wrong to consider introducing an elected House of Lords without simultaneously addressing the question of a written constitution. The two should be inseparably connected, for a very simple but fundamental reason: if we are to have a constitution at all, it must be enforced either by checks within the parliamentary system or by checks from without.

It is sometimes suggested that the very existence of a body which may delay or even frustrate legislation proposed by a government is somehow undemocratic. But such a perceived difficulty would not necessarily be avoided by introducing an elected House of Lords. It is true that an elected House which was of the same political complexion as the Commons would be unlikely to upset the latter. It would probably not act at all. It would be more or less superfluous in any area of contention. On the other hand, an elected House which happened to be of a different political complexion from the Commons might well feel a greater confidence than the present House in opposing and frustrating the intentions of a government, and might even be emboldened to do so on party-political grounds.

It would be supported by an element of 'democratic legitimacy' equivalent to that possessed by the Commons, and it may be supposed that electors who have an equal say in the choice of both Houses of Parliament will not readily grasp why one House should not have the same authority to act on their behalf as the other. The government propose to try to solve this problem legally by declaring that the House of Commons would continue to have the superiority accorded to it by the Parliament Acts. But that would flatly contradict the theory behind the proposed change, and a legal declaration of something contrary to general perception would be fragile. Indeed, if the 'democratic legitimacy' theory means anything other than enhancing the careers of party politicians, it is difficult to see why the Parliament Acts or the Salisbury Convention should have to remain in force if the Lords were to become an elected body. Regular conflict would be the full and logical price to pay for the sacred abstraction.

At present, although the major political parties are in agreement, there is a recorded division of opinion between the two Houses of Parliament on the issue of electing the upper House. On 7th March 2007 the Commons voted to ignore the conclusions of the Royal Commission of 2000 and press for an elected (or at least 80 per cent. elected) House. A few days later the Lords voted (by 361 to 121) in favour of a 100 per cent. appointed chamber. Mr Straw, the Lord Chancellor, subsequently announced his determination to push through the wishes of the Commons, apparently in the belief that this is the course required in a democracy. This showed a disappointing unawareness of the first principles of a constitution. It cannot be the business of the Commons to tamper with the only effective control on their power, especially when there is no evidence of any general popular

support for such interference. It could never happen in a country with a written constitution. And it would be plainly wrong to suppose that the principle behind the Salisbury Convention should apply in a constitutional matter such as this. If there were a clear body of opinion in the country supporting a particular constitutional change, that might be another matter, although even then it would be necessary to ponder very carefully the consequential effects which introducing the change might have. There are few parts of the constitution, if any, which do not impinge on others – the future of the Lords, for instance, cannot be separated from the issue of a judicially-enforced written constitution. In the case of Lords reform, however, there is at present no indication whatever of public opinion. The voters at the last general election were given no choice, because the major political parties decided not to contest the issue and there was no campaigning on it.

It is a matter of deep concern that, in the absence of debate between the political parties, no reasoned case for election was advanced in the recent white paper, certainly nothing to challenge the detailed reasoning in the report of the Wakeham Commission. The white paper more or less assumes that the House should be elected. But this is too fundamental an issue to be treated so dismissively. Politicians must somehow be persuaded that they have a supreme duty to lay aside their own career interests, and the aspirations of their class, in the public interest. Above all, the House of Lords itself has a duty to stop the draft bill from becoming law. That might result in arguments about whether the Parliament Acts can be invoked by the Commons in order to override them. But for the government to force such an issue would be unworthy. Constitutional reform should not be a matter of brute force, because the

constitution does not belong to the government but to the people. And the objective of parliamentary reform should not be an abstract concept of 'democratic legitimacy' which would in practice promote elective dictatorship. It should be the prevention, by the best available means, of the accrual of arbitrary, arrogant, and absolute power.

Sir John Baker QC is Downing Professor of the Laws of England, University of Cambridge.

Addressing the central policy questions

David Howarth

Perhaps the most controversial provision of the draft House of Lords Reform bill occurs very near the start. Clause 2(1) says:

> Nothing in the provisions of this Act … affects the primacy of the House of Commons or otherwise affects the powers, rights, privileges or jurisdiction of either House of Parliament, or the conventions governing the relationship between the two Houses.

Clause 2(1) implies an entirely passive answer to the central questions of policy in the debate about House of Lords reform. Should the reform of the House of Lords include reform of its powers and role, or should it confine itself to the House's composition? What is the problem with our political system to which House of Lords reform is the answer, or at least part of the answer? Does it make sense to carry out constitutional reform in a series of isolated changes, or should we think about the structure of the constitution as a whole? Clause 2(1)'s answer to all these questions appears to be 'don't know', or even 'don't ask'.

The government's apparent position is that the only thing wrong with the House of Lords is that its members are not elected. Ministers insist that the issue is quite

straightforward – any institution with legislative powers should be elected, or at least overwhelmingly elected. But the issue is not so simple. In terms of practical politics, electing the House of Lords is likely to change the relationship between the two Houses. Currently, the House of Lords is wary of using even the powers it formally has – in particular the power to delay legislation for a year and to force the Commons to use the Parliament Act to get its way. The Parliament Act has been used only four times since the Second World War, despite the very frequent existence of profound disagreement between the two Houses. But an elected House of Lords might well take the view that it should at least make fuller use of its existing delaying powers. One possibility is that, in a reversal of roles, a proportionately-elected House of Lords would challenge the political legitimacy of any use by the relatively unrepresentative Commons of its legal powers of override under the Parliament Act. A further possibility is that the Lords would press for alterations in the relationship between the two Houses, not only as established by statute but also in the standing orders of the House of Commons and in the practices of the two Houses.

We know that the previous Labour government was anxious about any drift towards more powers for the House of Lords, which is why it set up a joint committee on the conventions governing the relationship between the two Houses and why Labour's Secretary of State for Justice, Jack Straw, constantly warned against the prospect of 'deadlock' between the two Houses. Clause 2(1) obscures the position of the current government on the issue, perhaps because it produces tensions between the coalition partners. There are some indications that it takes a view similar to that of its predecessor. For example, ministers have occasionally

claimed that one reason for the proposal in the bill that members of the Lords should be elected only for a single long term is to undermine its claim to democratic legitimacy, on the argument that only those who face the prospect of losing their seats are fully accountable to the electorate. But who knows?

Whatever the current government's view, however, the question is too fundamental to remain unanswered. Assuming that democratisation brings about pressure for enhancement of the Lords' powers, would that be a good idea? It is clear that many members of the House of Commons strongly object to the suggestion that there should be any loss of the Commons' 'primacy'. But, aside from the *amour propre* of MPs, why should a well-designed constitution not include a second chamber with greater power than the existing House of Lords? The answer to that question depends on what one thinks a second chamber is for, a question that the government appears to be trying to evade.

Some believe, or at least purport to believe, that the House of Lords is hardly a legislative body at all and that its role is as an expert adviser to the Commons – with the Commons conceived for practical purposes as a unicameral legislature. But anyone who has experienced the last session of a parliament, especially the "wash-up" period after the calling of an election, when the Parliament Act over-ride provisions are not in practice available and the Lords has regained its power of veto, knows full-well that the Lords is a legislative body, not just an adviser. The Lords also exercises straightforwardly legislative powers over secondary legislation.

There is a strong case for an expert advisory body on the quality of legislation, but even the current House of

Lords is far from suited to such a role. Its supposed experts are nearly always a long way from current practice and knowledge, and are often selected on the basis of political connections or public profile. An expert advisory body should be selected on merit alone, in the fashion of the civil service, and it should consist of current experts who continue to work in their fields.

What role should we want a second chamber to play? One approach is to think in terms of 'representation'. In a federal system, the upper House 'represents' the constituent states as units. In a unitary state, an upper House can be used effectively to give some people a second vote – for example in France, where the senate is elected by those who are themselves elected public officials.

But why, some might ask, do we need to represent the people more than once? There are several possible answers to that question. One common but incorrect answer is that the only reason one might require more than one version of representation is to hold together a state made up of regions that might secede unless their collective interests were recognised separately in the constitution. But this 'federal' argument fails to explain second chambers in unitary states, or why in some federal states the constituent states themselves have second chambers. A better answer, or set of answers, is that second chambers are attempts to deal with some of the inherent problems and defects of representative democracy.

One of these problems is that different electoral systems represent the people in different ways. First Past The Post (FPTP), for example, tends to produce decisive results that hand power to single parties but it fails to produce assemblies that closely mirror popular political opinion. At its worst, as in 2005, majority governments

can be formed with barely more than a third of the vote. Proportional systems have the opposite effects. One reason for electing two different assemblies might be to use the different effects of electoral systems for different purposes – for example using a disproportionate system (FPTP, AV or two-round run-off) to elect an assembly whose task is to create a government that can exercise executive power in a clear and decisive way, but to elect a second, proportionate, assembly to ensure majority public consent to new legislation. One can interpret the Australian system as based on such principles.

Another problem of democracy, exacerbated by modern communications technology, is that it tends towards excessively rapid, populist decisions that ignore the interests of unpopular minorities and fail to take into account either evidence or experience. One can establish a second chamber as a response to the challenge of the tyranny of instant majorities. It might be a chamber of wise, old heads, but since even the wisest of old heads can do nothing much without power, the main requirements for such a chamber are that it possesses not only the inclination to slow down decision-making but also effective means of doing so. It must be differently constituted from the first chamber (so that it is not automatically inclined to do the same things), enjoy relative protection from short term public opinion (for example a long term of office) and possess sufficient power that the first chamber has to listen to and negotiate with it. The powers and composition of the US senate, which from the foundation of the republic were not merely consequences of federalism, allow it to act as an effective counter to the threat of instant majorities.

Which of these arguments for a second chamber do we accept, and if we accept more than one, how do we

combine or prioritise them? British political thinking is unable to address the question effectively because it has become bogged down in the theory of electoral mandate, under which the purpose of elections is not to choose representatives but to decide which party shall govern and, on the basis of the winning party's manifesto, what the governing party not only may do during its term of office, but what it must do. Any deviation by the governing party from its 'mandate' is treated as 'undemocratic' and any political obstacle to its implementation - by opposition parties or rebellious backbenchers in the Commons or by any second chamber – is seen as illegitimate. The 'primacy of the Commons' is thus in reality the primacy of the government, since the government, elected with its mandate, is seen as the only legitimate political force in the land. The effect of the mandate theory is that there is hardly any point to either the House of Lords or the House of Commons. Apart from providing a little, of necessity ineffective, 'scrutiny' of how the government is going about its business, it is far from clear what either can legitimately do.

The mandate theory is deeply unsatisfactory in the context of an electoral system that usually produces minority rule. It justifies the perverse conclusion that a governing party chosen by a small minority of the electorate has obtained permission – indeed has acquired an obligation – to implement all of its policies including those that require changes in the law. The mandate theory may currently have short term attractions as a club with which to beat the coalition, but it is a fatal obstruction to serious consideration of the proper role of a second chamber.

To return to the substance of the question: what structure

should we choose for our parliament? A single chamber system cannot simultaneously meet the challenges of choosing a decisive executive and establishing majority consent for new law. A single chamber also struggles to combine the function of choosing and maintaining support for an executive with providing checks and balances against the tyranny of the majority and against the temptations of kneejerk politics. A second chamber can be needed either to ensure that legislation does not pass without widespread consent or to protect public policy from the distortions produced by demands for instant and continuous action.

To a great extent the consent function and the check and balance function can overlap, but the overlap is not a perfect match. They might, for example, point towards different methods of selection: the consent-to-legislation function seems to imply sensitivity to public opinion and thus frequent election, whereas the checking-and-balancing function seems to imply a considerable degree of insulation from public opinion.

My own inclination is towards the Madisonian position, that what matters above all is the ability of the second chamber to act as a check and a balance. I would reject the fear of 'deadlock'. Indeed I would welcome the threat of it as a way of moderating enthusiasms and encouraging the building of broader consensus. That position implies a degree of insulation from public opinion – whether by long terms of office, as in the current bill, or by indirect election, as in France. The problem of majority consent to legislation would therefore remain, although for those of us who have no truck with the crude mandate theory and who have no problem with coalition governments, that problem could be solved straightforwardly by introducing proportional representation for the House of Commons. Those who

reject that solution have to come up with a different one, or perhaps they might prefer the legislative consent function to the checks-and-balance function for the Lords.

The check-and-balance function, however, must above all be effective, and so must include power to disrupt a government's legislative programme to an extent sufficient to induce the government to open negotiations. How much power does the second chamber need? The current situation, in which the Lords may only delay legislation except that relating to the length of a parliament, is not much of a check, especially if combined with the previously influential Salisbury-Addison convention that 'manifesto' bills must be allowed through. An enhanced delaying power might be effective in some circumstances, but there is a problem that the greater the possible delay the earlier the government will introduce legislation, allowing itself even less time to think. A return to a full veto might be best, at least for bills other than those necessary for the exercise of current executive powers (appropriation bills, for example), or perhaps (although I do not myself favour it) making override of a second chamber veto dependent on a referendum.

If any kind of veto power is desirable, it is difficult to justify its exercise by people who lack any democratic credentials. The checks-and-balances function does not, however, necessarily require an absolute adherence to the principle of direct election. It needs only sufficient legitimacy for the exercise of the relevant powers, and it might be possible to gather authority in other ways, for example by indirect election. The greater the powers of veto, however, the greater the need for democratic endorsement.

The presence of some appointees and bishops is therefore not necessarily fatal to the functioning of a checks-and-

balances chamber, but it is otherwise if there are very many of them or, especially, if the government plays a part in their appointment. No government should be trusted to check and balance itself.

If one were instead to prioritise legislative authority over the check-and-balance function, a different set of proposals would emerge. As in the Australian senate, elections would be frequent (in Australia, half elected every three years) with less concern for the possibility of similarity of composition between the two Houses (as in the Australian possibility of a 'double dissolution' – which also provides a way of resolving a conflict about whether a proposal of the lower House has popular support by putting the issue to the people). No appointees of any kind, religious or secular, at least none with voting rights, should be tolerated, however, since their presence interferes directly in the function of providing more electoral legitimacy to changes in the law than that derived from the lower House.

The government might argue that its intention is not to prevent development in the relationship of the two Houses in the future, but merely to fix the composition of the House of Lords on the assumption that its functions remain the same. Clause 2(1), the government might argue, does nothing to prevent further change, either legislative or in the conventions of the two Houses. It merely says that no such further change should be inferred from the bill itself. Further developments might come naturally by other means. But to make the assumption of no change in function is to cut off any meaningful thinking not just about function itself but also about the structure of parliament as a whole, including the Commons, and ultimately, since composition should follow function and structure rather than the other way round, the assumption cuts off serious

thinking about composition. It might be that, as a matter of political convenience and the realities both of coalition government and of persuading a House of Commons jealous of its own position to vote for the government's proposals, the bill is the best that could have been done in the circumstances. Not for the first time, however, British constitutional reform is proceeding seemingly oblivious to any need for structural thinking. It is one of the reasons we never seem to finish with our constitution. Indeed, in one sense, the sense that to reform a structure one has to be aware of the structure's existence as a structure, we never seem to start.

David Howarth is Reader in Law at Clare College, University of Cambridge.

House of Lords reform: the turkeys deserve a vegetarian Christmas

Graham Allen

The coalition government is to be congratulated on doing something that landslide Labour governments failed to do over 13 years and that is bring forward proposals for a comprehensive reform of the second chamber. Parliament should now take this opportunity seriously, and produce an act which our democracy can be proud of.

My worry is that the House of Commons has become so puny in the face of an over mighty executive that it will not be up to the task ahead. Those who cynically talk about preserving the myth of the primacy of the House of Commons know perfectly well they mean to preserve the facade that hides the real primacy, that of the executive over parliament. Only a reformed parliament with revitalised first and second chambers can hope to hold to account the unrestrained executive power that prime ministers and governments exercise in the UK. Effective democratisation of the second chamber should not be mistaken as being more than just a part of the much longer march to extend the franchise in our country and rein in the unwritten and uninhibited power of government.

The most obvious flaw in the proposals is that they try to tackle two enormous objectives at once. The first, to rid our country of the inexcusable anachronism of the

unelected playing a part in passing the laws that govern us; the second, to establish the elective principle in the second chamber. For me the second is by far the most important objective-establish an elective element and let nature take its course with the rest.

It is Christmas that is important not the death of the turkey!

Those who currently inhabit the Lords should be left alone, allowed to use the facilities and to speak in debate, but not to vote. Only those who have the legitimacy of being elected should be allowed to vote on legislation. This would have the additional attraction to the unelected of enabling them to enjoy the catering in the second chamber or to get home at a reasonable time leaving their elected brethren to the late sittings! Such a prospect may well have the turkeys clamouring to vote for this vegetarian Christmas. This proposal is not of course in the existing draft. However there is a very long way to go and the compromise proposal to focus only on introducing the elective element may look much more attractive in a year's time.

So, I support the coalition proposals for House of Lords reform, since they intend to lead to 80 per cent – a big improvement on zero per cent – of members of the second chamber being put there by voters.

A serious chance for change has been a long time coming. The introductory text to the Parliament Act 1911 stated that:

> it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

In other words, a hundred years ago – before all adult males and any females had the vote – it was already seen as an established principle, set out in an Act agreed to (admittedly under duress) by the House of Lords, that the Lords should be a 'popular' chamber.

After a century of indifference, feet-dragging and even sabotage by various governments of different complexions, we have finally been presented with a draft bill that promises to take us 80 per cent of the way there. No-one who claims to be a democrat should obstruct this opportunity for change, which may not come again for some time. Neither should misguided perfectionism nor party political opportunism distract from the pursuit of fundamental principles.

Any criticisms of the coalition proposals that follow, along with my predictions about complications that will arise from them, should be read against this basic outlook.

The proposals

In preliminary cross-party discussions, consideration was given to calling the new chamber the 'senate'. While it would probably be preferable to do so, the name of the institution that we create is a relatively minor issue next to that of how its members are chosen. If retaining the name House of Lords can ease the passage of the reforms, then it is well worth doing so.

It seems appropriate, following international example, for the second chamber to be smaller than the first and 300 – exactly half that of the Commons after the next general election – is as good a figure as any. But we cannot escape the fact that these 300 – though less in number than the current House of Lords total of nearly 790, or even the embarrassingly low average daily attendance of 388 – are

going to cost more money than peers do at present. It is right that they will be provided with the support – salaries, staff, facilities – they need. Democracy is worth paying for and we should not shy away from saying so when the inevitable negative comments are made about this cost of this reform.

Non-renewable terms of fifteen years may seem lengthy. Were they shortened, the staggered elections could be held more frequently, and the overall reform phased in more quickly**,** although that might mean abandoning the idea of synchronising elections to both Houses. However, fifteen year terms are a big improvement upon a place for life – or, as was the case for hereditary peers, membership of the House of Lords for you and your descendants after you, for eternity.

If the current proposal that elections to the Commons and second chamber are to be held at the same time is retained, it is important that the latter body is to be elected by thirds and using a proportional system. Otherwise there would be a risk of duplicating results within the two Houses. While all electoral systems have their quirks and none are perfect, the Single Transferable Vote seems a good option to have chosen for this purpose. The white paper is to be commended for clearly extolling the merits of this system. It seems the prospect of using a system other than first past the post for parliamentary elections is not as horrifying in this instance as some held it to be when a referendum was held in May this year on using the Alternative Vote for elections to the House of Commons.

It is regrettable that there will still be 60 appointed members of the House of Lords, a decision which runs counter to the overall logic of the package. Rather than a final settlement, this provision should be regarded as

a temporary concession which can be returned to and corrected at a later date. It is unclear why the Bishops need to be retained at all, albeit as *ex officio* members, or how the figure of 12 Bishops replacing the present 26 was arrived at.

While it is intended that peerages will now become purely honorary and not be linked to membership of the legislature, the executive surely does not need even more patronage at its disposal than it already possesses. If peerages must be retained as an honour, it should be stipulated that they cannot be awarded to MPs or members of the second chamber.

The duration of the transitional arrangements favoured in the white paper is excessively long. It is intended that:

> By the time of the third election, the chamber would comprise only those members, apart from the Bishops, who have been either elected or appointed to sit in the reformed House of Lords.

The ideal option would be to hold full elections immediately. If the new second chamber must be elected in portions, then subsequent elections could be staggered. If it is absolutely necessary to retain more than 60 appointed peers for a time, then those remaining under arrangements that are being phased out should lose their voting rights immediately after the next general election. As it stands, it seems that it will take until 2025 before 80 per cent of a reform agreed to in principle by parliament in 1911 is realised. If these reforms are worth introducing then it seems unclear why they should be delayed for so long.

At the opposite end of the scale, another concern is the speed at which the constituencies will have to be devised. The white paper notes that there will be a need to devise

new constituencies or 'electoral districts' in England, with Northern Ireland, Scotland and Wales each forming single electoral districts. It can only be hoped that a better process will be used in England than the top-down, unresponsive method in place for the boundary reviews required to equalise the size and reduce the number of Commons constituencies under the Parliamentary Voting System and Constituencies Act 2011.

Likely consequences of the reforms

Those drafting these reforms may have unwittingly created a constitutional time-bomb, which will eventually detonate and explode traditional understandings of the relationship between the two Houses of Parliament. The government's approach is to consider this major alteration of the composition of the second chamber in isolation from the issue of its powers and role. In so doing they have ignored the advice contained in the introductory text to the Parliament Act 1911 quoted from above. It states that a measure establishing a House constituted on a 'popular' basis would also have to make "provision… for limiting and defining the powers of the new second chamber".

The 2011 white paper present a different view. It asserts that: "The House of Commons would remain the primary chamber and the reformed House of Lords would complement it". It also claims that:

> the change in composition of the second chamber ought not to change the status of that chamber as a House of Parliament or the existing constitutional relationship between the two Houses of Parliament.

It is the case that the current proposals do not involve any changes to the Parliament Acts of 1911 and 1949,

which provide the statutory basis for the primacy of the Commons, including limiting the delaying and blocking powers of the Lords and protecting money bills. However, also important to the operation of the relationship between Commons and Lords are non-statutory working practices known as 'conventions'. Changes to conventions can take place without being specifically willed by parliament. Taking account of this issue, clause 2 of the draft bill states that:

> (1) Nothing in the provisions of this Act about the membership of the House of Lords, or in any other provision of this Act—
>
> (a) affects the status of the House of Lords as one of the two Houses of Parliament,
>
> (b) affects the primacy of the House of Commons, or
>
> (c) otherwise affects the…conventions governing the relationship between the two Houses.

The draft bill offers no detail on what the rules referred to in 2 (1) (c) are. In other words it does not follow the path of 'limiting and defining the powers of the new second chamber' set out in the Parliament Act 1911. If it did so, then conventions would no longer be involved, replaced instead by a statutory framework.

So what are the conventions helping provide for the 'primacy' of the Commons? Important to them has been the Salisbury-Addison agreement, dating from 1945, intended to restrain the Lords from obstructing bills implementing manifesto commitments of the governing party. In 2006 the Joint Committee on Conventions set out how it saw Salisbury-Addison as having developed:

> In the House of Lords:
>
> A manifesto bill is accorded a Second Reading;
>
> A manifesto bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the bill; and
>
> A manifesto bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the bill or any amendments the Lords may wish to propose.

The Joint Committee further noted that:

> In addition the evidence points to the emergence in recent years of a practice that the House of Lords will usually give a Second Reading to any government bill, whether based on the manifesto or not.

The advent of the first coalition government since the Salisbury-Addison agreement has called into question the validity of the Salisbury-Addison convention, since there is no single manifesto that can be drawn upon. Furthermore, one of the components of the coalition, the Liberal Democrats, was never party to the Salisbury-Addison deal anyway. The draft text of the Cabinet Manual published last December did not refer to Salisbury-Addison at all. Nor did it refer to a convention such as the second one noted by the Joint Committee.

Now in the white paper the government has asserted the following:

> The relationship between the Houses is governed on a day to day basis by a series of conventions which have grown up over time. These include

> that the House of Lords should pass the legislative programme of the Government which commands the confidence of the House of Commons… whether or not a bill has been included in a Manifesto, the House of Lords should think very carefully about rejecting a bill which the Commons has approved…Most important, though, are the conventions which support the financial privileges of the House of Commons.

This description of the proper relationship between the two Houses is neither sufficiently precise nor legally enforceable. If the government proposals for the Lords are implemented, as the second chamber grows in democratic legitimacy, convention will not prevent it from becoming more assertive. The (eventually) 240 members of the second chamber who are elected – by a more proportionate system than that in use for the Commons – may feel they are well within their rights increasingly and more forcefully to try and obstruct Commons legislation to which they are opposed; and to take a more active role in scrutinising financial policy.

Whether it is the intention of the present government or not, there *will* be an impact upon "the conventions governing the relationship between the two Houses". Simply stating in the legislation that will drive these changes that it will not have this effect will not be sufficient to prevent it from occurring, since the developments that will be involved are non-statutory in their nature.

Some may regard the consequent rebalancing of the relationship between the two Houses as a negative tendency, using phrases such as 'gridlock'. In fact, a system which requires greater dialogue and cooperation as part of the legislative process is to be welcomed. However, it will

probably prove necessary eventually to codify the respective powers of the two chambers in order to introduce the required clarity to the democratic process. The best way of doing so would be as part of a broader process which sets out the fundamental principles of the UK constitution as a whole and defines our rights as citizens, in a document that has a higher status than the regular law and conventions on which our settlement currently rests. At present the UK is almost the only country in the world that lacks a 'written constitution' and its introduction is long overdue. The production of this text would have to involve the entire UK population and not simply the two Houses of Parliament. Its authority would rest on the sovereignty of the people. Within such a settlement one means of reconciling the two Houses of Parliament would be through establishing a prime minister whose legitimacy and position was not derived indirectly from either chamber, but upon direct election by UK voters.

The House of Lords reforms proposed by the government should be welcomed, but not because they are a perfect, final settlement. Rather, their value is as an opening gambit, an enormous improvement upon current unacceptable arrangements; and because they will inevitably lead on to further change that may finally bring the UK into line with other world democracies. Merry Christmas everyone!

Graham Allen MP is elected Chair of the Select Committee on Political and Constitutional Reform.

Scrutiny, revision, inquiry: why do they matter?

Dawn Oliver

In this short paper I shall explore some of the implications for constitutionalism and good government of the institution of an elected or largely elected second chamber in the UK, and the implications if no such reform is introduced. My focus is on the importance of the ability of a second chamber to revise and scrutinise bills and perform other constitution-related functions in the UK system. The reason why this function is particularly important in the UK is that the country lacks an entrenched written constitution with a constitutional or supreme court with jurisdiction to strike down 'unconstitutional' provisions in Acts of Parliament. Under the system at present these functions are intra-parliamentary: they are performed within parliament, particularly, and particularly well, by the second chamber and its committees.

These functions of scrutiny and revision are important in any democratic system. In most countries they are performed partly, of course, by intra-parliamentary bodies similar to our select committees and public bill committees, and partly by extra-parliamentary bodies, such as the Conseil d'ětat in France and similar bodies in Spain, Italy and other countries, and by constitutional or supreme courts as in the USA and Germany and indeed many other countries.

What if the second chamber is wholly or mainly elected?

Let us jump ahead in time and imagine that the UK's second chamber consists of 300 elected, or 240 elected and 60 appointed, independent members, as is proposed by the government white paper and draft bill of May 2011.[1] My question is whether those members will be able to perform the functions of a number of important and highly regarded House of Lords Select Committees. For instance:

- Constitution Committee: this committee requires among its members some expertise in and understanding of constitutional law, constitutional principles and the rule of law, and a relatively independent and impartial approach to provisions in bills that affect these principles;
- Delegated Powers and Regulatory Reform Committee: its work requires knowledge and understanding of constitutional principles such as the need to avoid abuse of 'Henry VIII' clauses, and of regulation;
- European Union Committee and its seven sub committees: its work requires knowledge and understanding of European law and policy and legal skills;
- Merits of Statutory Instruments Committee: membership in this requires the ability to read, understand and interpret complex statutory instruments and form relatively impartial views on them;

1 Cm 8077, May 2011.

- The Joint Committee on Human Rights: This committee requires among its members knowledge and understanding of human rights and international instruments on human rights, including the European Convention on Human Rights, the ICPR and many others, and – like the Constitution Committee - a relatively independent and impartial approach to provisions in bills that affect these matters.

In addition to its scrutiny and revision role, the current House of Lords conducts inquiries into issues affecting the public interest and public policy. Some of these inquiries are conducted by standing select committees, such as Science and Technology and Economic Affairs Committees, and some by ad hoc committees established for the purpose, sometimes as joint committees of the two Houses.

My concern is that a largely or wholly elected second chamber would not contain sufficient people with the qualities required to carry out these functions. It is obvious that the House of Commons members cannot do so: partly because of their workloads – with responsibilities for their constituencies; partly because of lack of expertise – there are not many lawyers for instance in the House of Commons; and partly because the House is, rightly and inevitably, highly politicised. The roles of the House of Lords and its committees that are listed above require political nous and experience – which is what elected members would be expected to possess - but they also require expertise, wisdom and independence of approach which not all elected members would necessarily possess.

The case for an independent Scrutiny Commission

Let us imagine that after a few years of an elected second chamber it is found and agreed that the quality of legislation passed by parliament and of statutory instruments is not good because the second chamber has not been able to perform its revision and scrutiny roles, or the inquiry roles, well, and not as well as the present House of Lords. And let us assume that because it is known in government that the second chamber will not perform these roles well, the preparation of bills 'upstream' is less well done. Let us also assume that the UK has not by then acquired an entrenched written constitution with a supreme court with the power to set aside statutory provisions which are incompatible with the constitution. It seems to me to be likely and highly desirable that there should then be established a high status extra-parliamentary body to perform these revision, scrutiny and inquiry roles. Let us call it the Scrutiny Commission. What would such a body be like?

The status and functions of the Scrutiny Commission

It would be completely independent of government and of parliament. It would be established by an act of parliament. Its function would be to complement and support the House of Commons in holding government to account in the course of the scrutiny and revision of bills and inquiries into matters of public policy. Its special responsibilities would include the constitution, delegated powers, European law and policy, human rights and statutory instruments, their drafting and merits. Its functions could be extended into international law and scrutiny of treaties. It would be entitled to scrutinise and revise bills and to conduct inquiries into matters of public interest and to debate and report on such matters.

Role in the legislative process

Its role in the legislative process would be provided for in its enabling act: it would regulate the role of the government in the legislative process, imposing delay on that process unless it is satisfied about the quality of each bill. The commission would examine, amend and report on bills at each stage of the intra-parliamentary legislative process – before second reading, after second reading, after committee stage, before report, after report. The government would be required by statute to provide a reasoned response to each commission report. The commission should have two weeks to respond to the government response. The government may not take the bill to the next stage in the parliamentary legislative process until the commission has given that response.

The point of this is that government would be expected to take care to secure that its bills did not transgress the standards the enabling statute and the commission would elucidate, so that its existence would have an effect upstream when bills were being prepared. It is to be expected that members of the House of Commons would take into account the commission's reports when the bill made progress through that House; opposition members in particular would draw on the commission's reports at each stage of the legislative process, pressing for the non-partisan issues raised by the commission to be resolved by government. It could be provided that a bill could not receive royal assent until one year after its introduction into parliament if the commission expressed continued objection to it at the time that its parliamentary passage was completed.

Appointment and terms of office

All members of the Scrutiny Commission should be appointed by an independent appointments commission which would work according to statutory criteria laid down in the enabling act. These would deal with the size of the Scrutiny Commission, a gender, ethnic and party balance, and an independent element of say 25%. There should be no mandating or whipping. The enabling statute would provide for the appointments commission to consult on and lay down the needs of the Scrutiny Commission for expertise in matters such as commerce, constitutionality, culture, defence, economics, education, European law, finance, foreign affairs, health, human rights, industry, international affairs, law, sport, welfare, and so on and to take these into account when making appointments.

Members of either of the two Houses would be disqualified from membership. Former members, like all others suitably qualified individuals, would be eligible to be appointed, but they would have no special claims to appointment: it would be for the appointments commission to determine whom to appoint.

The Scrutiny Commission should be entitled to sit in committees or in plenary session and to adopt standing orders regulating its procedures. All of its plenary and committee evidence taking sessions should be held in public, and transcripts of those meetings should be published on its website. Its Reports should also be published and presented to parliament and to the government.

Scrutiny Commissioners should serve for a single term of, say, fifteen years, followed by a period of quarantine before they could stand for elected office. They should not

be required to be full time. They should receive a *per diem* allowance for the work that they do.

Standards

In carrying out their scrutiny and revision roles in relation to bills, draft bills, draft statutory instruments and other legislative instruments the Scrutiny Commission would apply standards, many of which would be set out in the enabling legislation. The enabling statute could require the Scrutiny Commission to report on whether, for instance, the government had published the evidence base for the proposed legislation and carried out efficient risk, regulation, environmental and other impact assessments. It could also set out standards such as legal certainty, non-retroactivity, access to a court or tribunal for the resolution of disputes, preservation of the independence of the judiciary and of the integrity of the electoral system and civil service impartiality.

Other standards could be set from time to time by parliament: standards can be extracted from reports of parliamentary committees, such as the House of Lords Constitution Committee, thus constituting 'legisprudence' and giving parliament ownership of them.[2]

Such a commission would be legitimate because of its statutory basis and remit and because of the quality of its work. It would not be a legislative body and so would not be expected to be elected. It would not be a House of Parliament. And its work and its existence would make up for what I expect to be the inability of an elected or largely elected second chamber to carry out these functions of revision, scrutiny and inquiry.

2 See D Oliver, 'Improving the scrutiny of bills: the case for standards and checklists' Public Law 219, 2006.

Such a new institution would secure that there were effective safeguards against the passing of defective laws and ensure that matters of public policy could, where necessary in the public interest, be independently and openly scrutinised by those with political nous, experience, wisdom, expertise and independence and make it possible for the country to continue without post-legislative scrutiny by the courts.

Implications of a Scrutiny Commission for the second chamber

What would be the implications of the existence of such a body for a largely or wholly elected second chamber, if one emerges from the current proposals and draft bill? We need to note that the assumption in current and all past proposals for a reformed second chamber is that it would perform the same roles and functions and have the same powers as the House of Lords. If that were all that the elected or largely elected chamber were supposed to do, and if it turned out that it could not do them so that a Scrutiny Commission had to be established, it would follow that the elected or largely elected second chamber was unnecessary. It could be abolished, and the cost of 300 full time, paid members of the second chamber, their staff and their expenses could be saved. The cost of a Scrutiny Commission would be very much less.

What If the House of Lords is not wholly or partly elected?

My second 'what if?' question is, what if the present proposals for reform of the second chamber are not implemented? It seems to me that the current situation is

not sustainable, because the House of Lords is growing to nearly 1,000 members, each entitled to claim £300 per day tax free for attendance, plus some expenses. Even if there are sufficient members in this enormous House to carry out the revision, scrutiny and inquiry functions, there are bound to be many who are not needed for those purposes and yet who attend in order to draw their allowances or contribute in other ways.

If the current reform proposals are not put into effect there may then of course be progress in relation to putting the appointment process to the current House on a statutory basis and removing the prime minister's patronage[3], removing the hereditary peers, making appointments for a single fixed term of say 15 years, permitting or encouraging retirement so as to reduce the numbers in the House (while allowing those who retire to retain their titles). But if this proves not to be possible, another – and perhaps more easily achievable from a political point of view - approach would be to abolish the House of Lords, thus saving the increasing annual cost of this huge institution. Provision could be made to pay compensation or severance to current members based, for instance, on the length of their membership and their contributions in committees. In its place a Scrutiny Commission on the lines outlined above could be established. (That commission might well contain some of the members of the House of Lords who contribute most and best to its current functions, but there should be no expectation of such appointment).

Professor Dawn Oliver is Emeritus Professor of Constitutional Law, University College London.

3 See for instance the House of Lords Reform bill introduced for 2010-2011 and in a number of past years by Lord Steel of Aikwood.