



SCL

SOCIETY OF CONSERVATIVE LAWYERS

An Elected Second Chamber – Building a Better House?

SOCIETY OF CONSERVATIVE LAWYERS

An Elected Second Chamber – Building A Better House?

FOREWORD

House of Lords Reform has been an issue for more than a century. Significant changes in the Second Chamber have included the creation of Life Peerages and the removal of all but a fairly small number of hereditaries. However, the appetite for reform, in some quarters at least, has remained.

The Coalition said in its Programme for Government: “We will establish a committee to bring forward proposals for a wholly or mainly elected Upper Chamber on the basis of proportional representation. The Committee will come forward with a draft Motion by December 2010. It is likely that this will advocate single long-terms of office. It is also likely there will be a grandfathering system for current peers.”

A White Paper and draft Bill were submitted for pre-legislative scrutiny to a Joint Committee to consider and report on the draft Bill.

It seems inevitable that House of Lords Reform will be part of the Queen’s Speech in May 2012, and there is likely to follow a prolonged debate both in and out of Parliament on the proposed changes.

In the draft Bill the proposal is for a wholly or substantially elected Second Chamber to be phased-in over the course of 3 elections, the first of which is to take place in 2015. The ultimate size of the Second Chamber is to be 300 members, all of whom would be expected to be full-time politicians.

Amongst the many questions that will be fiercely debated, is whether a democratically elected Second Chamber can be expected to exercise the same restraint that the existing House of Lords has shown. Other questions include how those members of the current House of Lords who have achieved eminence and have expertise in a number of different fields, can be encouraged to participate in the new Second Chamber, particularly when few of these Peers have seen themselves as politicians in the traditional sense.

The Bill proposes regionally elected “senators” for multi-member geographically-based seats. Our Executive Committee Chairman, Oliver Heald MP, who has not only been a member of the Joint Committee considering the draft Bill, but was also, in 2007, a member of the Cross Party Working Group to consider House of Lords Reform, in this pamphlet has formulated a proposal for indirect elections.

This was not something which could be considered in detail by the Joint Committee in its Report because the terms of reference required the Committee to concentrate on the draft Bill and indirect elections were not in it. However, it is likely that the contents of any Bill which is proposed by the Government in the Queen’s Speech will be significantly altered during the course of its passage through Parliament and Oliver’s proposals have a real intellectual coherence about them. As such, they might well meet with significant approval across the parties and in both Houses.

During the months, or even years, of debate which are likely to follow the introduction of a Bill bringing House of Lords Reform, the proposed function of the Second Chamber and its composition are likely to be the focus of intense debate. I consider Oliver’s contribution in this pamphlet to be a valuable and particularly well thought out addition to the pool of information and argument on the subject. I very much hope that the pamphlet reaches a wide audience. As Chairman of Research I welcome his ideas, consistent as they are with the continuing contribution that the Society of Conservative Lawyers makes to political debate.

Foreword by Lord Faulks QC

Chairman of Research, Society of Conservative Lawyers
April 2012

An Elected Second Chamber – Building A Better House?

**By Oliver Heald MP, Chairman of the Executive Committee,
Society of Conservative Lawyers**

Executive Summary

The key challenge in reforming the House of Lords is to increase its democratic legitimacy while retaining its distinctive role as a ‘revising’ House

The Government’s proposals for a substantially elected Second Chamber are based on regional direct elections but this system is flawed

The Government’s proposals would:

- Jeopardise the Government’s ability to govern effectively
- Weaken the relationship between the two Houses of Parliament
- Blur the constituency link between MPs and their constituents and lead to conflicts at local level
- Reduce the quality and extent of the pool of talent available for the Second Chamber
- Increase election costs by at least £100 million and add to the complexity of the voting system and
- Increase the cost of running the Second Chamber by tens of millions of pounds each year

The Government should consider indirect election which is widely used across the world. Under the Secondary Mandate system each Party would publish a list of its candidates and would gain seats in the House of Lords in exact proportion to the share of the electorate’s support won in the General Election

This system is proportionate, simpler, cheaper and would be more effective than the Government’s current proposals.

Introduction

The Government is currently considering options for reforming the House of Lords. Their proposals are rightly focused on the central aim of creating a Second Chamber that has more democratic legitimacy, but which retains its role as a ‘revising’ House.

However, the Government’s current plan for a substantially elected House rests on the idea of regionally elected representatives using the Single Transferable Vote (STV). I believe this system is flawed and will create a number of problems.

I served as a member of the 2007 Parliamentary Cross Party Working Group convened by Lord Falconer and Jack Straw MP to consider House of Lords reform. More recently I have been a member of the Parliamentary Joint Committee on the Draft House of Lords Reform Bill. Through these extensive committee processes it became clear to me that the Government’s current plans for regional representatives from geographical electoral districts will:

- Jeopardise the Government’s ability to govern effectively
- Weaken the relationship between the two Houses of Parliament
- Blur the clarity of the constituency link between MPs and their constituents and lead to conflicts at local level
- Reduce the quality and extent of the pool of talent available for the Second Chamber
- Increase election costs and the complexity of the voting system and
- Increase the costs of running the Second Chamber

These are significant issues. A reformed House of Lords based on the Government’s electoral proposals will not commend itself to voters. I believe there is a simpler and more effective system the Government could adopt: a form of indirect election known as the Secondary Mandate. This is where seats in the Second Chamber are allocated on the basis of the proportion of votes cast for political parties at the General Election. Each party would field a list of candidates they had selected. The system is simple to operate, proportionate and would be likely to avoid many of the difficulties which arise with the Government’s proposal for direct regional elections. The Secondary Mandate would meet the Government’s main objective for reform and would fit in with the Coalition Agreement, which said:

“We will establish a committee to bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation.”

However, the Joint Committee was not able to consider indirect elections in detail in its Report, because pre-legislative scrutiny required the Committee to concentrate on the draft Bill’s proposals for direct elections. In this pamphlet I will look at both electoral systems and highlight what I believe to be the key reasons why indirect elections would be a more effective mechanism than the Government’s current proposals.

The Government's Proposals

The Government's draft Bill provides for

- a reformed House with members 80% elected and 20% nominated
- election by single transferable vote for regional multi-member Constituencies
- appointments made by a Statutory Appointments Commission
- members to be elected by thirds at each General Election and to serve for one term only of 15 years
- twelve Bishops would continue to sit
- transitional arrangements would reduce the existing membership by a third at each General Election
- by-elections for the current hereditary peers would cease in 2015
- members would be salaried with payroll and allowances administered by the Independent Parliamentary Standards Authority (IPSA)
- provision is also made for resignation, disqualification, expulsion and suspension.

The Government sets out the case for reform by making it clear that the House of Lords “performs its work well”, but “in a modern democracy it is important that those who make the laws of the land should be elected by those to whom those laws apply.”¹ Some witnesses to the Joint Committee seemed to agree. Lord Adonis said, “People who make the law should be elected – period.”² However, there were important voices, such as Professor Sir John Baker of the University of Cambridge, who took a completely different view. He made the point that the House of Lords’ essential scrutiny role “does not require the sanction of the ballot box to give it legitimacy, any more than the judicial role, because the House of Commons can insist on the last word.”³ I favour a democratic reform, provided that it works, and could agree with much of the Government’s architecture for the reform. But I do believe they should reconsider using direct elections with STV for large multi-member constituencies and opt instead for the Secondary Mandate.

The Advantages of National Indirect Election

Indirect elections are commonly used for national Second Chambers. Internationally, a form of indirect election is used to elect the membership of 34 Second Chambers and 16 of these are wholly indirectly elected.⁴ The Joint Committee received proposals for various types of indirect election, but one type was the system where votes for the House of Commons are translated into a proportionately representative Upper House, or its elected element. This is known as the Secondary Mandate and was originally espoused by Billy Bragg. Under the Secondary Mandate, each Party would publish a list of its candidates and would gain seats in the Second Chamber in exact proportion to the share of the electorate’s support it won. Philip Collins of The Times has described it as a system where “if the turnout were 100% and the Tories won 40% of the popular vote, they would get 40% of the seats in the Upper House.”⁵

The Secondary Mandate is simple but proportionate. It has none of the complexity of STV or the complex application of electoral formulae. The experience of the Alternative Vote referendum suggests that the public like a straightforward system.

It also seems inconsistent for the Government to be suggesting a considerably more expensive Second Chamber at a time when it is reducing the size of the House of Commons to cut the cost of national politics.

1 *House of Lords Reform Draft Bill, Cm 8077 May 2011 p.5*

2 *Oral evidence to Joint Committee on the Draft House of Lords Reform Bill, Q494*

3 *Op cit Q222*

4 *Written Evidence to the Joint Committee Dr Meg Russell EV58*

5 *Philip Collins, The Times, Friday 2 March 2012*

There are 6 main reasons why I consider indirect elections to be preferable to the Government's proposals :

- Role of the House of Lords
- Relationship between the Commons and Lords
- Constituency conflicts
- Quality of candidates
- Cost of Elections
- Cost of the reformed House of Lords.

The Role of the House of Lords

The current functions of the House of Lords are set out in the Introduction to the Draft Bill, "The House of Lords plays an important role in our legislature and, as a Second Chamber, is a vital part of our Constitutional arrangements. The House of Lords shares responsibility for legislating with the House of Commons. Bills are debated and scrutinised in both Houses. The House of Lords has a reputation for careful consideration of legislation and has the ability to delay and ask the Government and House of Commons to think again and in some cases offer alternative Amendments."⁶ The Government went on to highlight the role of scrutiny, holding the Government to account, questioning and debating. They also pointed out that Select Committees of the House of Lords conduct Inquiries into matters of public policy and publish their findings. The role of the House of Lords can be described as that of a "revising Chamber".

The Government's proposals for direct elections would mean that the new House would also, for the first time, acquire a representative function. This is a significant change. The constituency link between a House of Commons member and his constituents is a potent one. The new Senators elected to the Second Chamber would also have such a link. In giving evidence to the Joint Committee, the Minister, Mark Harper MP, recognised that Senators would have constituency responsibilities, although at a lower level than members of the House of Commons. The new Second Chamber would become a forum for the representation by elected members of their electoral districts. This representative function would overlap with the representative function of members of the House of Commons.

Another point which is generally accepted in discussions about an elected Second Chamber is that the new House would be likely to exercise its powers in a much more assertive way. Professor Vernon Bogdanor has written "direct election, however much the principle is qualified, is likely to make the second Chamber more powerful. The Upper House would become an opposing rather than a revising Chamber."⁷

The main criticisms of Government plans revolve around whether good effective government would be possible, the strained relationship which would be likely to develop between the two Houses, and about the relationship at local level between elected Senators and MPs, where there is potential for confusion, conflict and undermining of the constituency link between MPs and their constituents.

Indirect elections would resolve these issues. The electoral mandate of the new House would then be more suited to a revising Chamber and would not create a link between voters in a geographical area and their representative. The Second House would be democratically legitimate, but without justification for the much more assertive role that a new representative function would bring.

⁶ Cm 8077 p.10

⁷ Op cit Vernon Bogdanor EV 02

Relationship with the House of Commons

There is a clash between the desire for democratic legitimacy and the concern of many that our Constitution works well at present and that a much more powerful Second Chamber might interfere with this balance. The secret is to find a system which is democratic, but also works in the sense that it retains important features of the current system. The Government has tried to achieve this with its draft Bill. Some argue that it would be a good thing for the two Houses to be more assertive towards each other and that this would lead to a greater check on the Executive. But there is a risk of deadlock and undermining the ability of the Government to govern and do its business. The 80/20 composition and the method of election with the House coming up a third at a time mean that there will be no Government majority in the Second Chamber. The fact that members of the new House would serve only one term makes them more independent of Party, but also makes them unaccountable to the electorate and independent from them.

The Government has said that it proposes no change to the constitutional powers and privileges of the Second Chamber, or its relationship with the House of Commons. They point out correctly that the House of Commons would remain the primary House of Parliament. It would do so by virtue of the fact that it is the Government-making House and that a majority in the House of Commons would remain vital to government. The control of Supply would remain with the House of Commons and the Parliament Acts would need to be re-stated, but would also ensure the primacy of the House of Commons.

However, the concern is less about the theory and more about the practical working of the new arrangements. The fact is that a more assertive Second Chamber would make government more difficult. Even if the Parliament Acts were re-stated in the new House of Lords Reform Act, it is not practical to use the Parliament Acts on every Bill and a consensus would have to be achieved between the Houses in the form of a concordat or a package of conventions more suited to the new, more powerful, Second Chamber.

The work on this should start now with a Joint Committee of Lords and Commons, but the current House of Lords would not be able to bind its successors in the new Second Chamber. The ground work can be done, but it is a gamble to assume that the newly elected Senators would support a concordat of conventions, if it was seen to limit their ability to represent their new constituents.

It is also worth recalling that the reason for the primacy of the House of Commons is that it is the place at Westminster where sovereignty resides; the power of the people. Each member of the House of Commons is elected to represent about 70,000 people in a given geographical area. Taken together, the members of the House of Commons represent all the people and are thus able to trump the weaker non-elected mandate of the Second Chamber. This is the logic behind the Parliament Acts. It cannot be denied that if the Second Chamber is substantially elected, some of that power will then reside in the Second Chamber, as well as in the House of Commons. As Professor Bogdanor said of the current House of Lords, “it can make no claim to be a representative Chamber and therefore can never challenge the primacy of the Commons.” He went on to point out that a Government seeking to tamper with that logic would do so at its peril.⁸

It is often said that STV at regional elections with geographical constituencies would lead to more independents being elected. This is belied by the evidence in Australia, where the overwhelming preponderance of those elected under STV are from political parties. The Government tacitly accepts this, because it is suggesting that the new Second Chamber should be split between 80% elected and 20% who would be appointed by an independent Appointments Commission as independent cross-benchers. It is important that independent members should continue to play a role in the work of the Second Chamber and also that people of national standing in professions and other walks of life should be represented in the House. This would preserve expertise and also ensure that the Second Chamber has a different mandate from that of the House of Commons. However, it also means that there will be a substantial independent element there – far more than any electoral system would achieve.

It is also suggested that 12 Bishops should remain. It is notable that other faiths agree and this reflects the strength and structure of the Church of England and its ability to bring different faiths together. No other religion in the UK has the resources to do this or the established role of doing so.

The Government has stated that the Second Chamber should be 300 in number, but members of the House of Lords have made it clear that in order to continue with their Committee work, the number would need to be higher.

The arrangements proposed with a strong independent element and election of only a third at each General Election will produce a House without a Government majority and this is desirable in a revising Chamber. However, it does add to the risk that a more assertive Second Chamber could deadlock Government.

There is a difference between electing senators directly for a region or large multi-member constituencies on the one hand and the sort of indirect election which I am suggesting in this pamphlet. The Secondary Mandate allocates seats to nominated individuals and there is not the constituency link which provides much of the representative strength of the mandate of a member of the House of Commons. It is a form of election, but is less threatening to the principle of primacy of the House of Commons and less damaging to the ability of the Government to govern.

Constituency Conflicts

The constituency link between a Member of Parliament in the House of Commons and his constituents is valued by the public, is clear and well-understood and is good for MPs and public alike. The fact that an MP will stand up for the interests of all constituents regardless of Party affiliation is a great strength of the system and ensures that constituents have an avenue of individual representation. It will be confusing, create conflicts and undermine the constituency link, if directly elected Senators from other parties are representing themselves as alternatives to the sitting MP.

Australia has a system quite similar to that proposed in the draft Bill. There, political parties actively encourage their Senators to shadow House of Representatives' seats held by other parties and do constituency work there as the representative of their party in that area. This was explained during a Joint Committee evidence session with Australian Senators.

Senator Ursula Stephens from the governing Labor Party told us:

"I am allocated a number of seats that are not held by the Government in the lower House in my state. I look after those constituents who do not have a government representative. Those people might come to me about issues and legislation."

Senator Lee Rhiannon from the Australian Greens explained "...we have nine Senators and only one Member in the House of Representatives. The issue of working with constituents is very important for us and it takes up quite a bit of time."⁹

Senator Michael Ronaldson of the opposition Liberal Party agreed "I do not think that you can make the assumption that you will not be engaged in constituency-type work, particularly if the elected Lords in an area—as Senator Stephens said—come from the other party. If you are a Member of the non-ruling party, the Lords might find that they have more people knocking on their doors than they might otherwise have anticipated."¹⁰

Many UK witnesses considered it inevitable that the members of the new Second Chamber would become embroiled in conflicts with MPs in the House of Commons and that "constituency case tourism"¹¹ would occur where constituents could approach elected representatives competitively.

⁹ *Oral evidence Q.412*

¹⁰ *Op cit Q 414*

¹¹ *Clerk of the House of Commons Robert Rogers Q 655*

It is easy to say that Senators should not undertake personal constituency casework, but if an aggrieved constituent in East Anglia wanted the A14 widened to improve his commute to work, a Senator would be likely to take up a campaign to achieve this result and probably tour the marginal seats, local radio and TV studios making his point. The same is true of matters concerning the performance of hospitals and railways. There are a host of other issues of local and regional concern, which also have a personal edge to them.

It was clear in 2007¹² when there was a two day debate on House of Lords Reform and again last year¹³ that MPs were very reluctant to see any weakening of their link with constituents and that meddling by elected Senators was a major concern. In 2007 I took another view, but having now heard the detailed concerns of so many witnesses, the strength of feeling of many MPs and the clear evidence of Australian Senators that they do constituency work in seats held by other parties in the lower House, I am convinced that there is scope for constituency conflicts and an undermining of the constituency link between House of Commons MPs and their constituents.

Quality of Candidates

Some criticise the Secondary Mandate system on the basis that it gives power to the political parties to select the list of candidates. Yet this is a matter for the political parties in every electoral system and in practical terms there is little difference between the parties selecting candidates for a national closed list, an open regional list or STV. The current system is one where the Party Leaders decide on appointments to the House of Lords. But it should be noted that the political parties have been willing recently to use innovative methods for selection of candidates to the House of Commons and there is no reason to think that they would not wish to find ways of attracting the best possible candidates to the lists for a Second Chamber.

There are obvious advantages for the political parties in preparing a well-balanced list which is representative, diverse and of high quality. This is particularly so as the Secondary Mandate election would be decided as part of the General Election and the lists of candidates would be published in advance. There would be a strong incentive to file a high quality list, which was not going to cause embarrassment on the Campaign Trail.

It is often said that the strength of the House of Lords is that it includes people in all the political parties who are nationally recognised in their own areas of expertise. But it is unlikely that prominent professionals would want to stand for direct election or to take on a region's representative function. They are more likely to be attracted by a national indirect election. It would be an unfortunate aspect of a regionally elected House that the breadth of talent would be reduced in this way.

Costs of Elections

The Government is proposing a complicated proportional representation system, which would be costly to administer. As a point of reference the 2009 European Elections used a less complex PR system and cost £103 million.¹⁴ In a period of austerity it will make it more difficult to garner public support for the new proposals if they are significantly more expensive. The Secondary Mandate system does not require separate elections, so there would be no need for many of the costs. Campaign literature mailings could be limited and no boundary inquiries would be needed.

12 *Hansard* 6 & 7 March 2007

13 *Hansard* 27 June 2011

14 *Election Accounts: UK and European Parliamentary Elections 2009-10 Account : Returning Officers' Expenses HCD 738 2010-12 and Returning Officers' Expenses Northern Ireland : statement of accounts 2009-10, HC 978 2010-12*

Costs of a Second Chamber with a Representative Role

The draft House of Lords Reform Bill suggests that elected members of the Second Chamber would be full-time and salaried, albeit at slightly lower salary levels than MPs. This would be a major change from the current system, where many Lords attend regularly, but on the basis of a *per diem* payment allowing them to continue to pursue other careers. This is something which helps with the revision of legislation and contributions to debate, because many Lords have particular up to date knowledge and expertise gained from their other jobs. With the Secondary Mandate, it would be possible for the current non-salaried system to continue.

Under the Government's proposals, the new House would have a representative role. It is hoped to avoid the Second Chamber members doing individual casework, but they would represent geographical areas with constituents and there would be constituency issues of a local and regional nature to be dealt with.

The necessary expenses for staffing support would be set by IPSA, the independent salaries and allowances body. In 2010/2011, £185 million was spent on MPs' pay, staffing and expenses.¹⁵ By contrast, Peers' Expenses and Financial Support amounted to £18 million.¹⁶

Even if the Second Chamber is set at half the number of members of the House of Commons with slightly lower salaries and even if the constituency work does not involve individual casework, it can be seen that a very substantial increase in salaries, staffing and office costs is inevitable under Government plans. These costs would not arise under a system of national Secondary Mandate.

Criticisms of the Secondary Mandate

One criticism of the Secondary Mandate was summed up by Dr Meg Russell in evidence to the Joint Committee:

"Some people vote tactically in general elections for local reasons, but they might not necessarily want their vote to go to the same party in the second Chamber. It is very hard to deny people a second ballot paper in a situation such as that, should they wish, for example, to vote Conservative or Labour in the local constituency but they might like their votes to go to the Greens or UKIP for the second Chamber."¹⁷

If the General Election and the Second Chamber Election take place on the same day, as suggested by the Government, it is inevitable that there will be a blurring of the issues. Some parties will gain the benefit in the Second Chamber race of having an attractive MP candidate in a particular seat. A less than ideal MP candidate may benefit from his Party being more popular and having strong Second Chamber candidates. Some tactical voting may take place. But overall these differences will have only minor impacts. It is noteworthy that one of the systems proposed by the highly regarded Wakeham Commission¹⁸ was a "complementary system" whereby votes cast for the parties' general election candidates would be accumulated at regional level and the parties would secure a number of regional members proportional to their share of the vote in that region. This is a form of Secondary Mandate. Although I prefer a national election, for the reasons set out above, it is encouraging that the principle of the Secondary Mandate was endorsed by such an authoritative body.

15 *Financial Year Data 2010/2011 House of Commons and IPSA*

16 *House of Lords, resource Accounts 2010/11, July 2011, HL 185 2010-12*

17 *Oral Evidence Q177*

18 *Royal Commission on The Reform of the House of Lords: a House for the Future, 2000, Cm 4534 para 12*

Equally, advocates of proportional representation cannot logically criticise the Secondary Mandate as they often refer approvingly to national general election vote shares as evidence of proportionality and fairness.

Supporters of a fully appointed House sometimes argue that the Secondary Mandate can be seen “simply as a system of appointment. In the end, there is very little difference between the two.”¹⁹ This criticism ignores the obvious point that it is a democratic system - the list of candidates for the Second Chamber would be published ahead of the general election and be part of the Election Campaign. To put forward a strong balanced list would strengthen a Party’s campaign, whilst a weak list could provide damaging headlines. The fact that the Secondary Mandate involves less dramatic change is a strength rather than a weakness.

Conclusions

I have changed my own views on the best system for election for the Second Chamber based on extensive evidence that direct elections do create risks: to the Government’s ability to govern effectively, to the relationship between the two Houses of Parliament and their members, to the clarity of the constituency link between MPs and their constituents and to the quality and extent of the pool of talent available for the Second Chamber. There is also the important consideration of the far higher costs of both organising elections and running the Second Chamber.

In this pamphlet I have looked for an alternative form of election which will give democratic legitimacy without turning the Second Chamber into an over-assertive “opposing Chamber”, putting at risk the ability of the Government to govern or creating the other problems set out in this pamphlet.

Indirect election is chosen by many countries for their Second Chamber, because it provides an electoral mandate which is better suited to a revising Chamber. The Secondary Mandate system merits further consideration by Government.



For further information about the Society of Conservative Lawyers, contact Sarah Walker (Administrative Secretary) at SocConLaw@aol.com

www.conservativelawyers.com

Produced by Chris Dowling - Print & Design Ltd.
Tel. 01825 764047 www.dowlingprint.com