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THE FUTURE OF THE SECOND CHAMBER: THE COALITION GOVERNMENT AND THE HOUSE OF LORDS

Abstract

On 17th May 2011, the Government published its House of Lords Reform Draft Bill and accompanying White Paper, which contained proposals for a smaller, reformed House of Lords. The Draft Bill proceeded to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament, which held its first public evidence sessions in October 2011. The Joint Committee on the Draft House of Lords Reform Bill is due to publish its report in March 2012, and it is expected that the Government will introduce a Bill with a view to holding the first elections to the reformed House in 2015. This thesis seeks to examine the implications of the Government's proposals and endeavours to determine whether such reform of the House of Lords is both necessary and desirable. It addresses both the strengths and weaknesses of the House as presently constituted, and attempts to evaluate the performance of the current chamber in the execution of its roles and functions. Consideration is given to both the advantages and disadvantages of altering the composition of the upper chamber by moving to a wholly or predominantly elected House, and seeks to address the question of whether or not a more incremental, evolutionary path of reform might better answer the so-called 'second chamber paradox', whilst retaining the inherent qualities of the present House, and ensuring it can continue to fulfil its functions effectively and efficiently.

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THE FUTURE OF THE SECOND CHAMBER: THE COALITION GOVERNMENT AND THE HOUSE OF LORDS

“to devise a good second chamber; to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform – this is the task which has tried the ingenuity of constitution makers from time immemorial.”

J.A.R. Marriott *Second Chambers* (Oxford: Clarendon Press 1910),
p.298

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DECLARATION

Please note that work on this thesis was completed prior to the publication of the Report of the Joint Committee on the Draft House of Lords Reform Bill, which is due to be published in March 2012.

INTRODUCTION

In the time since it took office in May 2010, the Coalition Government has succeeded in placing constitutional and political reform firmly back on the legislative agenda in the United Kingdom. It would appear that the desire of the political class to cast off the shadow of the expenses scandal that engulfed Parliament in 2009 has awoken a new determination amongst Britain's political leaders to 'clean up politics', a goal which the present Government appears to hope can be realised through a programme of rather radical constitutional reform. The Liberal Democrats may have failed to convince the British public of the virtues of electoral reform,¹ but as we reflect on the significance of what was only the United Kingdom's second ever nationwide referendum, and as we ponder the implications of the United Kingdom's first fixed-term Parliament,² there has hardly been a more fitting time to discuss the issue of what is to become of that great "constitutional anachronism",³ the House of Lords.

Aside from the removal of the bulk of hereditary peers in 1999, the House of Lords managed to survive, mostly unscathed, thirteen years of a Labour Government intent on tugging at the threads of the constitution, a Government with a reform agenda that was arguably more radical than that of the present Coalition. Even in their eleventh hour, the Labour leadership scrambled to pass the Constitutional Reform and Governance Act 2010, in one final attempt to remove the last element of heredity from the upper chamber. But the proposals to end hereditary by-elections and to allow for the resignation, suspension and expulsion of peers were all lost in the wash-up period before the 2010 general election. Labour's reforms to the upper House between 1997 and 2010 were piecemeal, and, it is submitted, demonstrated a distinct lack of commitment to any identifiable goals in the arena of second chamber reform. But things look set to change under the Coalition Government which, if we are to believe the rhetoric, is determined to succeed where others have failed in bringing wholesale reform to the House of Lords.

¹ The Alternative Vote referendum was held on Thursday 5th May 2011. It offered the electorate the choice of retaining the first-past-the-post electoral system, or instead adopting the alternative vote system. Turnout for the referendum was 42.2%. 67.9% of voters rejected AV while only 32.1% voted in favour of the change.

² The Fixed-term Parliaments Act 2011 received Royal Assent on 15th September 2011

³ Oliver, D. 'The Modernization of the United Kingdom Parliament?' in Jowell J. and Oliver, D. *The Changing Constitution* (6th edn Oxford: Oxford University Press, 2007), p.174

Despite extensive reviewing of options for reform, including three government White Papers,⁴ a Royal Commission report,⁵ the report of the Select Committee on Public Administration,⁶ and the range of options forwarded by the Joint Committee of both Houses,⁷ no significant changes have been implemented to either the powers or the composition of the Lords since the removal of the hereditary peers in 1999, with the exception, of course, of the removal of the Appellate Committee under the Constitutional Reform Act 2005.⁸ In March 2007 the House of Commons voted in favour of either a wholly elected House, or one which contained a majority of elected members,⁹ and a White Paper was published in 2008 with a view to advancing this position.¹⁰ Yet the current House lives on in a “curious kind of limbo, stigmatised as an interim institution and threatened with imminent extinction.”¹¹ Labour’s pledges to bring about sweeping reforms to the House of Lords in all three of its election manifestos between 1997 and 2005 proved to be of little worth, despite the “clear electoral authority”¹² that stemmed from three successive election victories.

More than twelve years after the House of Lords Act received Royal Assent there is still no definitive answer to that much recited question: what should be done with the House of Lords? The Government appears to believe that it now has the solution. But throughout the discussions that have taken place amongst academics and politicians alike, one issue seems to have been largely overlooked. Could it not be possible that the House of Lords, despite its idiosyncrasies, does not actually require fundamental, wholesale reform? Might it not be the case that the issue of Lords reform could be better resolved with steady, evolutionary, pragmatic reform to build on what is considered by many to be a highly effective second chamber and a valuable component in the legislative framework of the United Kingdom?

During the debates which followed the 2010 Queen’s Speech, one Conservative peer quipped that his party and the Liberal Democrats, despite previous political animosity, had found themselves, as a result of the inconclusive general election result, “chained together like

⁴ *The House of Lords: Completing the Reform* Cm 5291 (2002); *The House of Lords: Reform* Cm 7027 (2007); *An Elected Second Chamber: Further Reform of the House of Lords* Cm 7438 (2008)

⁵ Royal Commission on the Reform of the House of Lords, *A House for the Future* Cm 4534 (2000)

⁶ Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (Fifth Report of Session 2001-2002) HC 494 (2002)

⁷ Joint Committee on House of Lords Reform, *House of Lords Reform: First Report* (First Report of Session 2002-2003) HL 17 (2002)

⁸ The judicial functions of which were assumed by the newly created Supreme Court of the United Kingdom.

⁹ *Hansard* HC cols.1389–1488 (6th March 2007) and cols.1524–1638 (7th March 2007)

¹⁰ *An Elected Second Chamber: Further Reform of the House of Lords* Cm 7438 (2008)

¹¹ Bogdanor, V. *The New British Constitution* (Oregon: Hart 2009), p.145

¹² Brazier, R. *Constitutional Reform: Reshaping the British Political System* (Oxford: Oxford University Press, 2008), p.65

suffragettes.”¹³ And although the string of playful witticisms that ensued were greeted with laughter in the chamber, the remarks of Earl Ferrers, for some the symbol of steady continuity, while for others the remnant of an embarrassing pre-democratic past, are indicative of the inherent tension and instability in the relationship between the Coalition partners. Indeed, when Lord Ferrers proceeded in his speech to address the issue of Lords reform, this same metaphor was used in an altogether more serious context. In drawing their lordships’ attention to the passage in the Queen’s Speech pertaining to “a second House which is wholly or partially elected”,¹⁴ he remarked that “one does not have to be a genius to realise from which end of the suffragette’s chain that idea came.”¹⁵

This is evidently more than just a resentful jibe at the party with which Lord Ferrers has found himself reluctantly sharing power. What had previously been regarded by the Conservative parliamentary party as a ‘third term issue’ is now at the forefront of Nick Clegg’s reform agenda. The working group assembled under the chairmanship of the Deputy Prime Minister tasked itself with the production of a draft bill by December 2010, and despite the predictable delay in the publication of their proposals, the House of Lords Reform Draft Bill and accompanying White Paper were put before the House of Commons on 17th May 2011.¹⁶ Due to the outcome of the last general election, reform of the upper House is therefore well and truly back on the political agenda. But during the aforementioned speech, Lord Ferrers posed one very pertinent question which, it is submitted, deserves some consideration. He asked the House to consider “why we always have to use up energy and parliamentary time in changing things which are working well - time which could be better addressed to the subjects which are not working well.”¹⁷ But to what extent is this actually case? Does the House of Lords already function as an effective chamber of Parliament, or is major constitutional upheaval an uncomfortable necessity?

The metaphorical ‘chain’ to which Lord Ferrers referred, the chain which holds together two parties that once appeared so ideologically opposed, is what has come to be known as the ‘Coalition Agreement.’¹⁸ This document commits the Coalition partners to a far-reaching programme of constitutional reform, and amidst the talk of fixed-term parliaments and electoral change nestles a single paragraph committing the Government to “bring forward proposals for a

¹³ Earl Ferrers, *Hansard* HL col.9 (25th May 2010)

¹⁴ *Ibid.* at col.11

¹⁵ *Ibid.*

¹⁶ *Hansard* HC col.155 (17th May 2011)

¹⁷ Earl Ferrers, fn.13, col.11

¹⁸ HM Government, *The Coalition: Our Programme for Government* (London: Cabinet Office, 2010)

wholly or mainly elected upper chamber on the basis of proportional representation.”¹⁹ In the meantime, “Lords appointments will be made with the objective of creating a second chamber that is reflective of the share of the vote secured by the political parties in the last general election.”²⁰ The Conservative Party manifesto at the 2010 general election had committed the Tories to a similar goal, although in slightly more ambiguous terms. They pledged themselves to “work to build a consensus for a mainly-elected second chamber...recognising that an effective and efficient second chamber should play an important role in our democracy.”²¹ But one does not have to be a cynic to be unconvinced about the party’s dedication, particularly that of backbench MPs and peers, to this reform. Nonetheless, reform is on the horizon, and it has taken a radical shape. The Deputy Prime Minister has indicated that he would be quite willing to use the Parliament Act procedure to force through his plans for Lords reform should they be obstructed in the upper House.²² One need look no further than the judgement of the current President of the Supreme Court in *Jackson v. Attorney General* for evidence of the constitutional and legal uncertainty surrounding such a move.²³ As Lord Ferrers was quick to remind the Government, it is the “intricate weave of the constitution”²⁴ that allows flexibility, pragmatism and the ability to evolve over time. We must, so Lord Ferrers argues, “be careful not to snap the thread.”²⁵

Already these constitutional threads appear to be fraying. The Deputy Prime Minister’s plans for an elected senate may be in their infancy, but other aspects of the Government’s strategy have provoked considerable hostility in and out of the chamber. A recent report by University College London’s Constitution Unit has indicated that the Government’s stated objective of achieving proportionality between the parties in the House of Lords in relation to general election vote

¹⁹ *Ibid.* at p.27

²⁰ *Ibid.*

²¹ The Conservative Party, *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (April 2010)

²² See Chapman, J. ‘Nick Clegg pledges to push through reform of the House of Lords’ *Daily Mail* (19th December 2011) <<http://www.dailymail.co.uk/news/article-2076082/Nick-Clegg-pledges-push-reform-House-Lords.html>> accessed 16th January 2012; Wintour, P. ‘Nick Clegg claims PM’s backing for Bill to create elected Lords’ *Guardian* (18th December 2011) <<http://www.guardian.co.uk/politics/2011/dec/18/nick-clegg-promises-reform-lords>> accessed 16th January 2012

²³ *R (Jackson) v. Attorney General* [2005] EWCA Civ 126, [2005] QB 579 at paras.41 and 98-100. The Court of Appeal judgement, to which Lord Phillips of Worth Matravers contributed, was handed down by Lord Woolf CJ. The Court suggested that the Parliament Acts could not be used to abolish the House of Lords, or to fundamentally alter the relationship between the House of Lords and the House of Commons. It concluded that there were some constitutional changes that were so fundamental that they could not be implemented using the 1911 Act. While this view was rejected by the House of Lords on appeal, there remains some ambiguity, as evidenced by the judgement of Lord Carswell. See *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at para.178.

²⁴ Earl Ferrers, fn.13, col.8

²⁵ *Ibid.*

shares is already having a serious impact on the functioning of the House.²⁶ The report notes that from taking office David Cameron created an unprecedented 117 new peers in less than a year. To satisfy the objectives of the 'Coalition Agreement' a further 269 peers would have to be appointed, taking the size of the chamber to 1062 which, the report suggests, "risks rendering the House of Lords completely unable to do its job."²⁷ The influx of members not only has implications in terms of costs, but it also places considerable pressure on the House's limited resources. The report notes that "peers are faced with working in overcrowded conditions, with limited access to computers and telephones, and little or no space for staff",²⁸ which is "far from conducive to effective working."²⁹ Further, "many more peers are seeking to contribute to debates, ask questions, and become members of committees",³⁰ creating a "more fractious atmosphere in the chamber, and growing frustration amongst members who cannot contribute effectively."³¹ It would appear from this analysis that the Government's approach to the House of Lords is already having a negative impact on its ability to function as an effective chamber of Parliament.

But this is just the beginning. The proposals contained within the Draft Bill arguably amount to the effective abolition of the House of Lords and its replacement with an elected (or at least predominantly elected) senate, a view espoused on multiple occasions in recent debates in the House.³² The fundamental question is whether these plans will enhance the ability of the upper House to function as an effective chamber of Parliament, or cause irreparable damage to the performance of an age-old institution. In other words, is this reform really necessary? Or could it be the case that, as the recently-ennobled Lord Hennessy has suggested, the answer lies in "organic reform",³³ reform grounded in evolutionary rather than revolutionary principles?

In order to answer these questions, I shall begin in Chapter I by examining the proposals contained within the 2011 White Paper, along with data on the current composition of the House, before proceeding to address the questions of why the House of Lords has proved so difficult to reform, and indeed, whether the United Kingdom actually needs a second chamber at all. I shall end Chapter I by introducing the comparative element of this study, and provide a brief introduction to the second chambers in other comparable democracies, which shall be

²⁶ Russell, M. *House Full: Time to get a grip on Lords Appointments* (London: Constitution Unit, 2011), p.3

²⁷ *Ibid.* at p.9

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² See, for example, Baroness Boothroyd, *Hansard* HL col.1172 (21st June 2011)

³³ Lord Hennessy of Nympsfield, *Hansard* HL col.1194 (21st June 2011)

used to develop the analysis offered in relation to the House of Lords. In Chapter II I shall present a case study of the way in which the House of Lords has interacted with a constitutionally significant piece of legislation. The Parliamentary Voting Systems and Constituencies Act 2011 is arguably one of the most constitutionally significant pieces of legislation that will be passed by the present Government, and will therefore form the focus of this case study. This will not only allow me to draw comparisons between the way in which the House of Lords and House of Commons deal with scrutiny and amendment of legislation, but also help me to draw conclusions on whether the House, as currently composed, adequately performs the functions attributed to it. The analysis from this case study, along with comparative data on second chambers within other bicameral legislatures, will then inform the analysis provided in Chapters III and IV. In Chapter III I shall examine the strengths and weaknesses of the current composition of the House of Lords, before moving on to examine both the advantages and the pitfalls of both a wholly elected House, and a House consisting of both appointed and elected members. In Chapter IV I shall examine the powers of the House of Lords, and draw on a variety of comparative data to determine whether any change is necessary to the balance of power between the two chambers of Parliament. I shall then conclude as to whether the present Government's plans to introduce direct election to the upper House are desirable, or whether there is an alternative, more beneficial option for reform of the second chamber.

CHAPTER I: REFORMING THE HOUSE OF LORDS

The Coalition Proposals

On 17th May 2011, the Government published its proposals for a smaller, reformed House of Lords. The proposals contained in the House of Lords Reform Draft Bill and accompanying White Paper set out in detail options for how a reformed House of Lords might look.³⁴ In the foreword the Government states its belief that, “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.”³⁵ It states that “the House of Lords performs its work well but lacks sufficient democratic authority”,³⁶ and sets out its plan to “strengthen Parliament”³⁷ through the creation of a wholly or mainly elected second chamber. Reactions to the proposals were hostile in both chambers of Parliament,³⁸ and the media reaction has been equally unenthusiastic.³⁹ Nonetheless, the Draft Bill proceeded to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament, composed of 13 peers and 13 Members of the House of Commons. The Committee is due to report in March 2012, and a Government Bill will then be introduced with the intention of holding the first elections to the reformed House in 2015.

The 2011 White Paper proposes a reformed chamber of 300 members, wholly or mainly elected in line with the terms of the Coalition Agreement.⁴⁰ The accompanying Draft Bill sets out the Government’s proposals for an 80% elected House, with the remaining 20% of members appointed by a statutory Appointments Commission.⁴¹ The reformed House would therefore contain 240 elected members and 60 appointed members. Representation for the Church of England would be maintained, with a maximum of 12 Church of England Bishops sitting as ex-

³⁴ *House of Lords Reform Draft Bill*, Cm 8077 (2011)

³⁵ *Ibid.* at p.5

³⁶ *Ibid.*

³⁷ *Ibid.* at p.6

³⁸ *Hansard* HC cols.155-175 (17th May 2011); *Hansard* HL cols.1268-1289 (17th May 2011)

³⁹ See for example, Blackburn, D. ‘Clegg’s great rejuvenator falls a little flat’ *The Spectator* (17th May 2011) <<http://www.spectator.co.uk/coffeehouse/6952318/cleggs-great-rejuvenator-falls-a-little-flat.shtml>> accessed 2nd June 2011; Editorial, ‘The country is weary of Mr Clegg’s tinkering’ *The Telegraph* (17th May 2011) <<http://www.telegraph.co.uk/comment/telegraph-view/8519750/The-country-is-weary-of-Mr-Cleggs-tinkering.html>> accessed 2nd June 2011; White, M. ‘Lords reform: not worth the fuss?’ *The Guardian* (18th May 2011) <<http://www.guardian.co.uk/politics/blog/2011/may/18/lords-reform-not-worth-the-fuss>> accessed 2nd June 2011.

⁴⁰ *House of Lords Reform Draft Bill*, fn.34, p.11 paras.12-23

⁴¹ *Ibid.* Clause 1 of the Draft Bill

officio members.⁴² The White Paper also states that the Prime Minister should be allowed to appoint a limited number of people to serve as Ministers, who would be members of the reformed House only for the duration of their appointment. The Draft Bill makes provision for such arrangements to be implemented via secondary legislation.⁴³ Under the proposals, members would serve a single, non-renewable term of three normal election cycles which, following the implementation of the Fixed-term Parliaments Act 2011, means that members would serve for a total of 15 years.⁴⁴ The White Paper states the Government's belief that "serving a single term, with no prospect of re-election would enhance the independence of members of the reformed House"⁴⁵ and "reinforce the distinct role for members of the House of Lords, which is different from that of MPs."⁴⁶ Elections would take place at the same time as general elections to the House of Commons⁴⁷ "in order to maximise voter turnout and to provide the least disruption to the work of Parliament"⁴⁸, but would be staggered so that only a third of seats are contested at each election,⁴⁹ ensuring that "members of the reformed House would never collectively have a more recent mandate than MPs",⁵⁰ and making it less likely that one party would gain an overall majority. Elections to the reformed House would use a system of proportional representation, and the Draft Bill favours the adoption of the Single Transferable Vote.⁵¹ The appointed, independent members would be nominated by a statutory Appointments Commission and recommended by the Prime Minister for appointment by the Queen.⁵² Thus, 20 members would be appointed at the time of each election to the reformed House, with the same term as elected members.⁵³

The proposals envisage that the reformed House of Lords would have the same core functions as the current House, scrutinising legislation and holding the Government to account.⁵⁴ No changes are proposed to the formal constitutional powers and privileges of the House, or to the existing constitutional relationship between the two Houses of Parliament.⁵⁵ The link between

⁴² *Ibid.* at p.22 paras.91-103 and Part 4 of the Draft Bill

⁴³ *Ibid.* at p.19 paras.67-68 and Part 5 of the Draft Bill

⁴⁴ *Ibid.* at p.13 paras.24-25 and Clauses 6 and 19 of the Draft Bill

⁴⁵ *Ibid.* at p.13 para.24

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at p.13 paras.26-27 and Clause 4 of the Draft Bill

⁴⁸ *Ibid.* at para.26

⁴⁹ *Ibid.* at para.25 and Clause 4 of the Draft Bill

⁵⁰ *Ibid.* at para.25

⁵¹ *Ibid.* at pp.13-16 paras.28-47 and Clause 7 of the Draft Bill

⁵² *Ibid.* at pp.18-19 paras.55-66 and Part 3 of the Draft Bill

⁵³ *Ibid.*

⁵⁴ *Ibid.* at p.10 paras.2-6

⁵⁵ *Ibid.* at p.11 paras.7-11 and Clause 2 of the Draft Bill

the peerage and membership of the second chamber would be broken,⁵⁶ and members would receive a salary and allowances, as well as a pension administered by the Independent Parliamentary Standards Authority.⁵⁷ They would be subject to a disqualification regime similar to that which applies to members of the House of Commons,⁵⁸ and the franchise for general elections would be extended so that members of the reformed House could vote in elections to the lower House.⁵⁹ However, members of the reformed House would be disqualified from standing for election to the House of Commons until the second general election after the end of their term as a member of the upper House.⁶⁰

The move to a smaller, mainly elected second chamber would not take place in one step. It is proposed that reform be implemented in three phases, during which some existing peers would remain as transitional members.⁶¹ The White Paper sets out a range of options to realise this aim, with a view to ensuring that the House continues to work effectively until the transition is complete.⁶² The option proposed in the Draft Bill is to reduce the number of current members in parallel with the introduction of new elected and appointed members over the course of three elections,⁶³ providing a “gradual handover from the old to the reformed House.”⁶⁴ The first transitional period would begin with the first election to the reformed House. At the next general election, 80 members would be elected to the House and 20 would be appointed, while two thirds of existing peers would be selected to remain as transitional members. It would be for the existing House of Lords to determine the procedure for selecting members to sit in the transitional periods.⁶⁵ At the time of the second election, a further 80 elected members and 20 appointed members would be introduced to the House, and half of the existing peers selected to remain for the first transitional period would remain for the second transitional period. At the time of the third election, the remaining transitional members would leave, and a further 80 elected members and 20 appointed members would join the House. The transition to a reformed House would then be complete.

However, the plans set out in the Draft Bill are not set in stone, and much of what is contained in the White Paper is left up for debate. The size of the reformed chamber, for example, is not

⁵⁶ *Ibid.* at p.13 para.23

⁵⁷ *Ibid.* at pp.23-26 paras.104-128 and Clause 59 of the Draft Bill

⁵⁸ *Ibid.* at pp.27-28 paras.140-145 and Part 7 of the Draft Bill

⁵⁹ *Ibid.* at p.17 paras.50-51

⁶⁰ *Ibid.* at p.28 paras.146-150 and Clause 55 of the Draft Bill

⁶¹ *Ibid.* at pp.19-21 paras.69-86

⁶² *Ibid.*

⁶³ *Ibid.* Clause 1 of the Draft Bill

⁶⁴ *Ibid.* at p.20 para.71

⁶⁵ *Ibid.* at para.72

entirely fixed, as the Deputy Prime Minister made clear when introducing the draft bill to the House of Commons:

“Three hundred is the number that we judge to be right, but this is an art and not a science. In the vast majority of bicameral systems, the second Chamber is significantly smaller. That arrangement helps to maintain a clear distinction between the two Houses. We are confident that 300 full-time Members can cover the work comfortably. We are, however, open to alternative views on that.”⁶⁶

The Draft Bill sets out proposals for an 80% elected House, but the White Paper makes clear that the Government is open to considering a wholly elected House if that option is supported during the period in which the Draft Bill is scrutinised.⁶⁷ Similarly, the Bill expresses a preference for the use of the Single Transferable Vote in elections to the reformed House, but again, the Government is willing to consider the use of other proportional systems, another point recognised by the Deputy Prime Minister in the House:

“I know that some Members prefer a party list system, including Opposition members of the cross-party committee I chaired. We are willing to have this debate, and have not ruled out a list-based system in the White Paper.”⁶⁸

Although the Draft Bill sets out one option for the transitional period, the Government also remains open to views on the exact process of transition, and the White Paper contains details of two further options.⁶⁹ The Government clearly hopes that by maintaining a degree of ambiguity over the precise shape of reform, it will be possible to achieve some form of consensus and ensure that these proposals do not meet the same fate as those which preceded them. As the Deputy Prime Minister made clear to the House of Commons:

“Although we know what we want to achieve, we are open minded about how we get there. Clearly, our fixed goal is greater democratic legitimacy for the other place, but we will be pragmatic in order to achieve that.”⁷⁰

⁶⁶ The Deputy Prime Minister (Mr. Nick Clegg) *Hansard* HC col.155 (17th May 2011)

⁶⁷ *House of Lords Reform Draft Bill*, fn.34, p.12 para.15

⁶⁸ Nick Clegg, fn.66 at col.156

⁶⁹ *House of Lords Reform Draft Bill*, fn.34, para.70 and paras.81-86

⁷⁰ Nick Clegg, fn.66 at col.155

The Current Composition of the House of Lords

The House of Lords has long been regarded as something of a peculiarity,⁷¹ and very little has changed in the composition of the House since the passage of the House of Lords Act 1999.⁷² As of 10th January 2012 there were a total of 787 members entitled to sit and vote in the House of Lords.⁷³ However, the total membership of the House holds the potential to rise to 826, since there are a further 39 members who could potentially return to the chamber. These include 13 members of the senior judiciary who are disqualified by virtue of section 137(3) of the Constitutional Reform Act 2005, all of whom are entitled to return to the House upon their retirement from judicial office. A further 22 members are currently on “leave of absence” under section 23 of the Standing Orders of the House, including Baroness Ashton of Upholland, the current European Union High Representative for Foreign Affairs. In addition, Baroness Ludford is presently disqualified as a Member of the European Parliament, and three peers are temporarily suspended from the House.

The vast majority of peers currently entitled to sit and vote are life peers appointed under either the Life Peerages Act 1958 or the Appellate Jurisdiction Act 1876. Of the 672 life peers, 235 sit on the Labour benches, while the Conservatives have 170 and the Liberal Democrats have 87. There are 154 life peers on the crossbenches, and a further 26 represent minor parties or are non-affiliated. A further 90 hereditary peers retain their seats by virtue of the House of Lords Act 1999, of whom 48 are Conservative, 4 are Labour, 4 are Liberal Democrats, and 32 sit on the crossbenches. Two other hereditary peers sit as *ex-officio* members by virtue of being royal office-holders. The remaining ‘hereditaries’ are, upon their death, replaced in a by-election, with their hereditary counterparts within their respective groups serving as electors. The exception to this is where the deceased peer was one of the fifteen chosen by the whole House to continue as a Committee Chairman or Deputy Speaker, in which case the whole House chooses the replacement.

In addition, 26 Bishops of the Church of England, including the Archbishops of Canterbury and York, sit by virtue of their ecclesiastical offices as Lords Spiritual, and retain the right to sit and vote until they retire rather than for life.⁷⁴ The two Archbishops, along with the Bishops of Durham, London and Winchester are automatically entitled to a seat in the House of Lords. The

⁷¹ King, A. *The British Constitution* (Oxford: Oxford University Press, 2009), p.297

⁷² For a brief history of House of Lords Reform since 1911 see Appendix 1

⁷³ All figures presented here are taken from the House of Lords website: <<http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party/>> accessed 17th January 2012

⁷⁴ One of these seats is currently vacant.

remaining 21 take their seats in order of seniority, which is determined by length of service as an English diocesan Bishop. This means that upon the retirement of a Lord Spiritual, his seat in the House of Lords is not granted to his successor in the diocese, but to the next most senior Bishop within the Church of England.⁷⁵

Table 1: Composition of the House of Lords, as of 10th January 2012

AFFILIATION	LIFE PEERS	HEREDITARY PEERS	BISHOPS	TOTAL
Conservative	170	48	-	218
Labour	235	4	-	239
Liberal Democrat	87	4	-	91
Crossbench	154	32	-	186
Bishops	-	-	25	25
Other	26	2	-	28
Total	672	90	25	787

Source: House of Lords Website. Excludes members on Leave of Absence and those who are temporarily suspended or disqualified.

Given the unusual composition of the second chamber, it is unsurprising that the House of Lords is so often derided by its more critical commentators as an unrepresentative and undemocratic feudal relic which is out of place in a modern democracy.⁷⁶ How then has the House, an institution “unscathed by democracy”,⁷⁷ managed to survive into the twenty-first century? Why have successive attempts at wholesale reform⁷⁸ throughout the last century invariably met with failure? The famous preamble to the 1911 Parliament Act sought to pave the way for second chamber constituted on a ‘popular rather than hereditary basis’, yet hereditary peers continued to dominate the House until 1999. Even in 2012, the House remains almost entirely appointed, with no claim to direct democratic legitimacy. As Shell asks, why has reform been “so long delayed and introduced with such caution?”⁷⁹

⁷⁵ On the presence and role of the Bishops in the House of Lords see Harlow, A. Cranmer, F. and Doe, N. ‘Bishops in the House of Lords: A Critical Analysis’ (2008) *Public Law* 490; Smith, C. ‘The Place of Representatives of Religion in the Reformed Second Chamber’ (2003) *Public Law* 674; and Smith, C. ‘Episcopal Seats and Proposals for the Reform of the House of Lords 2002’ 13(1) *King’s College Law Journal* 109

⁷⁶ Shell, D. ‘The House of Lords: Time for a Change?’ (1994) 47(4) *Parliamentary Affairs* 721, pp.721-723

⁷⁷ *Ibid.* at p.721

⁷⁸ These are outlined in detail in Appendix 1

⁷⁹ Shell, D. ‘The Future of the Second Chamber’ (2004) 57(4) *Parliamentary Affairs* 852, p.854

Why is the House of Lords so Difficult to Reform?

Russell and Sandford have suggested that dissatisfaction with the second chamber is a common phenomenon across many bicameral legislatures.⁸⁰ Indeed, they are often criticised for having “too little power, or on the other hand for having too much; for being too democratic, or not democratic enough; for being sidelined and irrelevant, or for being a carbon copy of the lower house.”⁸¹ But despite the apparent hostility felt towards upper houses across the legislative spectrum, very little seems to be achieved in the way of comprehensive reform. Russell and Sandford suggest that there are a number of key barriers to reform of the second chamber which are common to many bicameral legislatures.⁸² One such factor is the inherent rigidity within the constitutional arrangements of some countries. Particularly in those countries with written constitutions, there is a significant danger that the onerous procedures that have to be negotiated to implement constitutional change will suffocate the impetus for reform.⁸³ In Australia, for example, constitutional amendments must be approved by referendum with a majority in four of the six states as well as an overall majority. As Uhr notes, this ‘double majority’ is “not easy to obtain, which helps explain why only eight of 44 Australian proposals for constitutional change have been successful.”⁸⁴ Similarly in Canada constitutional amendments must be approved by the provincial legislatures. Given that, as Docherty observes, “the provinces are far from united on what to do about the Senate”,⁸⁵ this acts as a major obstacle to constitutional change.⁸⁶

The United Kingdom, however, does not have a written constitution, and the passage of constitutional bills is not impeded by the sorts of constitutional safeguards which operate in other comparable democracies.⁸⁷ Russell and Sandford therefore conclude that “the UK does not

⁸⁰ Russell, M. and Sandford, M. ‘Why are Second Chambers so Difficult to Reform?’ (2002) 8(3) *Journal of Legislative Studies* 79

⁸¹ *Ibid.* at p.81

⁸² *Ibid.* at p.82

⁸³ *Ibid.* at p.83

⁸⁴ Uhr, J. ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies*, 3, p.22

⁸⁵ Docherty, D. ‘The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About’ (2002) 8(3) *Journal of Legislative Studies* 27, p.43

⁸⁶ For a useful summary of the different procedures that must be followed to implement constitutional change in comparable democracies see Russell, M. *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000) pp.179-184, and for further discussion see Russell, M. ‘Responsibilities of Second Chambers: Constitutional and Human Rights Safeguards’ (2001) 7(1) *Journal of Legislative Studies* 61. The issue of the relative powers of second chambers over constitutional amendments will be discussed in greater detail in Chapter IV.

⁸⁷ Parliamentary procedure and practice does provide for a slightly different process for constitutional bills. For example, bills considered to be of ‘first class constitutional importance’ customarily take their Commons

suffer from the constitutional rigidity which applies in many other states and indeed has already embarked on an ambitious programme of constitutional reform.”⁸⁸

Another factor considered by Russell and Sandford is the tendency of second chamber reform to be swallowed up in the wider constitutional debate, and progress to be hampered by a failure to reach a consensus on broader, often unrelated, constitutional issues.⁸⁹ As Docherty notes, the last major attempt at Senate reform in Canada⁹⁰ “failed not just because some citizens were opposed to the Senate model proposed, but because most citizens were opposed to other parts of the larger constitutional reform package.”⁹¹ Once again though, this fails to offer an explanation for inaction in the United Kingdom. As Russell and Sandford explain, “with no tradition of grand constitutional design, House of Lords reform is presented as a discrete issue and debates are impressively self-contained by comparison.”⁹² In implementing reform of the House of Lords in 1999 the Labour government even managed to separate the expulsion of the hereditary peers from the issue of the long-term future of the House, thereby ensuring that their goal of ending hereditary entitlement could be realised, and not impeded by an inability to reach a consensus on the precise shape that the reformed House should take. It can thus be seen that, “reform of the Lords has not been linked to other elements of the programme or made contingent on other reforms”,⁹³ and as such this does not offer an explanation for the failure of successive governments to implement wholesale reform of the upper House.

A factor which may have been influential in obstructing second chamber reform within the United Kingdom is the reluctance of those with vested interests in maintaining the status quo to consent to such reform. In many countries, the members of the second chamber themselves can act as a significant barrier to reform, since in many legislatures they will exercise a significant degree of control over the passage of reforming legislation.⁹⁴ Indeed, in the United Kingdom, any bill to reform the House of Lords will be considered by the House itself, and though as a result of the Parliament Acts the House has only a suspensory veto, it can cause costly delays to both the Bill and other aspects of the Government’s programme. One has only to consider the results of the votes held in the House of Lords in 2003 and 2007 to appreciate the hostility felt in the

committee stage on the floor of the House. See Seaton, J. and Winetrobe, B.K. ‘The Passage of Constitutional Bills in Parliament’ (1998) 4(2) *Journal of Legislative Studies* 33, particularly pp.36-8.

⁸⁸ Russell and Sandford, ‘Why are Second Chambers so Difficult to Reform’, fn.80, p.88

⁸⁹ *Ibid.* at p.83

⁹⁰ Part of the Charlottetown Accord, a package of amendments to the Canadian Constitution proposed by the Canadian federal and provincial governments in 1992.

⁹¹ Docherty, D. ‘The Canadian Senate’, fn.85, p.44

⁹² Russell and Sandford, ‘Why are Second Chambers so Difficult to Reform’, fn.80, p.84

⁹³ *Ibid.* at p.88

⁹⁴ *Ibid.* at p.84

chamber to this particular parliamentary reform.⁹⁵ Political parties can also have good reason to seek to preserve the status quo. Michael Laver observes that party political control over both the nomination and voting process make the Irish Seanad a convenient stopover for career politicians or for those who have been unsuccessful in elections to the Dáil.⁹⁶ In short, the principal reason for a lack political interest in reform of the Irish upper chamber is that the present arrangements are “really rather cosy for the political establishment.”⁹⁷ Similar observations could be made of the British upper House. As Russell and Sandford note, the House of Lords currently acts as “a pasture for retired politicians as well as a prize for loyal party service to those who have not otherwise won seats in Parliament.”⁹⁸ This is a considerable resource for the political parties, and may well have dissuaded them from a vigorous pursuit of second chamber reform in recent years.

Invariably the dominant vested interest is of course the Government itself, which in many legislatures enjoys considerable powers of patronage over the upper house. This is indeed the case in the United Kingdom where the Prime Minister retains control over the frequency and number of appointments to the upper House, and is able to control the party balance within the chamber. In the case of second chambers such as the British House of Lords or the Canadian Senate, the greatest problem to be remedied by future reform is the lack of perceived legitimacy inherent in their unelected memberships. As Russell and Sandford note, “the obvious direction for reform in these cases is thus to boost the effectiveness of the chamber through enhanced powers, a more legitimate membership, or an end to the stranglehold the parties of government have over its membership.”⁹⁹ It is not difficult to discern how this might not appeal to a government of any political persuasion. On the other hand, retaining an almost exclusively appointed House whose membership is controlled by the Prime Minister and which, due to its own sense of illegitimacy, is reluctant to frequently frustrate the will of the House of Commons, is undoubtedly beneficial to any governing party which seeks the safe passage of its legislative agenda through Parliament, and may well have impeded second chamber reform in the United Kingdom.¹⁰⁰

⁹⁵ For further detail on which see Appendix 1.

⁹⁶ Laver, M. ‘The Role and Future of the Upper House in Ireland’ (2002) 8(3) *Journal of Legislative Studies* 49, p.58

⁹⁷ *Ibid.*

⁹⁸ Russell and Sandford, ‘Why are Second Chambers so Difficult to Reform’, fn.80, p.85

⁹⁹ *Ibid.*

¹⁰⁰ It is worth noting however that, as will be explored further in Chapter III, the removal of the hereditary peers from the House of Lords actually prompted the House to perceive itself as more legitimate, to become more assertive, and to challenge the Government more frequently in the post-1999 era.

One final constraint on second chamber reform recognised by Russell and Sandford is public opinion. Reform of the second chamber is rarely seen as a high priority amongst the electorate, who instead tend to be more concerned with economic and social policies, and are reluctant to support a government that will spend a great deal of time and money on something which will make very little difference to their day-to-day lives.¹⁰¹ The lack of enthusiasm amongst the public for second chamber reform certainly does little to spur on any radical change amongst the political classes, who are of course preoccupied with what they perceive to be vote-winning policies. Further, in cases where the government does seek change, public opinion can act as a major obstacle to second chamber reform. John Uhr notes that in Australia “voters rarely endorse proposals for constitutional reform because they suspect that sponsoring governments generally want to consolidate and centralise power.”¹⁰² As Russell and Sandford conclude, “public opinion will act as a constraint on government action which seeks to weaken an effective upper house.”¹⁰³

Shell identifies a number of further factors that have delayed reform to the House of Lords in recent years.¹⁰⁴ One such reason, so Shell argues, is that since the passing of the 1911 Act, the House of Lords has not posed a serious threat to any government. Rather than fully utilising its remaining powers under the 1949 Act, the House, according to Shell, has “accepted a junior role and developed conventions designed to avoid any prolonged confrontation with the government or the Commons.”¹⁰⁵ The continued prevalence of the Salisbury Convention coupled with the ‘legislative last resort’ of the Parliament Act procedure, have heralded an era of what Shell labels “de facto unicameralism”,¹⁰⁶ whereby the House of Lords respects the democratic legitimacy of the lower House and, though not ashamed to make the government think again from time to time, is careful not to challenge the authority of the elected House in a fundamental manner. The extent to which this is an accurate characterisation of the current House of Lords will be a subject of further discussion in Chapter III.

Much like the constitution itself, the ability of the House of Lords to evolve and adapt incrementally over time may also have ensured its survival. Shell suggests that what has enabled the House to survive “in its essentially unreformed state”¹⁰⁷ has been “its capacity to

¹⁰¹ Russell and Sandford, ‘Why are Second Chamber so Difficult to Reform?’, fn.80, p.87

¹⁰² Uhr, ‘Explicating the Australian Senate’, fn.84, p.22

¹⁰³ Russell and Sandford, ‘Why are Second Chambers so Difficult to Reform’, fn.80, p.88

¹⁰⁴ Shell, ‘The Future of the Second Chamber’, fn.79

¹⁰⁵ *Ibid.* at p.854

¹⁰⁶ *Ibid.* at p.855

¹⁰⁷ *Ibid.* at p.856

make modest changes, which have cumulatively altered it a great deal.”¹⁰⁸ The House’s acceptance of the Salisbury Convention, the introduction of Life Peers (including the first female peers) in 1958, the introduction of the right to disclaim a peerage in 1963, the introduction of expenses, and the development of a valuable network of committees are all examples of this capacity to evolve. The House has, so Shell contends, “metamorphosed from being a gentleman’s club of part-time aristocrats to being a largely professional House.”¹⁰⁹ The ability of the House to move with the times and adapt to meet specific challenges may well have mollified the pressure for radical, more comprehensive reform. Governments must also be mindful of the cost involved with such reform, not only in terms of parliamentary time, but also in terms of the costs to party cohesion. Indeed, along with the problem of depriving more pressing social issues of parliamentary time, “the capacity to precipitate intra party dissent has been another disincentive to party leaders to instigate major reform”,¹¹⁰ reform that lacks the political urgency to be deemed worthwhile.

The final saving grace for the House of Lords has been its usefulness within the political and legislative system. As will be explored further in Chapter III, the effectiveness of the House in providing expert, largely non-partisan scrutiny of legislation, not to mention the work of its internationally-regarded committee network, has allowed the House to become regarded by some as an indispensable component within the legislative framework of the country.¹¹¹ Indeed, as Norton notes, the House ‘adds value’ to the political process in a way that could not easily be emulated.¹¹² Successive governments have likely been reluctant to deprive themselves and the country of what could be regarded as a rather valuable asset. But this prompts a further question that must be considered. Is a second chamber really a necessity in the United Kingdom?

Do We Need a Second Chamber?

As Mughan and Patterson note, second chambers remain “essentially contested institutions.”¹¹³ Indeed, there are those who regard the existence of a second chamber as “a useless complexity

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at p.857

¹¹⁰ *Ibid.* at p.858

¹¹¹ See Parkinson, J. ‘The House of Lords: A Deliberative Democratic Defence’ (2007) 78(3) *Political Quarterly*, 374, and Puttnam, D. ‘A Democratic and Expert House’ (1999) 70(4) *Political Quarterly* 368.

¹¹² Norton, P. ‘Adding Value? The Role of Second Chambers’ (2007) 15(1) *Asia Pacific Law Review* 3, p.15

¹¹³ Mughan, A. and Patterson, S.C. ‘Senates: A Comparative Perspective’, in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.338

which hinders and upsets the course of good government in a state.”¹¹⁴ The hostility felt towards the bicameral model is nicely summarised by the oft-quoted observation of French constitutionalist Abbe Sieyes that “if a second chamber dissents from the first it is mischievous; if it agrees it is superfluous.”¹¹⁵ However, the proposals put forward by the Coalition Government offer little support to those in the United Kingdom who favour the outright abolition of the House of Lords and the move to a unicameral parliament. In fact, no attempt has been made to advocate such a change since the early 1980s when the left was “temporarily ascendant”¹¹⁶ within the Labour Party. Michael Foot’s ill-fated 1983 Labour Manifesto, immortalised by Sir Gerald Kaufman as “the longest suicide note in history”,¹¹⁷ was the last occasion on which abolitionism would be official policy of any of the major political parties. Furthermore, outright abolition was rejected in the House of Commons in the votes of 2007, and rejected decisively at that.¹¹⁸ But given the aforementioned hostility shown towards the House of Lords by many academic and political commentators, why is there such a lack of enthusiasm for its outright abolition and the creation of a unicameral legislature?

The simple answer is that, despite the antipathy felt by many for the House of Lords, there is a general recognition that it, like so many second chambers across the world, performs functions that are vital to the health of both our democracy and our legislative system. As Massicotte identifies, while not uncommon, the majority of countries today do not have a second chamber.¹¹⁹ Indeed, of the 192 countries belonging to the Inter-Parliamentary Union, some 59% have unicameral parliaments, while only 41% are bicameral.¹²⁰ But in the British context, it would seem that the second chamber could not easily be discarded. Bagehot famously stated that “with a perfect lower House it is certain that an upper House would be scarcely of any value.”¹²¹ But as Shell contends, “now, as then, and throughout history, no first chamber can be

¹¹⁴ Baldwin, N.D.J. ‘Concluding Observations’ (2001) 7(1) *Journal of Legislative Studies* 171, p.171

¹¹⁵ Abbe Sieyes, cited in Shell, D. ‘The History of Bicameralism’ (2001) 7(1) *Journal of Legislative Studies* 5, p.13

¹¹⁶ Dorey, P. ‘1949, 1969, 1999: The Labour Party and House of Lords Reform’ (2006) 59(4) *Parliamentary Affairs* 599, p.610. On the historical relationship between the Labour Party and the House of Lords see also Baldwin, N.D.J. ‘The House of Lords and the Labour Government 1974-79 (1995) 1(2) *Journal of Legislative Studies* 218; Tierney, S. ‘The Labour Government and Reform of the House of Lords’ (2000) 6(4) *European Public Law* 506 and Dorey, P. *The Labour Party and Constitutional Reform: A History of Constitutional Conservatism* (Basingstoke: Macmillan, 2008)

¹¹⁷ An epithet originally attributed to Sir Gerald Kaufman MP in 1983 to describe the radically left-wing Labour manifesto, *The New Hope for Britain*.

¹¹⁸ By 416 votes to 163. See *Hansard* HC, cols.1389–1488 (6th March 2007) and cols.1524–1638 (7th March 2007)

¹¹⁹ Massicotte, L. ‘Legislative Unicameralism: A Global Survey and a Few Case Studies’ (2001) 7(1) *Journal of Legislative Studies* 151

¹²⁰ Figures taken from the Inter-Parliamentary Union website: <<http://www.ipu.org/parline-e/ParliamentsStructure.asp?REGION=All&LANG=ENG>> accessed 20th July 2011.

¹²¹ Bagehot, W. *The English Constitution* (London: Collins, 1963), p.133

considered so virtuous.”¹²² It has historically been recognised that a second chamber cannot be viewed in isolation, and must instead be examined in relation to the first chamber which makes up the bicameral structure.¹²³ Churchill once compared bicameralism to the motor car, remarking that “if you have a motor car...you have to have a break. There ought to be a break...it prevents an accident through going too fast.”¹²⁴ George Washington preferred the analogy of pouring hot liquid into a saucer to cool. In the same way, he explained, “we pour legislation into the senatorial saucer to cool it.”¹²⁵ But whichever one’s chosen analogy or metaphor, second chambers can perform a number of vital functions.

Patterson and Mughan described the two central functions of a second chamber as ‘representation’ and ‘redundancy’.¹²⁶ The representative function pertains to the ability of second chambers to represent different interests to those represented in the first chamber. As Loewenberg and Patterson note, “bicameralism originated in the essentially pre-democratic view that the representation of the nation required both an upper and lower house, in the class-conscious sense of ‘upper’ and ‘lower’”.¹²⁷ But although the House of Lords does still contain 92 hereditary peers, the idea of class representation is no longer utilised as a justification for the bicameral system, and as Russell notes, the representative function of second chambers around the world is today concentrated more on the protection of minority interests, reflecting territorial, ethnic or linguistic divisions.¹²⁸ The House of Lords performs its representative function in a slightly more traditional sense, whereby the custom of appointing members who have reached the senior levels of their professions has resulted in a chamber well placed to represent the arts, science, literature, academia and business. As Russell notes, “the chamber to some extent represents ‘the great and the good’, who bring a different perspective to policy making than the elected members of the lower house.”¹²⁹ The distinctive party balance within the House of Lords is also fundamental in representing different interests. Since no party has a majority within the chamber, which also contains nearly 200 independents, the House has a

¹²² Shell, ‘The History of Bicameralism’, fn.115, p.15

¹²³ *Ibid.* See also Vatter, A. ‘Bicameralism and Policy Performance: The Effects of Cameral Structure in Comparative Perspective’ (2005) 11(2) *Journal of Legislative Studies* 194

¹²⁴ Winston Churchill, cited in Baldwin ‘Concluding Observations’, fn.114, p.174.

¹²⁵ George Washington, cited in Baldwin, ‘Concluding Observations’, fn.114, p.174

¹²⁶ Patterson, S.C. and Mughan, A. ‘Senates and the Theory of Bicameralism’, in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), pp.10-16

¹²⁷ Loewenberg, G. and Patterson, S.C. *Comparing Legislatures* (Boston: Little Brown, 1979), p.121, cited in Russell, M. ‘What are Second Chambers For?’ (2001) 54(1) *Parliamentary Affairs* 442, p.443

¹²⁸ Russell, M. ‘What are Second Chambers For?’ (2001) 54(1) *Parliamentary Affairs* 442, p.443

¹²⁹ *Ibid.* at p.446

different political dynamic to that of the Commons, introducing “an element of consensus politics into what may be an otherwise majoritarian system.”¹³⁰

The second key function identified by Patterson and Mughan, that of ‘redundancy’, refers to the degree of delay and duplication provided for by the existence of a second chamber. As both Churchill and Washington acknowledged, a second chamber can act as an important component in the checks and balances on government, a chamber of second thoughts preventing the implementation of rash decisions and ill-considered policies. Russell notes that the consideration of legislation in a less politically-charged atmosphere allows for deliberation of issues that may have been missed in the lower house, and may prevent the government from passing a bill too hastily.¹³¹ As Russell argues:

“the consideration of a bill by a second group of legislators, with different territorial, political or cultural perspectives, may increase the chance of flaws being ironed out before it reaches the statute book.”¹³²

Some second chambers around the world have the power to veto legislation,¹³³ while others, like the House of Lords, have only the power to delay or introduce amendments that frustrate the intentions of the government. But even where, as in the United Kingdom, the lower House retains the right to override amendments made by the second chamber, the public and media attention attracted by the dispute between the two chambers can be enough to obtain concessions, and the fear of enhanced scrutiny will often prevent the government from attempting to pass overly contentious measures.¹³⁴ Thus, the redundancy function, performed by second chambers in general, and performed specifically by the House of Lords, is something that could not easily be cast aside.

Russell has identified two further functions performed by second chambers.¹³⁵ One obvious benefit of having a second chamber of parliament is that it provides an additional body of people to share the parliamentary workload.¹³⁶ In many countries, including the United Kingdom, senior ministers are predominantly selected from the first chamber, and it is there that most major legislation is initiated. As shall be demonstrated in Chapter II, debate often

¹³⁰ *Ibid.*

¹³¹ *Ibid.* at p.450

¹³² *Ibid.*

¹³³ Italy, Canada and Australia are examples. For a useful summary see Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), pp.34-38 Table 2.2

¹³⁴ Russell, *What are Second Chambers For?*, fn.128, p.450

¹³⁵ *Ibid.* at pp.451-453 and pp.446-447

¹³⁶ *Ibid.* at p.451

centres on the fundamental principles of a bill, and often declines into party-political point scoring. Large sections of legislation are not debated, and ministers are reluctant to concede amendments for fear of them being regarded as political defeats.¹³⁷ Second chambers tend to have far more time to spend providing detailed scrutiny of legislation. In the case of the House of Lords, peers are not burdened with constituency duties, and because they are appointed, are less responsive to media and electoral pressure.¹³⁸ A second chamber is also able to take on work neglected by the first chamber. For example, the House of Lords has developed numerous specialist committees to cover areas not adequately scrutinised by the Commons committee network,¹³⁹ and are often able to debate issues thought too politically sensitive to be addressed in the lower House. As Russell notes, in recent years the Canadian and Spanish Senates as well as the House of Lords have all carried out detailed investigations into euthanasia, while the House of Lords has also reported on life imprisonment for murder and the legalisation of cannabis for medical use, topics which are “more difficult for the more politicised members of the lower houses to take up.”¹⁴⁰

Finally since, as in the United Kingdom, it is quite common for the governing party not to have a majority in the second chamber, and due to the fact that it is customary for party discipline to be greatly reduced from that of the first chamber, an upper house can facilitate greater independence from the will of the executive, strengthening the control of parliament over government.¹⁴¹ For example, in the United Kingdom the majority of government ministers are drawn from the House of Commons, while members of the Lords tend to be towards the end of their political careers and less inclined towards accepting government posts. Ambitious career-politicians are few and far between in the upper House. The continuity of membership and the method of appointment mean that members are not dependent on party or government for their continued existence, and the prevalence of non-party-aligned experts who are “less controllable”¹⁴² by parties than lower house members, enhances the independence of the chamber from the executive. As such, the upper house acts as an important check on government, providing “an important counterbalance in an otherwise executive-dominated parliament.”¹⁴³

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* at p.452

¹³⁹ The House of Lords Delegated Powers and Deregulation Committee would be an example.

¹⁴⁰ Russell, ‘What are Second Chamber For?’, fn.128, p.453

¹⁴¹ Russell, *ibid.* at pp.446-449

¹⁴² Russell, *ibid.* at 449

¹⁴³ Russell, *ibid.* at 447

It can therefore be seen that, while there is much criticism of the continued existence of the House of Lords in its current form, the continued existence of a *second chamber* is in fact considered desirable for the effective operation of the legislative system in this country. Indeed Shell goes so far as to suggest that, with the rise of the professional career politician, the increasing control of the party over its candidates, the prevalence of adversarial, partisan politics, and the increasing tension between the role of the House of Commons in maintaining a government whilst also holding it to account, the lower house has neither the quality of membership nor the political will to adequately hold the government to account.¹⁴⁴ It is likely that those who favour reform of the House of Lords are also aware of the deficiencies of the House of Commons, which would account for their reluctance to reduce the United Kingdom to a unicameral parliament.

What will be Achieved by Wholesale Reform?

Arend Lijphart proposed that a two-chamber parliament could be classified as an example of 'strong bicameralism' when it exhibited two fundamental characteristics: significant powers, and a composition distinct from that of the lower house.¹⁴⁵ A useful and effective upper chamber, according to Lijphart's analysis, would therefore require powers relatively equal to those of the lower house.¹⁴⁶ Further, in a country with a strong party system such as the United Kingdom, a distinct composition would necessitate a different party political balance within the chamber to that of the lower house, though in other instances factors such as regional affiliation and state representation might provide the distinctive character.¹⁴⁷ If only one of these two criteria is met then the parliament in question will exhibit 'weak bicameralism', and if neither is satisfied then the parliament is classified as an illustration of 'insignificant bicameralism', and is judged to make "little or no impact on the work of the legislature."¹⁴⁸ Lijphart classified the United Kingdom parliament as 'weakly bicameral', in that despite the distinct composition of the upper House, the balance of power between the House of Lords and the House of Commons was deemed to be "extremely asymmetrical."¹⁴⁹

¹⁴⁴ Shell, 'The History of Bicameralism', fn.115, pp.15-17

¹⁴⁵ Lijphart, A. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (New Haven CT: Yale University Press, 1984), p.99

¹⁴⁶ *Ibid.* See also Russell, M. *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), p.254

¹⁴⁷ Russell, M. 'Is the House of Lords Already Reformed' (2003) 74(3) *Political Quarterly* 311, p.314

¹⁴⁸ Russell, *Reforming the House of Lords*, fn.146, p.253

¹⁴⁹ Lijphart, *Democracies*, fn.145, p.98

Russell has revised Lijphart's criteria to fit the British context, and in so doing added a third characteristic: perceived legitimacy.¹⁵⁰ Russell contends that it is in fact perceived illegitimacy that prevents the House of Lords from making full use of its formal powers, and prevents the Westminster parliament from being classified as 'strongly bicameral.'¹⁵¹ For a reformed upper chamber to be effective therefore it must exhibit all three characteristics: *adequate powers*, *distinct composition* and *perceived legitimacy*. The requirement of *adequate powers* does not necessarily mean that "anything less than a total veto will be ineffective."¹⁵² It simply means that the upper house must have the necessary bargaining power to make an impact on government policy and legislation, the ability to make the lower house think again. As Russell notes:

*"there is no simple measure of what are 'adequate' powers. At times the threat of a short delay, during which the media and the public may focus on a controversial policy, will be influential enough."*¹⁵³

There are also various ways in which a second chamber can be *distinct* in its composition, although in the modern context this is often taken as synonymous with control by a different party to that of the lower chamber.¹⁵⁴ Russell suggests that where both chambers are controlled by the same party the upper house is unlikely to make use of its powers, with the exception of cases where territorial or other interests override party allegiance, but opposition control can also be problematic in that it can lead to legislative gridlock.¹⁵⁵ As such, often the most effective contributions are made by second chambers where there is no majority party, which is sometimes achieved in elected second chambers by use of a system of proportional representation.¹⁵⁶ In order to make use of the powers it has available to it, the upper house must also have the *perceived legitimacy* to carry public support. This is usually achieved via election, but as shall be discussed further, it is possible that there may be other routes to legitimacy.

Russell's criteria provide a benchmark by which the qualities of the House of Lords can be measured. By weaving Russell's analysis into this study it will be possible to determine not only whether the current House is performing satisfactorily, but also whether the reforms currently contemplated by the Government are in fact necessary.

¹⁵⁰ Russell, *Reforming the House of Lords*, fn.146, p.254

¹⁵¹ *Ibid.* at p.253

¹⁵² Russell, 'Is the House of Lords Already Reformed', fn.147, p.314

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

Second Chambers Overseas

In order to further inform the analysis offered, it will be useful to place the House of Lords in a comparative context. Rather than examining the British second chamber in isolation, much can be gained by identifying the similarities and differences between our own upper House and those in other comparable bicameral legislatures. It is possible that an analysis of second chambers overseas may also help us to identify the optimal path for reform of the House of Lords. Drawing on Russell's study of second chambers overseas,¹⁵⁷ along with other notable comparative works,¹⁵⁸ it will be possible to identify a range of general trends and patterns that are common across bicameral parliaments. Particular focus will be placed on two key comparators, the elected Australian Senate and the appointed Canadian Senate.

The Canadian Senate is a useful comparator since it is, as Russell notes, "the closest in composition to the British House of Lords and very similar to the new, transitional, UK upper house."¹⁵⁹ But it also appears to rival the House of Lords as an object of criticism. As Docherty remarks, "to say the Canadian Senate is a much maligned body would be at best a cliché and more objectively an understatement."¹⁶⁰ The Senate is principally seen as a reflective, conservative body, originally conceived as a chamber of 'sober second thought' from what was (and still is) considered to be the more radical lower house.¹⁶¹ As Docherty notes, the initial objective or purpose of the Senate was to "represent two distinct segments of Canadian society, regions and propertied interests."¹⁶² However, as Russell observes, the original property qualifications that applied to Senate membership – ownership of property worth \$4,000 and assets of at least \$4,000 - are now "relatively meaningless."¹⁶³ However, regional interests have had a "constant role"¹⁶⁴ for the Canadian upper house.

The original chamber had 72 members, 24 each for Ontario and Quebec, with a further 24 split equally between Nova Scotia and New Brunswick. As Russell notes, "the institution thus conformed roughly to the classic model of a federal upper house."¹⁶⁵ A further 6 seats were given to each of the western provinces of British Columbia, Alberta, Saskatchewan and Manitoba

¹⁵⁷ Russell, M. *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000)

¹⁵⁸ Particularly Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999)

¹⁵⁹ Russell, *Reforming the House of Lords*, fn.157, p.52

¹⁶⁰ Docherty, *The Canadian Senate*, fn.85, p.27

¹⁶¹ *Ibid.* at p.28

¹⁶² *Ibid.*

¹⁶³ Russell, *Reforming the House of Lords*, fn.157, p.53

¹⁶⁴ Docherty, *The Canadian Senate*, fn.85, p.28

¹⁶⁵ Russell, *Reforming the House of Lords*, fn.157, p.53

in 1915, and when Prince Edward Island entered confederation it received 4 seats.¹⁶⁶ Six seats were granted to Newfoundland when it joined the confederation in 1949, and the subsequent entry of other provinces eventually resulted in the present total of 105 seats. However, any principle of equal representation has long since been abandoned.¹⁶⁷ Members of the senate must also be at least 30 years old,¹⁶⁸ compared with 18 years old for membership of the House of Commons which, as Docherty notes, acts as a “reminder that Senators were to have worked and served in some capacity prior to sitting in the senate”¹⁶⁹ and consequently “have a greater and more contemplative world view.”¹⁷⁰

Appointments to the Canadian Senate are made by the Governor General of Canada, but are in practice controlled by the Prime Minister. As Docherty remarks, “the appointment process to the Canadian Senate is straightforward. The Prime Minister chooses you and you accept or decline.”¹⁷¹ Appointments were for life until 1965 when a retirement age of 75 was introduced, and Senators tend to enter Parliament at a later age than members of the lower house. Indeed, “many members of the Senate enter the chamber at a time when most Canadians are thinking about retiring from working life”,¹⁷² and given that the average age of entry is 63, Senators will serve an average of 12 years before they reach retirement age.¹⁷³

Unlike in Britain, there is no tradition of appointing members from opposition parties, and very few independents are appointed.¹⁷⁴ Indeed, almost 95% of appointments to the Senate are of the same political affiliation as the Prime Minister, with the remaining 5% of seats going to independent members almost as often as opposition parties,¹⁷⁵ providing support to the “conventional wisdom that appointments are used first and foremost as a political reward for party faithful, both elected and those who toil behind the scenes.”¹⁷⁶ Further, because ministers must be members of the Canadian Parliament, appointment to the Senate has become a safe means for Prime Ministers to bring unelected members into government.¹⁷⁷ Appointment to the Senate has also been used frequently in recent years to make up for the lack of broad-based representation in the House of Commons, by appointing people on the basis of other non-

¹⁶⁶ Two were taken away each from Nova Scotia and New Brunswick.

¹⁶⁷ Russell, *Reforming the House of Lords*, fn.157, p.53

¹⁶⁸ Under Section 23 of the Constitution Act 1867

¹⁶⁹ Docherty, *The Canadian Senate*, fn.85, p.29

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* at p.30

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Russell, *Reforming the House of Lords*, fn.157, p.54

¹⁷⁵ Docherty, *The Canadian Senate*, fn.85, p.31

¹⁷⁶ *Ibid.*

¹⁷⁷ Russell, *Reforming the House of Lords*, fn.157, p.54

territorial considerations such as occupation, gender, religion and ethnicity,¹⁷⁸ and the Senate also offers representation for areas that are often perceived as being neglected in the political system, such as the arts, education and culture.¹⁷⁹ However, as will be discussed later, in the light of such considerations it becomes “questionable”¹⁸⁰ whether the Senate truly does represent the regions of Canada and fulfil its functions as a territorial chamber.

The powers of the Canadian Senate are, in formal terms, quite considerable. Indeed, “constitutionally, the Canadian Senate is one of the most powerful in the world.”¹⁸¹ In fact the Canadian Senate has the power to block almost any measure, with the major exception that it holds only a six month delaying power over legislation which amends the constitution.¹⁸² However, although the Canadian Senate may, due to its full veto, appear to be strong, it is “in practice one of the weakest legislative bodies because it has so little credibility.”¹⁸³ Because of their perceived lack of legitimacy, along with the low esteem with which they are held by the Canadian electorate and the control exercised by the executive over the appointment system, Senators tend to confine themselves to detailed legislative scrutiny. Very rarely does the Senate fully flex its legislative muscles.¹⁸⁴ The Canadian Senate will therefore be a useful comparator for our purposes, since it shares a number of characteristics with the House of Lords. Though it has far greater formal powers, it rarely uses them, “largely because it is seen as undemocratic for an appointed house to challenge the will of an elected one”.¹⁸⁵ In addition, Prime Ministerial control over the appointments system and the use of political patronage mean that the Senate has “little respect amongst Canadians”,¹⁸⁶ while its work is either ridiculed or ignored by the political media.¹⁸⁷ The similarities between the Canadian Senate and the House of Lords should make it a useful comparator.

The Australian federation was formed when the six self-governing British colonies of Queensland, New South Wales, Victoria, South Australia, Western Australia and Tasmania came

¹⁷⁸ Docherty, *The Canadian Senate*, fn.85, p.33

¹⁷⁹ *Ibid.* at p.32

¹⁸⁰ Russell, M. ‘The Territorial Role of Second Chambers’ (2001) 7(1) *Journal of Legislative Studies* 105, p.114

¹⁸¹ Russell, M. *An Appointed Upper House: Lessons from Canada* (London: Constitution Unit, 1998), p.3

¹⁸² In addition, the Senate is restricted from initiating Bills which provide for public expenditure or the imposition of taxes, though it is permitted to amend or reject such legislation when it arrives from the House of Commons.

¹⁸³ Smith, J. ‘Legislatures’ in Pocklington, T.C. (ed.) *Representative Democracy* (Harcourt Brace, 1994), cited in Russell, M. *An Appointed Upper House*, fn.181, p.6

¹⁸⁴ See Franks, C.E.S. ‘Not Dead Yet, But Should It Be Resurrected? The Canadian Senate’, in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), pp.124-150

¹⁸⁵ Russell, M. *An Appointed Upper House*, fn.181, p.1

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

together in 1901. The Australian Senate initially had a total of 36 members with equal representation for each of the six states, and was elected under the first-past-the-post system,¹⁸⁸ although this changed to a preferential voting system in 1919.¹⁸⁹ Each state formed one large constituency for elections to the Senate, and due to the majoritarian voting system, generally returned members who all represented the same party, resulting in a majority for the government in the upper house.¹⁹⁰ However, in 1946 the Labor Government introduced a system of proportional representation for the Senate, and at the same time increased its size to 60 members, with 10 members representing each state.¹⁹¹ The Senate was enlarged again in 1983, giving each state a total of 12 representatives and, along with the addition of two seats each for the Northern Territory and Australian Capital Territory, now contains a total of 76 members.¹⁹²

Senators representing the six Australian states serve fixed six-year terms, with six members elected from each state every three years. The four members representing the two territories serve fixed three-year terms, and are renewed at each election. Elections to the lower house are held every three years, and governments try to ensure that elections to the Senate are held on the same day, to prevent them being used as a mid-term opinion poll and a means by which voters can register their frustration with the incumbent government.¹⁹³ While the House of Representatives is elected under the alternative vote system, Senators are chosen by a form of the Single Transferable Vote with each state or territory acting as a multi-member constituency, which allows independent members and smaller parties to gain seats, something they have little chance of doing in the lower house.¹⁹⁴ Indeed, the adoption of proportional representation has not only meant that governments rarely win a Senate majority, but has created a form of “divided government”¹⁹⁵ in which “a government with an unmistakable governing majority in the House of Representatives must satisfy dissenting parties and interests in the Senate.”¹⁹⁶

The Senate is virtually equal in legislative power with the House of Representatives and has a reputation as one of the most powerful parliamentary upper houses, much of which stems from

¹⁸⁸ Six representatives were elected from each state with half elected every 3 years.

¹⁸⁹ See Russell, *Reforming the House of Lords*, fn.157, p.55

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* at p.56

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Uhr, J. ‘Generating Divided Government: The Australian Senate’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.98

¹⁹⁶ Patterson, S.C. and Mughan, A. ‘Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers’ (2001) 7(1) *Journal of Legislative Studies* 39, p.47

its ability to veto government legislation.¹⁹⁷ However, while the Senate does largely succeed in executing its functions of review, holding the government to account and ensuring the minority interests are properly represented it has, as will be discussed later, “never really performed as a ‘states house’”¹⁹⁸ and has instead evolved as a highly partisan body, in which the predominant influence on members is party rather than territorial affiliation.¹⁹⁹ Nonetheless, the Australian Senate is, in comparative terms at least, generally offered as a successful example of a directly elected second chamber,²⁰⁰ and should thus offer some valuable lessons for those who seek to introduce direct election to the House of Lords.

¹⁹⁷ See Uhr, *Explicating the Australian Senate*, fn.84, pp.14-17.

¹⁹⁸ *Ibid.* at p.4

¹⁹⁹ See Farrell, D.M. and McAllister I. ‘Legislative Recruitment to Upper Houses: The Australian Senate and House of Representatives Compared’ (1995) 1(2) *Journal of Legislative Studies* 243.

²⁰⁰ See Russell, M. *A Directly Elected Upper House: Lessons from Italy and Australia* (London: Constitution Unit, 1999)

CHAPTER II: THE HOUSE OF LORDS IN ACTION

The Role of the Upper House

In the previous chapter the functions performed by second chambers were considered in the context of providing a justification for the retention of a bicameral structure in the United Kingdom. However, the identification of the role and functions that we wish our second chamber to perform is also crucial in order to properly determine the appropriate composition of the chamber. As Archer notes, “discussion of how a second chamber should be composed requires first some clarification of its intended functions.”²⁰¹ Indeed Lipsey remarks that, when deciding on the shape of future reform to the House of Lords, we must ask ourselves the following: “What do we want it to do? Who do we want to sit in it? I put these questions in this order because this is the order in which, logically, they must be answered.”²⁰² Lord Rooker made precisely the same point in debate in the House of Lords. All three major parties fought the 2010 general election promising to bring about a wholly or mainly elected second chamber, but as Lord Rooker noted:

*“the manifesto lines of the parties are obsessed with composition. Not one asked what we are for, what we do and how we do it. The functions and powers of the second Chamber should be known before starting on the composition.”*²⁰³

The classic statement of the functions of a second chamber within the British constitutional framework was given by the Bryce Commission Report in 1918. This report suggested four key functions that should be performed:

- (1) the examination and revision of Commons bills;
- (2) the initiation of comparatively non-controversial bills;
- (3) the interposition of so much delay (and no more) in the passage of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it, and
- (4) the discussion and debate of important questions of general policy, particularly those for which sufficient time cannot be provided in the first chamber.²⁰⁴

²⁰¹ Archer, P. ‘The House of Lords: Past, Present and Future’ (1999) 70(4) *Political Quarterly* 396

²⁰² Lipsey, D. ‘What the House of Lords is Really For?’ (2009) 80(3) *Political Quarterly* 400

²⁰³ Lord Rooker, *Hansard* HL col.1709 (29th June 2010)

The role of the House of Lords was addressed again by the Wakeham Commission, which identified both the functions that the House did perform, and those that it should.²⁰⁵ The Report concluded that the second chamber should:

- (1) bring a range of different perspectives to bear on proposed legislation and the development of public policy;
- (2) be broadly representative of British society;
- (3) play a vital role as one of the checks and balances within the unwritten British constitution, holding the government to account, and if necessary, forcing the House of Commons to think again, and
- (4) provide a voice for the nations and regions of the United Kingdom.²⁰⁶

The Coalition Government also appears to be mindful of the inextricable link between functions and composition, and has set out in detail what it perceives to be the critical functions of the House of Lords.²⁰⁷ The White Paper makes a number of statements on the roles fulfilled by the House of Lords, which it suggests should remain unchanged in the reformed House.²⁰⁸ These functions can be summarised in the following way:

- (1) The careful consideration and scrutiny of legislation, including the ability to delay and ask the government to think again and, in some cases, offer alternative amendments for further consideration.
- (2) Scrutinising the work of government and holding it to account for its decisions and activities by asking oral and written questions, responding to Government statements and debating key issues
- (3) Conducting inquiries into matters of public policy via House of Lords Select Committees and publishing their findings to Parliament

²⁰⁴ *Report of the Conference on the Reform of the Second Chamber*, (the Bryce Commission) Cmnd 9038 (1918), para.6. See Hadfield, B. 'Whether or Whither the House of Lords' (1994) 35 *Northern Ireland Legal Quarterly* 320, p.331

²⁰⁵ Royal Commission on the Reform of the House of Lords, *A House for the Future* Cm 4534 (2000)

²⁰⁶ *Ibid.* at p.3 para.12

²⁰⁷ *House of Lords Reform Draft Bill*, Cm 8077 (2001), p.10 paras.2-5

²⁰⁸ *Ibid.* at para.6

It is with these roles and functions in mind that one must consider the most appropriate method of composition for the second chamber. Before doing so, however, it is necessary to consider how well the current House of Lords, as presently constituted, actually performs these functions. The 2011 White Paper indicates that the primary purpose of the second chamber should be to scrutinise legislation and hold the government to account.²⁰⁹ But just how well does the House of Lords currently fulfil this task? In order to answer this question, it will be useful to examine the way in which the House of Lords has interacted with a major piece of legislation. The Parliamentary Voting System and Constituencies Act completed its passage through the House of Lords in February 2011, and is arguably one of the most constitutionally significant pieces of legislation that will be passed by this Coalition Government. As such, it will make an appropriate case study.

The Parliamentary Voting System and Constituencies Act 2011

The Parliamentary Voting System and Constituencies Bill²¹⁰ was introduced to the House of Commons on 22nd July 2010,²¹¹ and had its Second Reading on 6th September 2010.²¹² The purpose of the Bill was to provide for the 2015 general election to be fought under the Alternative Vote (AV) electoral system, provided that such a change was approved in a referendum to be held on 5th May 2011. The Bill also provided for a proposed reduction in the size of the House of Commons from 650 members to 600 members. Under the provisions of the Bill, the introduction of AV would be prevented until boundary changes had taken place. However the boundary changes provided for in the Bill would take effect at the next general election irrespective of the referendum result.²¹³ After the division on the Second Reading, the House of Commons divided on the Programme Motion, which was passed by 324 votes to 272.²¹⁴ The Programme Motion allowed for five days in Committee and two days for consideration and Third Reading.²¹⁵ As a constitutional Bill, the committee stage was taken on the floor of the House of Commons. Day 1 of the Committee stage took place on 12th October,²¹⁶

²⁰⁹ *Ibid.* at p.7

²¹⁰ Bill No.63 of 2010-11

²¹¹ *Hansard* HC col.594 (22nd July 2010)

²¹² *Hansard* HC cols.34-143 (6th September 2010) See White, I and Gay, O. *Parliamentary Voting System and Constituencies Bill 2010-11: progress of the Bill*, Standard Note 5697, House of Commons Library (27th October 2010), p.1

²¹³ For further detail on the provisions of the Bill as introduced to the House of Commons see Gay, O. and White, I. *The Parliamentary Voting System and Constituencies Bill*, Research Paper 10/55, House of Commons Library (1st September 2010). For details on the final provisions of the Bill as enacted see White, I. *AV and Electoral Reform*, Standard Note 5317, House of Commons Library (12th July 2011)

²¹⁴ *Hansard* HC col.138 (6th September 2010)

²¹⁵ *Ibid.*

²¹⁶ *Hansard* HC cols.197-301 (12th October 2010)

and there were three more days taken on 18th, 19th and 20th October.²¹⁷ The final day was 25th October.²¹⁸ Report Stage took place on 1st and 2nd November²¹⁹ and was followed by Third Reading.²²⁰ From Second Reading to Report, the House of Commons spent 8 days and an approximate total of 48 hours scrutinising the Bill.

Amendment and Scrutiny in the House of Commons

As Gay and White note, “no major changes were made during the passage of the Bill in the Commons.”²²¹ However, the text of the referendum question was amended and provision was made for the combination of polls on 5th May 2011. One recurring criticism throughout the passage of the Bill centred on the lack of pre-legislative scrutiny and the speed with which the Bill was timetabled through Parliament. The Political and Constitutional Reform Committee published a brief report on 2nd August 2010 in which it suggested that the timetable for the Bill meant that the Committee had been denied an adequate opportunity to scrutinise the Bill before Second Reading.²²² The Committee published its substantive report on the Bill on 11 October 2010 in which it again criticised the government for the lack of pre-legislative scrutiny of the Bill:

“The Parliamentary Voting Systems and Constituencies Bill seeks fundamentally to change the political establishment in the UK. We regret that it is being pushed through Parliament in a manner that limits both legislative and external scrutiny of its impact, and may consequently undermine the Government’s intention to restore the public’s faith in Parliament.”²²³

The Chair of the Political and Constitutional Reform Committee voiced further concern during the Bill’s Second Reading, criticising the Government for the lack of pre-legislative scrutiny: “this is not some small order or statutory instrument, but potentially the biggest Bill that the House will consider in five years, and my Committee has been given just two sessions in which to consider it.”²²⁴ Nonetheless, the Bill passed its Second Reading by 328 votes to 269.²²⁵

²¹⁷ *Hansard* HC cols.641-767 (18th October 2010); cols.837-919 (19th October 2010); cols.995-1104 (20th October 2010)

²¹⁸ *Hansard* HC cols.27-136 (25th October 2010)

²¹⁹ *Hansard* HC cols.653-738 (1st November 2010); cols.795-892 (2nd November 2010)

²²⁰ *Ibid.* For a summary of the final stages of the Bill in the House of Commons see Purvis, M. *Parliamentary Voting System and Constituencies Bill*, House of Lords Library Note 2010/28 (9th November 2010)

²²¹ Gay, O. And White I. *The Parliamentary Voting System and Constituencies Bill: Summary of Amendments*, Standard Note 5863, House of Commons Library (21st February 2011)

²²² House of Commons Political and Constitutional Reform Committee, *Parliamentary Voting System and Constituencies Bill: Report for Second Reading* (First Report of Session 2010-11) HC 422 (2nd August 2010) p.3

²²³ House of Commons Political and Constitutional Reform Committee, *Parliamentary Voting System and Constituencies Bill* (Third Report of Session 2010-11) HC 437 (11 October 2010) p.3

²²⁴ Graham Allen MP (Labour) *Hansard* HC col.63 (6th September 2010).

The Referendum Question

Perhaps the most significant amendment made to the Bill in the House of Commons was in relation to the wording of the referendum question. On 30 September 2010 the Electoral Commission published its report on the intelligibility of the proposed referendum question.²²⁶ The report concluded that, while most people taking part in the research found the Government's proposed question to be clear and understandable, some people, particularly those with lower levels of education and literacy, found the question difficult to understand. This, the report suggested, was because of the structure, length and language used in the proposed question.²²⁷ The Commission recommended a redrafted question that would be easier for all sections of the public to understand.²²⁸ During Committee Stage, Caroline Lucas (Green Party) spoke to an amendment to offer voters a two-question referendum. They would first have a choice between retaining first-past-the-post or changing to a different system, and then a choice between AV, the Single Transferable Vote system and the Additional Member System as the new system, citing the New Zealand 'preferendum' of 1993 as a precedent.²²⁹ This amendment was grouped with a number of government amendments to change the wording of the question as recommended by the Electoral Commission, sponsored by the Deputy Prime Minister and members of the Political and Constitutional Affairs Committee. The Green Party amendment was lost by 346 votes to 17,²³⁰ while the government amendments were passed without a division,²³¹ and the question was thus brought into line with the Electoral Commission's recommendations.

Technical Government Amendments

A number of technical government amendments were agreed relating to the counting officers and conduct of the referendum. The Government tabled a number of amendments to Schedule 1 relating to the designation of counting officers for the referendum, and a further government amendment defined the voting areas for the referendum. Other government amendments allowed for the fees to be paid to counting officers to be reduced if they failed to meet a suitable

²²⁵ *Ibid.* at col.134

²²⁶ The Electoral Commission, *Referendum on the UK Parliamentary Voting System: Report of Views of the Electoral Commission on the Proposed Referendum Question* (2010)

²²⁷ *Ibid.* at pp.22-23

²²⁸ *Ibid.* at p.24

²²⁹ *Hansard* HC cols.281-85 (12th October 2010)

²³⁰ *Ibid.* at col.294

²³¹ *Ibid.* at col.297

standard of performance. These were agreed without a division.²³² A Government amendment clarifying the role of the Electoral Commission in providing information about voting systems was also agreed without a division.²³³ Government amendments to the rules for the conduct of the referendum were also agreed. The key amendment was to change the deadline for issuing the notice of poll from 16 days to 15 days before the referendum date. This, and other minor technical changes relating to the combination of polls on 5th May 2011 were passed.²³⁴ Government amendments to adjust forms issued in connection with the referendum were also agreed.²³⁵ These were all minor, technical amendments to the Bill, which were passed willingly by the House.²³⁶

A number of technical government amendments to Schedule 6, which makes amendments to the Parliamentary Election Rules to allow for a change to the Alternative Vote System were agreed without a division. These included the procedures that would be followed if there was a tie under AV.²³⁷ A series of minor amendments were moved to clarify responsibility for electoral law and were added without a division,²³⁸ as was a Government amendment regarding the new redistribution rules to clarify the definition of local authority boundaries.²³⁹

The Government added a new clause 19 to the Bill, which made clear that the costs of covering and reporting on the referendum in the media were not to be referendum expenses for the purposes of the Political Parties, Elections and Referendums Act 2000. This clause was added without a division.²⁴⁰ The Government also added new clause 20 and new Schedules 2, 3, 4 and 5 on the combination of polls. The new clause and schedules allowed for the referendum to be combined with other elections or local referendums that could take place on 5th May 2011. Aside from a number of minor technical government amendments that were agreed at Report Stage,²⁴¹ the House of Commons made no other changes to the substance of the Bill, which passed its Third Reading by 321 votes to 264 on 2nd November.²⁴²

²³² *Hansard* HC col.654 (18th October 2010)

²³³ *Ibid.* col.689

²³⁴ *Ibid.* col.726

²³⁵ *Ibid.* col.735.

²³⁶ For further detail see Gay, O. and White I. *Parliamentary Voting System and Constituencies Bill 2010-11: Commons Stages*, Research Paper 10/72, House of Commons Library (11 November 2010)

²³⁷ *Hansard* HC col.864 (19th October 2010)

²³⁸ *Hansard* HC col.1028 (20th October 2010)

²³⁹ *Ibid.* at col.1097

²⁴⁰ *Hansard* HC col.36 (25th October 2010)

²⁴¹ See Gay and White, fn.236, p.22-26. The detail on all of the technical amendments referred to in this section is provided by Gay and White, fn.236, pp.15-19.

²⁴² *Hansard* HC col.888 (2nd November 2010)

Government Timetabling: A Lack of Proper Scrutiny?

There was, however, general criticism of the way in which the Bill was handled in the Commons. On 11th October the Scottish Affairs Committee published the written evidence it had received on the date for the referendum. On the first day of Committee in the House of Commons, the Chair of the Committee, Ian Davidson, suggested that “a strong view had been expressed by civic Scotland that is hostile to the proposals in the main.”²⁴³ He argued that the Government had not had sufficient chance to take these views into account due to the speed with which the legislation was being timetabled, and even expressed the view that “should the measures go through without due consideration it would be only right, in those circumstances, that another place should intervene to send some of them back.”²⁴⁴ Similar views were expressed by the Welsh Affairs Committee, which published its report, *The Implications for Wales of the Government’s Proposals for Constitutional Reform*, on 25th October 2010. The report expressed the following sentiment:

*“we are disappointed at the pace at which the whole package of constitutional reforms is being legislated and implemented. The provisions of the Bill will have profound consequences for the UK Parliament and for Wales in particular. We are equally disappointed that the Government has decided to timetable the Bill through the House of Commons without adequate opportunity for fuller scrutiny.”*²⁴⁵

When the second programme motion was put to the House of Commons on the first day of the Committee Stage, a number of members put forward the argument that more time was needed for such an important constitutional measure,²⁴⁶ but the programme motion was passed by 323 votes to 256.²⁴⁷ On the second day of Committee there was not an opportunity to debate the amendments to clause 6 relating to a turnout threshold for the referendum. Instead the Government moved Eleanor Laing’s (Conservative) amendment for a 50% turnout threshold. This was rejected without a division.²⁴⁸ On the third day of Committee a series of points of order complained of the failure to find time for a debate on a threshold in the referendum.²⁴⁹

²⁴³ *Hansard* HC col.192 (12th October 2010). Cited in Gay and White, fn.236, p.21

²⁴⁴ *Ibid.*

²⁴⁵ House of Commons Welsh Affairs Committee, *The Implications for Wales of the Government’s Proposals for Constitutional Reform*, (First Report of Session 2010-11) HC 495 (25th October 2010). Cited in Gay and White, fn.236, p.22

²⁴⁶ These included the Chair of the Political and Constitutional Affairs Committee Graham Allen, and in particular, Conservative backbenchers Bill Cash, Peter Bone, Bernard Jenkin, and the Chair of the Scottish Affairs Committee, Ian Davidson. See *Hansard* HC cols.189-192 (12th October 2010)

²⁴⁷ *Hansard* HC col.192 (12th October 2010)

²⁴⁸ *Hansard* HC col.767 (18th October 2010)

²⁴⁹ *Hansard* HC col.826 (19th October 2010)

Conservative backbencher Bill Cash gave the following account of the previous night's proceedings:

*"We saw the cynical adoption of amendments with which the Coalition Government clearly disagree merely to induce a negative vote. No opportunity was given for my amendments or those of other honourable members to be debated or voted on in Committee."*²⁵⁰

A subsequent programme motion was introduced on 19th October which "removed the internal knife on Day 3 allowing debate on Clause 9 to run on to Day 4."²⁵¹ However, this meant that by the end of Day 4, a number of amendments on the boundary review had not been debated. There was no time to debate amendments on public inquiries in clause 10,²⁵² and clauses 11 to 17 were added to the Bill without debate.²⁵³ On 1st November a fourth programme motion was introduced, which allowed for consideration of amendments relating to boundaries, the combination of polls, and referendum thresholds on the first and second days of Report stage.²⁵⁴ Labour's Chris Bryant indicated that the Opposition would oppose the motion:

*"We believe it is inappropriate not to allow any specific time for votes, because it is the right of this House not only to debate but to vote on such matters; we believe that it is inappropriate in particular to have so little time tomorrow, when we will be dealing with 28 pages of Government amendments, not a single one of which is the result of discussions in Committee"*²⁵⁵

Nonetheless, the programme motion was passed by 320 votes to 241,²⁵⁶ and no further time was allocated for the discussion of these amendments. Not only was the Bill not afforded the appropriate level of pre-legislative scrutiny for a fundamental constitutional measure of this kind, but it was timetabled through the House in such a way as to make detailed scrutiny and amendment of the Bill's provisions almost impossible. Clauses were left undebated, and fundamental amendments from both opposition and government backbench members were not afforded time for debate. The only amendments passed by the House of Commons were those moved by the Government, and thanks to the Government's majority in the chamber, coupled with the effectiveness of the whips, all non-government amendments to the Bill that were pressed to a division were defeated.

²⁵⁰ *Ibid.*

²⁵¹ Gay and White, fn.236, p.14. See *Hansard* HL col.832 (19th October 2010)

²⁵² *Hansard* HC col.1097 (20th October 2010)

²⁵³ *Ibid.* at cols.1100-1104

²⁵⁴ *Hansard* HC col.647 (1st November 2010)

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.* at col.648

Amendment and Scrutiny in the House of Lords

The Bill received its Second Reading in the House of Lords on 15th and 16th November 2010,²⁵⁷ and proceeded to a Committee of the whole House. Many peers were critical of the haste with which the Bill had been programmed through the House of Commons, and the lack of pre-legislative scrutiny. Lord Forsyth of Drumlean noted that “there has always been an understanding and a convention that on constitutional matters we should try to proceed with consensus and by agreement.”²⁵⁸ The Bill, he contended, was “the product of a political deal and that is no basis on which to amend the constitution of our country.”²⁵⁹ Lord Howarth of Newport suggested that the way in which the Government had so far handled the Bill demonstrated “an unreconstructed attitude on the part of the Executive to Parliament”,²⁶⁰ and expressed dismay at the fact that such major constitutional legislation had been programmed in the House of Commons in a way that hitherto “would have been unthinkable.”²⁶¹ Lord Falconer of Thoroton speaking for the Opposition said the following:

*“It is an insult to democracy and to the principles that we in this House hold so highly that a measure to enact constitutional change of such lasting significance has not been subject to pre-legislative scrutiny and public consultation.”*²⁶²

Nonetheless, the Bill, as is customary, passed its Second Reading.²⁶³ There then followed a total of 17 committee days in the House of Lords, with three days for Report on 7th, 8th and 9th February 2011.²⁶⁴ The Bill received its Third Reading on 14th February,²⁶⁵ and after a period of ping-pong, received Royal Assent on 16th February 2011. The time spent on the Bill by the House of Lords contrasts significantly with the House of Commons. In all the Commons spent 8 days considering the Bill, a combined total of approximately 48 hours. The Lords on the other hand spent 23 days scrutinising the Bill. With 2 days for Second Reading, 17 Committee days, 3 Report days and a day for Third Reading, the House spent an approximate total of 142 hours revising and amending the Bill, almost three times more than was spent in the Commons.²⁶⁶ The

²⁵⁷ *Hansard* HL cols.567-662 (15th November 2010); cols.718-772 (16th November 2010)

²⁵⁸ *Hansard* HL col.635 (15th November 2010). Cited in White, I and Gay, O. *Parliamentary Voting System and Constituencies Bill: Lords Stages*, Standard Note 5780, House of Commons Library (15th February 2011), p.6

²⁵⁹ *Ibid.* at col.638

²⁶⁰ *Hansard* HL col.724 (16th November 2010)

²⁶¹ *Ibid.*

²⁶² *Hansard* HL col.575 (15th November 2010). Cited in White and Gay, fn.258, p.6

²⁶³ *Hansard* HL col.772 (16th November 2010)

²⁶⁴ *Hansard* HL cols.13-77 (7th February 2011); cols.127-220 (8th February 2011); cols.230-309 and cols.331-346 (9th February 2011)

²⁶⁵ *Hansard* HL cols.507-524 (14th February 2011)

²⁶⁶ Figures arrived at through scrutiny of *Hansard* for relevant period.

House sat past eleven o'clock on eight occasions when considering the Bill.²⁶⁷ On 20th December 2010 the House sat until 1.14am,²⁶⁸ and again on 24th January 2011 the House sat until 1.35am on the Bill.²⁶⁹ On 19th January the House sat until 3.03am,²⁷⁰ and attracted great media interest on 17th January when it sat continuously for more than 16 hours through the night from 8.39pm until 12.52pm the following day.²⁷¹

The Referendum Date

Time spent scrutinising the Bill is not the only way in which the two Houses can be contrasted. A number of fundamental amendments were agreed in the House of Lords of the sort not witnessed in the House of Commons. These included a number of significant defeats for the Government. On the second Committee day Lord Rooker moved amendment 5 to insert 'before 31 October' instead of 5th May for the referendum date.²⁷² Lord Rooker argued that the Bill failed to provide time for a proper public information campaign regarding the issues addressed by the referendum.²⁷³ White and Gay note that the impact of this amendment was not entirely clear, since it would not prevent the poll from being held on 5th May, it simply allowed for alternatives.²⁷⁴ Lord Rooker explained his amendment as "a contingency measure"²⁷⁵ that would "not alter the Bill in any way or force any change",²⁷⁶ but rather would give the Government the option of holding the referendum at a later date if necessary. The Government opposed the amendment,²⁷⁷ but when the House divided, the amendment was passed by 199 votes to 195. The Government was defeated by 4 votes.²⁷⁸

The Case of the Isle of Wight

Equally significant was the amendment moved by Lord Fowler concerning the Isle of Wight. Lord Fowler's amendment sought to preserve the Isle of Wight as either a single constituency or

²⁶⁷ These were the first day of the Second Reading debate, the sixth, eighth, ninth, eleventh, twelfth and thirteenth Committee days, and the third day of Report.

²⁶⁸ *Hansard* HL cols.918-986 (20th December 2010)

²⁶⁹ *Hansard* HL cols.781-836 (24th January 2011)

²⁷⁰ *Hansard* HL cols.436-526 (19th January 2011)

²⁷¹ *Hansard* HL cols.91-324 (17th January 2011)

²⁷² *Hansard* HL col.11 (6th December 2010)

²⁷³ *Ibid.* at col.13

²⁷⁴ White, I and Gay, O. *Parliamentary Voting System and Constituencies Bill: Lords Stages*, Standard Note 5780, House of Commons Library (15th February 2011), p.12

²⁷⁵ *Hansard* HL col.12 (6th December 2010)

²⁷⁶ *Ibid.* at col.11

²⁷⁷ *Ibid.* at col.34 (Lord Strathclyde)

²⁷⁸ *Ibid.* at col.38

two constituencies. This issue had been raised in the House of Commons by the MP for Isle of Wight, Andrew Turner. At Second Reading he condemned the Government for its lack of consultation on this matter:

*"The Deputy Prime Minister has singularly failed to explain why Isle of Wight residents have not received similar consideration to Scottish island constituents. Like the Scottish islands, we are physically separate from the mainland, but our uniqueness is ignored. There has been no consultation and no explanation."*²⁷⁹

At Report stage on 1st November, Mr Turner moved an amendment to preserve the Isle of Wight as a single constituency.²⁸⁰ However, as Lord Fowler describes, he was unable to secure any change to the Bill:

*"You might think that his amendment would have been carefully considered in the other place, but you would be absolutely wrong. Due to the timetabling arrangements in the other place, which perhaps underlines a little the debate that has gone before, he was allowed no time at all in Committee, four minutes on Report and no opportunity to bring the proposition to a vote."*²⁸¹

Though Lord Fowler received support from several peers in the debate which followed,²⁸² the Government made it clear that it was not about to change its position.²⁸³ But when the House divided the amendment was passed by 196 votes to 122.²⁸⁴ When the Lords amendments were sent back to the Commons on 15th February, an amendment was moved by the Government to create two constituencies in the Isle of Wight, which was accepted by the House of Commons.²⁸⁵ An important change to the Bill was therefore secured through political pressure from the House of Lords.

Constituency Boundaries

The Isle of Wight was not the only topic on which the Government suffered a major defeat. On 9th February Lord Pannick moved an amendment to allow the Boundary Commission to deviate by up to a 7.5% from the average number of electors when creating constituencies in areas with special geographical considerations.²⁸⁶ Similar amendments had been tabled in the House of

²⁷⁹ *Hansard* HC col.73 (6th September 2010). Cited in Gay and White, fn.236, p.11

²⁸⁰ *Hansard* HC col.682 (1st November 2010)

²⁸¹ *Hansard* HL col.407 (19th January 2011)

²⁸² See for example Lord West of Spithead at col.409 and Lord Oakeshott of Seagrove Bay at col.410.

²⁸³ *Ibid.* at col.419 (Lord Wallace of Tankerness)

²⁸⁴ *Ibid.* at col.424

²⁸⁵ *Hansard* HC col.880 (15th February 2011)

²⁸⁶ *Hansard* HL col.230 (9th February 2011)

Commons, but with little success. On Report in the Commons Chris Bryant, speaking on an Opposition amendment, contended that:

“there are more instances than are allowed for in the Bill where the Boundary Commission should be allowed to exercise a degree of discretion, because this country is made up not just of statistics on a map but of living communities with distinct historical, cultural and political identities that need their discrete representation in the House.”²⁸⁷

The amendment would have allowed the Commission to vary the rule by up to 10%. Several speakers rose to support the amendment²⁸⁸ but it was opposed by the Government and, predictably, was defeated on division by 326 votes to 254.²⁸⁹ Lord Pannick’s amendment was also opposed by the Government on the basis that it would increase judicial review challenges and cause difficulties for the commissions in Scotland, Wales and Northern Ireland.²⁹⁰ However, the amendment was pressed to a division and was passed by 275 votes to 257.²⁹¹ This represented another major defeat for the Government on an issue that had been raised in the Commons, but on which members of the elected chamber had failed to secure any amendment.

A Referendum Threshold

A further defeat was inflicted on the Government when Lord Rooker moved an amendment on the first day of Report to the effect that the result of the referendum would not be binding on the Government unless 40% of the electorate had voted.²⁹² Lord Rooker argued that his amendment would do no more than allow the Government time to reconsider should the turnout be less than 40%, since the move to AV would still be allowed should the Government wish to press ahead. The only difference would be that the result of the referendum would not bind the Government.²⁹³ Lord Wallace, speaking for the Government, opposed the amendment on the basis that it would result in a lack of clarity:

“the amendment offers no indication of what kind of process might be followed where less than 40 per cent of the electorate voted... Is it really the case that we want to replace the current

²⁸⁷ *Hansard* HC col.657 (1st November 2010). Cited in Gay and White, fn.236, p.22

²⁸⁸ See particularly Charles Kennedy at col.661, Andrew George at col.678 and Mark Durkan at col.673, all cited in Gay and White, fn.236, p.23

²⁸⁹ *Ibid.* at col.687

²⁹⁰ See Lord Wallace of Tankerness *Hansard* HL col.242 (9th February 2011)

²⁹¹ *Ibid.* at col.247

²⁹² *Hansard* HL col.16 (7th February)

²⁹³ *Ibid.*

provisions in the Bill, which provide both clarity and certainty, with provisions that could leave us with no clear resolution for the two years following on from the referendum?"²⁹⁴

The issue of a threshold for the referendum was another topic that was neglected somewhat by the House of Commons. Bill Cash (Conservative) had moved an amendment on the last day of Report to the effect that a turnout of 40% was needed for the result of the referendum to be valid.²⁹⁵ However, this crucial issue was afforded less than an hour's debate in the Commons, after which the amendment was defeated by 549 votes to 31.²⁹⁶ In the House of Lords however, Lord Rooker's amendment was passed by 219 votes to 218, and the Government was defeated by just 1 vote.²⁹⁷

The Impact of Lords Amendments

When the Lords amendments were sent to the Commons on 15th February, the Government resisted Lord Rooker's amendment on the 40% threshold. The Minister moved an amendment to remove it, which was won by 317 votes to 247.²⁹⁸ However, Lord Pannick's amendment regarding the 7.5% deviation was not separately voted on. Both amendments were voted on together, and sent back to the House of Lords. Lord Pannick asked the House to insist on his amendment, but the Lords narrowly agreed to remove the 7.5% deviation by 242 votes to 241.²⁹⁹ However, the House did insist on its amendment for a 40% threshold.³⁰⁰ The Bill was sent back to the Commons who again insisted on the removal of the threshold.³⁰¹ The Bill was once again shuttled back to the Lords, who withdrew their insistence on the 40% threshold and allowed the Bill to pass.³⁰²

However, as will be discussed later, one cannot measure the impact of the House of Lords by defeats in the division lobby alone. Equally important are concessions extracted after debate and discussion. Towards the end of the Committee stage, the Leader of the House, Lord Strathclyde, announced that an agreement had been reached through the 'usual channels' that the Bill would complete its Committee stage on 2nd February, but that the Government would bring forward a package of concessions on Report.³⁰³ This was the result of an announcement by

²⁹⁴ *Ibid.* at col.28. Cited in White and Gay, fn.274, p.30

²⁹⁵ *Hansard* HC col.842 (2nd November 2010)

²⁹⁶ *Ibid.* at col.855

²⁹⁷ *Hansard* HL col.33 (7th February 2011)

²⁹⁸ *Hansard* HC col.907 (15th February 2011)

²⁹⁹ *Hansard* HL col.693 (16th February 2011)

³⁰⁰ *Ibid.* at col.673

³⁰¹ *Hansard* HC col.1090 (16th February 2011)

³⁰² *Hansard* HL col.786 (16th February 2011)

³⁰³ *Hansard* HL col.1214 (31st January 2011)

Baroness d'Souza, the convenor of the crossbench peers, that she would force a division on her amendment on public inquiries on that day. The crossbenches were concerned by suggestions that guillotine procedures could be introduced to the Lords if the scrutiny of the Bill could not be brought to an end. Baroness d'Souza spoke to her amendment, but withdrew it in anticipation of the Government concessions.³⁰⁴ Two sets of amendments were then passed at Report stage. Lord Wallace moved an amendment on the second day of Report which made provision for public hearings, which was accepted by the House.³⁰⁵ The following day Lord McNally moved a Government new clause to create a review of the reduction in the number of MPs, which was accepted without a division.³⁰⁶ Valuable concessions were therefore extracted from the Government without the need to press for a division. In anticipation of hostility from the crossbenches, and out of concern for the timetable of the Bill, the Government moved amendments themselves which made notable improvements to the content of the legislation.

Amendment by Consensus

Various technical Government amendments were passed throughout the Committee stage relating to the combination of polls,³⁰⁷ the regulation of loans to participants,³⁰⁸ and the definition of 'registration officer' for the purposes of the Bill.³⁰⁹ At Third Reading Lord Phillips of Sudbury moved an uncontroversial amendment relating to encouraging turnout, which was also agreed without a division.³¹⁰ However, some more fundamental changes to the Bill were agreed by consensus. On the 12th day of Committee Lord Tyler moved an amendment to add existing constituency boundaries to the list of factors that the Boundary Commission may take into account when determining new constituency boundaries.³¹¹ The amendment received the support of the Opposition and the Government. Lord Falconer of Thoroton, speaking for the Labour Party, expressed support for Lord Tyler's amendment.³¹² Speaking for the Government, Lord Wallace said that the Government were "content to accept"³¹³ the amendment on the basis that it:

³⁰⁴ *Ibid.* at col.1216. This account of events is provided by White and Gay, fn.274, pp.27-28

³⁰⁵ *Hansard* HL col.138 (8th February 2011)

³⁰⁶ *Hansard* HL col.296 (9th February 2011)

³⁰⁷ *Hansard* HL col.512 (13th December 2011)

³⁰⁸ *Hansard* HL col.631 (15th December 2010)

³⁰⁹ *Ibid.* at col.664

³¹⁰ *Hansard* HL col.523 (14th February 2011)

³¹¹ *Hansard* HL col.834 (24th January 2011)

³¹² *Ibid.* at col.836

³¹³ *Ibid.*

“will allow for the merits of existing boundaries to be taken into account where appropriate, thereby ensuring that the boundary commissioners do not have to start with a blank page.”³¹⁴

The amendment was therefore accepted without a division.³¹⁵ This sort of amendment by consensus was not seen during the Commons stages of the Bill.

The City of London

Another area in which the Government was persuaded to concede was in relation to the City of London. At Committee stage, Lord Brooke of Sutton Mandeville moved an amendment to recognise the special position of the City of London,³¹⁶ which was later withdrawn on the basis of an agreement by the Government spokesman, Lord Wallace of Tankerness, to meet with Lord Brooke to discuss the position of the City.³¹⁷ Lord Brooke moved a further amendment on Report to prevent the City of London from being divided into two constituencies.³¹⁸ The Government was unable to accept the amendment, but Lord Wallace indicated that the Government was prepared to accept the principle of the amendment, and would consider the issue for Third Reading.³¹⁹ The amendment was once again withdrawn.³²⁰ At Third Reading Lord Brooke moved a further amendment to add a reference to the City of London into the new Rules for Redistribution.³²¹ The amendment would, as Lord Brooke explained, “make the City of London as an entity a factor for the Boundary Commission to take into account in any future review.”³²² In response Lord Wallace said that the Government would accept the amendment, which would provide “the best way of including the boundaries of the City in the commission's considerations”,³²³ and the amendment was passed without a division.³²⁴

Further Areas of Debate

In addition to the various amendments made to Bill, the House of Lords found time to debate wider topics that were not fully addressed in the House of Commons. On two occasions the House debated the issue of voters with disabilities and access to polls for disabled people, both in response to amendments tabled by Lord Low of Dalston, the Chairman of the Royal National

³¹⁴ *Ibid.* Cited in White and Gay, fn.274, p.26

³¹⁵ *Ibid.*

³¹⁶ *Hansard* HL col.479 (19th January 2011)

³¹⁷ *Ibid.* at col.511

³¹⁸ *Hansard* HL col.251 (9th February 2011)

³¹⁹ *Ibid.* at col.253

³²⁰ *Ibid.* at col.254

³²¹ *Hansard* HL col.522 (14th February 2011)

³²² *Ibid.* Cited in White and Gay, fn.274, p.34

³²³ *Ibid.* at col.523. Cited in White and Gay, fn.274, p.35

³²⁴ *Ibid.*

Institute of Blind People.³²⁵ There were a series of debates on improving electoral registration among specific groups, most notable of which was the debate on the registration of black and minority ethnic voters prompted by an amendment moved by Lord Boateng.³²⁶ There were also debates on such matters as the use of the cross on the ballot paper,³²⁷ and the extension of the franchise for general elections to members of the Lords.³²⁸ Lord Foulkes of Cumnock moved amendments to allow prisoners serving sentences of less than four years to vote in the referendum,³²⁹ and to allow EU Citizens resident in the UK to vote,³³⁰ while Baroness Hayter of Kentish Town prompted a debate on the extension of the franchise to 16 and 17 year olds.³³¹ The ability of the House to find time for the debate of wider issues contrasts significantly with the approach of the House of Commons, where focus rested on passing the technical government amendments necessary for the Bill to be implemented.

Reducing the Number of MPs

It would be wrong to suggest, however, that the Lords' scrutiny of the Bill was completely comprehensive. The Lords failed to pursue the concerns raised in the Commons over reducing the number of MPs without reducing the number of Ministers. This had been raised in the Commons by Conservative backbencher Charles Walker, who voiced concerns over the ability of the House to hold the government to account due to the number of MPs that hold government positions.³³² Richard Shepherd (Conservative) also voiced his concern:

*"Clearly, if we reduce the number of Members of the House of Commons, and not the size of the Administration, their control over the size of the House of Commons increases. That is the very thing that the House is struggling to address in the wider context of constitutional reform."*³³³

In Committee Mr Walker moved an amendment to reduce the maximum number of ministerial office holders in the House of Commons Disqualification Act 1975, but the amendment was opposed by the Government.³³⁴ The amendment was pressed to a division, but was lost by 293 votes to 241.³³⁵ The Lords did little to pursue this quite cogent argument during the debates on

³²⁵ *Hansard* HL col.1288 (31st January 2011); col.332 (9th February 2011)

³²⁶ *Hansard* HL col.1476 (12th January 2011)

³²⁷ *Hansard* HL col.944 (20th December 2010)

³²⁸ *Hansard* HL col.284 (8th December 2010)

³²⁹ *Hansard* HL col.402 (13th December 2010)

³³⁰ *Ibid.* at col.481

³³¹ *Ibid.* at col.446

³³² *Hansard* HC col.49 (6th September 2010)

³³³ *Ibid.* Cited in Gay and White, fn.236, p.6

³³⁴ *Hansard* HC col.107 (25th October 2010)

³³⁵ *Ibid.* at col.132

the preferred size of the House of Commons.³³⁶ Neither did the House push the Government on the issue of holding the referendum on the same day as other elections. In Committee Lord Foulkes of Cumnock moved amendments to prevent the poll being held on the same day as elections to the Scottish Parliament, the first of which was withdrawn³³⁷ and the second of which was rejected without a division.³³⁸ Nor did the House press the Government on the issue of a multi-option referendum, previously raised in the Commons by Caroline Lucas. A number of amendments to this effect were introduced and debated, but not formally moved,³³⁹ while the amendments moved by Lord Rooker and Baroness McDonagh were withdrawn after debate.³⁴⁰ Nonetheless, fundamental changes were made to the Bill, through both Government defeats in the division lobbies and through concessions made in response to the pressures of time.

Filibustering in the Lords?

During the passage of the Bill there were suggestions that Labour peers were filibustering, deliberately obstructing the passage of Bill through the House for purely political reasons. In January, the Leader of the House, Lord Strathclyde, was reportedly considering introducing a guillotine motion, an unprecedented move for the House of Lords.³⁴¹ Lord Strathclyde accused Labour members of being “on a go slow”,³⁴² an allegation rebutted by Lord Falconer of Thoroton: “this government is trying to ram though this bill through in an arrogant way without proper scrutiny. We will do what the Lords are there to do.”³⁴³ These accusations were also rebutted by Labour members from within the chamber, who retaliated by pointing to the lack of participation from Conservative and Liberal Democrat peers. Lord Grocott made the following statement:

“I really find it offensive to hear continual references to filibusters taking place when discussions of this significance are before the House. In fact, I would say that there is negligence on the part of groups, parties and individuals who do not make a full contribution to this debate.”³⁴⁴

³³⁶ *Hansard* HL cols.21-81 and cols.91-324 (17th January 2011)

³³⁷ *Hansard* HL col.1455 (30th November 2010)

³³⁸ *Hansard* HL col.512 (13th December 2010)

³³⁹ *Hansard* HL cols.51-84 (6th December 2010)

³⁴⁰ *Ibid.* at cols.97-114

³⁴¹ Wintour, P. ‘Peer Pressure as Labour Threatens to Derail Alternative Vote Bill’ *The Guardian* (14th January 2011) <<http://www.guardian.co.uk/politics/2011/jan/14/alternative-vote-bill-labour-peers>> accessed 29th August 2011

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Hansard* HL col.1185 (10th January 2011)

Later in the debate Lord Solely stated that:

*"What we have seen this afternoon, sadly, is the reverse of a filibuster. A government party-or two parties-refused to take part in a serious debate about the constitutional matter of a Government taking on themselves the power to change the size of Parliament."*³⁴⁵

The Government's frustration at the time being taken for the Lords to pass the Bill presumably prompted these accusations of foul play, while Opposition peers were inevitably going to point to the need for proper and detailed scrutiny of major constitutional legislation. However, whether or not the Labour peers were in fact engaged in a filibuster, this episode, it is submitted, is indicative of exactly the sort of hostility that could be amplified in an elected chamber. The Government, in this case, accused Labour members of the House of Lords of obstructing a piece of legislation for purely political reasons, while at the same time proposing the move to a mainly elected upper chamber. Surely there is a degree of hypocrisy involved in this argument, for such behaviour, as will be discussed later, would surely occur more frequently in an elected chamber? If the Government take issue with what they deemed to be the overtly partisan, obstructionist behaviour of Labour peers, then perhaps, it is submitted, the Government should consider the likely consequences of a second chamber consisting mainly of whipped, party politicians.

Conclusion

The interaction of the two Houses of Parliament with the Parliamentary Voting System and Constituencies Act demonstrates well the contrasting approaches of the upper and lower chambers in the scrutiny of legislation. Not only did the House of Lords spend nearly three times the amount of time spent by the House of Commons on scrutinising the Bill, but significant changes were implemented that could not have succeeded in the House of Commons. During its passage through the Commons, no major changes were implemented to the Bill. The Bill was timetabled in such a way as to make detailed debate of fundamental issues an impossibility. Many clauses were added to the Bill without debate, and time was not afforded to crucial amendments proposed from all sides of the chamber. The only amendments passed by the House were those moved by the Government, while all non-Government amendments that were pressed to a division were defeated. The whipped Government majority in the House of Commons made the level of scrutiny afforded to the Bill entirely inadequate. In contrast, a series of major amendments were passed by the House of Lords. Some were forced on the Government

³⁴⁵ *Ibid.* at col.1267. Cited in Whited and Gay, fn.274, p.18

by defeat in the division lobbies, while others were the result of concessions extracted in anticipation of protracted opposition. Some changes were made by consensus, while in other cases the Government was simply persuaded of the merits of the argument. Time was found for the debate of wider issues that could not have been found in the House of Commons. It is true that some of the defeats inflicted in the House of Lords were reversed by the House of Commons, while others were duly accepted, but the House was unabashed in insisting on Lord Rooker's threshold amendment. Nonetheless, when the lower House insisted for a second time, the Lords gave way to the will of the democratically elected chamber. The Lords were willing to force the Government to think again, without challenging the primacy of the House of Commons.

CHAPTER III: THE COMPOSITION OF THE SECOND CHAMBER

There are three fundamental options for the composition of a reformed House of Lords: a wholly appointed House, a wholly elected House, or, as the present Government favour, a hybrid House containing both appointed and elected members.³⁴⁶ However, all three options have their disadvantages. As Phillipson notes:

“an appointed House is derided as a giant quango, representing rule by an elite, lacking any democratic legitimacy and ultimately ineffectual. A wholly elected chamber, on the other hand, is objected to on the basis that it would produce a clone of the Commons, that could become its rival, thus producing the danger of legislative impasse and destroying the clear line of democratic accountability between parliamentary government and the people that is said currently to exist... Finally the seemingly obvious compromise, a mixed elected/appointed House, is scorned as a “hybrid nonsense” that simply represents a failure to decide the issue one way or the other and would be crippled by internal divisions between its elected and appointed members and the different degrees of legitimacy each would claim.”³⁴⁷

Nonetheless the reformed House must adopt one of these forms, and it may well be, as Phillipson seems to suggest, that it is simply a case of choosing the least problematic option.³⁴⁸ But, as previously argued, in deciding on which of these three options is preferable, the intended role and functions of the reformed chamber should be a pivotal consideration. Before turning to examine the options for reform of the House of Lords, it is worth pausing to first identify the inherent strengths of the House of Lords as it is currently composed, and the qualities which currently aid it in the performance of its functions.

The Strengths of the Status Quo

Almost every recent attempt at reform of the House of Lords has focused on the need to alter the composition of the House, yet the membership of the chamber could also be viewed as its greatest strength. As King notes, prior to 1999, the numerical domination of the House by the hereditary peers meant that the chamber was “substantially swelled by the vain, the idle, the

³⁴⁶ For a commentary on the different methods of composition for second chambers see Borthwick, M. ‘Methods of Composition of Second Chambers’ (2001) 7(1) *Journal of Legislative Studies* 19

³⁴⁷ Phillipson, G. “The greatest quango of them all”, “a rival chamber” or “a hybrid nonsense”? Solving the second chamber paradox’ (2004) *Public Law* 352, p.353

³⁴⁸ *Ibid.*

dim-witted and, more than occasionally, the seriously demented.”³⁴⁹ However, hereditary peers now make up only a small proportion of the House’s membership, the majority of which is now constituted by life peers, individuals selected on their own personal merits on the basis that they have something valuable to offer to the legislative process. Puttnam recognises that one of the “great and growing merits of the House of Lords over the past forty years has been the wealth of knowledge and experience”³⁵⁰ which life peers have “been able to contribute to public life in this country.”³⁵¹ As Bogdanor observes, the fundamental consequence of the Life Peerages Act was “the admission into the Lords not only of party politicians but also of experts from all walks of life who were able to make important contributions to the work of the upper House.”³⁵² Indeed, it has been noted that “today’s House of Lords, consisting almost entirely of appointed life peers, is chock-a-block with ex-cabinet ministers, ex-cabinet secretaries, ex-heads of the armed services, actual business tycoons, brilliant lawyers, brilliant educators and assorted other worthies, some of whom are great and most of whom are certainly good.”³⁵³ The appointed nature of the chamber allows people from outside of the political profession who have achieved recognition for excellence within their chosen field to make a contribution to the legislative process. As Brazier notes, “people outside the practice of politics, especially men and women rising in their careers, can be inducted into Parliament without having to become professional politicians or to embrace the burdens of elections and constituents.”³⁵⁴

Of course, the value of individual expertise, and indeed the combined expertise of the chamber as a whole, is a difficult thing to quantify. One can point, for example, to the presence within the chamber of four former Chancellors of the Exchequer,³⁵⁵ three former Foreign Secretaries,³⁵⁶ seven former Home Secretaries,³⁵⁷ one former Prime Minister,³⁵⁸ not to mention two former Speakers of the House of Commons,³⁵⁹ and countless other retired cabinet ministers and former Secretaries of State. The House boasts a wide range of legal expertise which emanates not only from retired members of the senior judiciary, such as former Lord of Appeal in Ordinary, Lord

³⁴⁹ King, A. *The British Constitution* (Oxford: Oxford University Press, 2009), p.308

³⁵⁰ Puttnam, D. ‘A Democratic and Expert House’ (1999) 70(4) *Political Quarterly* 368, p.368

³⁵¹ *Ibid.*

³⁵² Bogdanor, V. *The New British Constitution* (Oxford: Hart, 2009), p.155

³⁵³ King, *The British Constitution*, fn.349, p.308

³⁵⁴ Brazier, R. *Constitutional Reform: Reshaping the British Political System* (Oxford: Oxford University Press, 2008), p.70

³⁵⁵ These are Lord Lamont of Lerwick, Lord Lawson of Blaby, Lord Howe of Aberavon, and Lord Healey. While Lords Howe, Lamont and Lawson remain active members of the House, at 93 Lord Healey is rarely in attendance

³⁵⁶ Lord Hurd of Westwell, Lord Howe of Aberavon, Lord Carrington and Lord Owen

³⁵⁷ Lord Reid of Cardowan, Lord Howard of Lympne, Lord Baker of Dorking, Lord Waddington, Lord Hurd of Westwell, Lord Brittan of Spennithorne, and Lord Carr of Hadley.

³⁵⁸ Baroness Thatcher is the only former Prime Minister to sit at present.

³⁵⁹ Lord Martin of Springburn and Baroness Boothroyd

Lloyd of Berwick and former President of the Family Division, Baroness Butler-Sloss, but also from highly respected practicing barristers such as Lord Pannick and Lord Lester of Herne Hill. On the crossbenches sit numerous military chiefs, including eight former Chiefs of the Defence Staff,³⁶⁰ a former Chief of the General Staff,³⁶¹ and a former First Sea Lord,³⁶² as well as other notable public servants including four former Commissioners of the Metropolitan Police,³⁶³ a former Chief Inspector of Prisons,³⁶⁴ and four former Cabinet Secretaries.³⁶⁵ In addition, a number of senior and internationally regarded academics can be found on both the crossbenches and the party benches, such as the Conservative peer Lord Norton of Louth,³⁶⁶ Labour peer Lord Desai,³⁶⁷ and the newly ennobled crossbencher Lord Hennessy of Nympsfield,³⁶⁸ whilst the Universities themselves are well represented by the many Chancellors and Vice-Chancellors that sit in the House.³⁶⁹

Business and industry are well represented, and include well-known tycoons such as Lord Sugar and financiers like Lord Turner of Ecchinswell,³⁷⁰ but so too are culture and the arts, with members such as the famous composer, Andrew Lloyd Webber, author and broadcaster Melvyn Bragg, and the recent addition of Oscar-winning actor and screenwriter Julian Fellowes. The House also contains various trade union leaders,³⁷¹ and representatives of voluntary and charitable organisations. In addition to the 26 Church of England Bishops who sit *ex officio* as Lords Spiritual, there are representatives of other religious groups,³⁷² as well as other

³⁶⁰ Lord Stirrup (also a former Air Chief Marshall), Lord Walker of Aldringham, Lord Boyce (also a former First Sea Lord), Lord Guthrie of Craigiebank, Lord Inge, Lord Vincent of Coleshill, Lord Craig of Radley, Lord Brammall

³⁶¹ Lord Dannatt (a number of the former Chiefs of the Defence Staff in the preceding note also held this position).

³⁶² Lord West of Spithead. Unlike most retired military chiefs, Lord West takes a party whip and sits on the Labour benches.

³⁶³ Lord Blair of Boughton, Lord Stevens of Kirkwhelpington, Lord Condon and Lord Imbert.

³⁶⁴ Lord Ramsbotham

³⁶⁵ Lord Turnbull, Lord Wilson of Dinton, Lord Butler of Brockwell, Lord Armstrong of Ilminster

³⁶⁶ Professor of Government and Director of the Centre for Legislative Studies at the University of Hull, and leading authority on Parliament.

³⁶⁷ Professor Emeritus of Economics at the London School of Economics

³⁶⁸ Attlee Professor of Contemporary British History at Queen Mary, University of London and expert on the British Constitution.

³⁶⁹ For example, Lord Patten of Barnes (Chancellor of Oxford University), and Lord Broers (former Vice-Chancellor of Cambridge University)

³⁷⁰ Chairman of the Financial Services Authority

³⁷¹ Examples include, Lord Morris of Handsworth (former General Secretary of the Transport and General Workers Union) Lord Monks (former General Secretary of the Trade Union Congress and former General Secretary of the European Trade Union Confederation), and Lord Young of Norwood Green (former General Secretary of the National Communications Union), to name but a few.

³⁷² Such as Lord Sacks (Chief Rabbi of the United Kingdom), and Lord Griffiths of Burry Pot (Methodist minister and former President of the Methodist Conference).

representatives of the Church of the England who sit on the crossbenches.³⁷³ Also of great value is the great medical and scientific expertise that can be found in the chamber. The House can boast members such as internationally regarded biology and fertility expert Lord Winston, world-leading surgeon Lord Darzi of Denham, and Lord Walton of Detchant, who served not only as President of the British Medical Association, but is also a former President of the General Medical Council and former President of the Royal Society of Medicine. The scientific expertise of the House is not limited to medicine, and includes the wider scientific knowledge of leading physicists, zoologists and engineers such as Lord May of Oxford,³⁷⁴ Lord Broers³⁷⁵ and Lord Rees of Ludlow.³⁷⁶

The concentration of expertise and experience within the House, it can be argued, make it well suited to the tasks of detailed revision and scrutiny, the very functions which the Draft Bill suggests the House should continue to perform.³⁷⁷ As Lipsey suggests, “the House of Lords provides a body of men and women, mostly of some distinction, who have a duty to attend to public affairs and who are available to contribute from a largely nonpartisan perspective to national debate, and to the resolution of intractable problems.”³⁷⁸ Appointed peers can bring with them the expertise that earned them their elevation to the peerage in the first place. They do not possess experience in every aspect of public affairs, but can often offer unrivalled expertise within their particular field. It is true that members of the House of Lords are part-time, often having other occupations and professional interests. But when a debate or piece of legislation arises concerning their particular field of interest, they are able to come to Parliament to make their contribution. As Lipsey remarks:

“horrible death caused by social service neglect? Send for Lord Laming. Languages in decline in our schools? Summon Lord Dearing. What should be done about pensions? What is wrong with financial regulation? Lord Turner is your man.”³⁷⁹

³⁷³ Such as Lord Harries of Pentregarth (former Bishop of Oxford), and Lord Carey of Clifton (former Archbishop of Canterbury).

³⁷⁴ Lord May lectured in Applied Mathematics at Harvard University, was Professor of Theoretical Physics at Sydney University, Professor of Zoology at Princeton University and now holds a joint professorship at Oxford University and Imperial College London. He served as President of the Royal Society from 2000 to 2005.

³⁷⁵ A former Professor of Electrical Engineering, former Vice-Chancellor of the University of Cambridge, and former President of the Royal Academy of Engineering.

³⁷⁶ Professor of Cosmology and Astrophysics at Cambridge University and former President of the Royal Society.

³⁷⁷ *House of Lords Reform Draft Bill Cm 8077* (2011), p.10 paras.2-6

³⁷⁸ Lipsey, D. ‘What the House of Lords is Really For?’ (2009) 80(3) *Political Quarterly* 400, p.402

³⁷⁹ *Ibid.*

Indeed, “on almost any topic the House can muster experienced specialists able to speak with authority.”³⁸⁰ The House of Lords can therefore “supply the additional dimension of contributions from those who have distinguished themselves in the activity under discussion or are familiar with the geographical region in question”,³⁸¹ members whose expertise allows them to “ask better questions, to spot inconsistencies and elisions better than the layperson.”³⁸² Due to the older average age of a life peer compared to members of the Commons, they will have an “accumulated knowledge, usually ending up in a top or near-top job in the field”³⁸³ Further, appointed peers are not distracted with the “101 tasks that go with being elected: looking after constituents, servicing the local press, and generally strutting their stuff.”³⁸⁴ The presence of appointed, part-time, expert members provides the House of Lords with a body of individuals which are arguably ideally suited to carrying out the functions of detailed scrutiny and revision of legislation which form the bulk of the chambers work. As was illustrated in Chapter II, the appointed members of the House of Lords, at least in relation to the Parliamentary Voting System and Constituencies Act, greatly outperformed the Commons in providing the detailed revision and scrutiny necessary to ensure the workability of the legislation in question.

Of course the individuals mentioned above amount to only a small proportion of the House’s overall membership and, as previously noted, expertise is a difficult thing to quantify. A recent report from University College London’s Constitution Unit provides a useful analysis of the existing data on the breadth of experience and expertise in the chamber.³⁸⁵ The report classifies the professional background of members of the House of Lords by attributing to each a primary and secondary ‘professional area’. The report defines professional area as “the kind of broad area often cited when describing the backgrounds of peers”,³⁸⁶ and cites ‘medical and healthcare’, ‘legal professions’ and ‘culture, arts and sport’ as examples.³⁸⁷

The data, which is displayed in full in Appendix 2, shows that members of the House of Lords have backgrounds in a wide range of professional areas, many of which are well represented in

³⁸⁰ Lord Bingham of Cornhill, ‘The House of Lords: its future?’ (2010) *Public Law* 261, p.263

³⁸¹ Archer, ‘The House of Lords, Past, Present and Future’ (1999) 70(4) *Political Quarterly* 396, p.397

³⁸² Parkinson, J. ‘The House of Lords: A Deliberative Democratic Defence’ (2007) 78(3) *Political Quarterly* 374, p.379

³⁸³ Lipsey, ‘What the House of Lords is Really For?’, fn.378, p.403

³⁸⁴ *Ibid.*

³⁸⁵ Russell, M. and Benton, M. *Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords: Report to the House of Lords Appointments Commission* (London: Constitution Unit 2010)

³⁸⁶ *Ibid.* at p.10

³⁸⁷ *Ibid.* The report goes further and classifies peers by job (i.e. what the peer actually did in his professional area, e.g. ‘barrister’, ‘journalist’ or ‘dental surgeon’) and by specialism (i.e. the more precise expertise that the peer has, e.g. ‘physiotherapy’, ‘human rights’ or ‘urban regeneration’).

the House.³⁸⁸ The data shows that the legal professions are particularly well represented in the Lords, with 67 peers (10% of the House) having a primary or secondary professional background in law.³⁸⁹ Russell and Benton's data on jobs shows further that there are 44 peers whose primary or secondary job was as a barrister, along with 31 who are former members of the judiciary, and 14 who were solicitors.³⁹⁰ Higher education is also well represented in the House of Lords. A total of 76 peers (11% of the House) are categorised by Russell and Benton as having "strong professional connections to university life."³⁹¹ The data on jobs identifies a total of 76 peers whose primary or secondary job was as an academic, while 5 peers have served as university vice-chancellors or deans.³⁹² A total of 87 peers have a professional background in banking in finance (12% of the House), while 95 have a background in business and commerce (14% of the House).³⁹³ It is also worth noting that there also 35 peers (5% of the House) with a professional background in journalism, media and publishing, while 27 peers (4% of the House) have a professional background in medicine and healthcare.³⁹⁴ Russell and Benton's data on specialisms shows that within the category of medicine and health there are peers specialising in a wide range of fields, from nursing and surgery to obstetrics and gynaecology, dentistry, neurology, epidemiology, gastroenterology and fertility.³⁹⁵ There are 31 peers (4% of the House) whose professional background is in religion, while 28 peers (3% of the House) have a professional background in the trade unions, and 13 peers (2% of the House) have strong connections to the armed forces.³⁹⁶

This is not to suggest that the spread of expertise within the House of Lords is perfect. As Russell and Benton state, it is "very difficult to say what the balance between professional areas *should* be in the Lords",³⁹⁷ or indeed the balance between different jobs and specialisms. Russell and Benton do note however, that areas which appear to be "less well represented"³⁹⁸ in the House of Lords include architecture and engineering, transport, non-higher education, the leisure industry and local authority administration.³⁹⁹ They note that there are very few peers with manual trades backgrounds,⁴⁰⁰ and at the level of jobs, note that many of the scientists in

³⁸⁸ Russell and Benton, fn.385, p.15

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.* at p.23

³⁹¹ *Ibid.* at p.14

³⁹² *Ibid.* at p.24

³⁹³ *Ibid.* at p.15

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.* at p.43

³⁹⁶ *Ibid.* at p.15

³⁹⁷ *Ibid.* at p.14

³⁹⁸ *Ibid.* at p.5

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

the Lords come from “academic rather than other backgrounds.”⁴⁰¹ They point to the “seeming lack”⁴⁰² of surveyors, planners and peers with backgrounds in environmental protection, and contend that there are “relatively few”⁴⁰³ former schoolteachers and peers with backgrounds in international organisations. Russell and Benton suggest the House lacks peers with backgrounds in public health and some scientific and medical specialisms such as psychology.⁴⁰⁴ But as they themselves note, it is “a matter of subjective judgement where the most important gaps appear or what the most appropriate balance should be.”⁴⁰⁵

It must be noted also that not every member possesses the sort of invaluable expertise referred to in the preceding paragraphs. Due to the system of political patronage that currently operates in the United Kingdom, specialist knowledge of a particular area or subject is not a precondition of membership of the second chamber. One criticism often made of the House of Lords is the number of ex-MPs and other professional politicians that make their way to the House. Indeed Russell and Benton recognise that the largest single group in the House is those with a background in representative politics.⁴⁰⁶ A total of 188 peers have a primary or secondary background in this area (27% of the House),⁴⁰⁷ of which 151 served as MPs.⁴⁰⁸ However, it is worth noting two points. Firstly, the fact that 27% of the House are former professional politicians means that 73% of the House come from a background other than professional politics.

The second point is that many of the peers in this category bring with them their own, very useful expertise. Of the 151 former MPs, 48 previously served as Ministers, 40 served as Secretaries of State, and 28 served as shadow spokesmen, while 4 peers also served as Speaker or Deputy Speaker of the House of Commons.⁴⁰⁹ Russell and Benton’s data on specialisms of former MPs⁴¹⁰ show that such members bring with them the experience and expertise that they have amassed during their political careers in the other House, be it in Foreign Affairs, Defence, Education or any other area in which they have specialised.⁴¹¹ It may be true that ex-MPs are

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.* at p.14

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.* at p.46

⁴⁰⁹ *Ibid.* at p.25

⁴¹⁰ Displayed in full in Appendix 3

⁴¹¹ Russell and Benton, fn.385, p.46

overrepresented in the House of Lords, but to suggest that a significant number of these do not bring with them valuable expertise useful to the House would be quite unfair.

This expertise of the House's membership also filters into the work of the House's select committee network, the development of which was prompted by Britain's entry into the European Community in 1973. At this point peers took it upon themselves to embark upon detailed scrutiny of European legislation through the newly established Select Committee on the European Communities. In 1977, a Committee established by the Hansard Society for Parliamentary Government was "struck by the relevance and businesslike nature of the results of the Lords' work in this field",⁴¹² while the Report of a Study Group of the Commonwealth Parliamentary Association in 1982 noted that the House of Lords provided "the only really deep analysis of the issues that is available to the parliamentary representatives of the ten countries in the Community"⁴¹³ and that Lords reports were "far more informative and comprehensive than those produced by the Commons committee on European legislation."⁴¹⁴ Bogdanor suggests that this superiority can be attributed to the "greater specialist knowledge of peers and the comparative absence of partisanship in the House of Lords",⁴¹⁵ with members being chosen for their specialist expertise, rather than for party political considerations, and concludes that the Committee has "proved to be perhaps the most effective in the European Union, precisely perhaps because the Lords is not an elected chamber."⁴¹⁶

The scrutiny offered by the House of Lords does not stop at European matters. Influential and well-respected committees have been established across a range of subject areas, utilising the expertise available in the House. The Science and Technology Select Committee, the Delegated Powers and Deregulation Committee, and the Select Committee on the Constitution are just examples of the specialist scrutiny offered by the House. By way of example, the Science and Technology Committee contains not only the aforementioned scientific expertise of Lords Winston, Broers and Rees, but is also chaired by Lord Krebs, a world leading zoologist, former Chairman of the Food Standards Agency, and current Principal of Jesus College, Oxford. Other members include a former Chairman of the National Rivers Authority,⁴¹⁷ a former President of the Royal Society of Obstetricians and Gynaecologists,⁴¹⁸ a former Chief Inspector of Schools,⁴¹⁹

⁴¹² Cited in Bogdanor, *The New British Constitution*, fn.352, p.165

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.* at p.166

⁴¹⁷ Lord Crickhowell

⁴¹⁸ Lord Patel

⁴¹⁹ Baroness Perry of Southwark

a former President of the Royal Agricultural Society and Royal Geographical Society,⁴²⁰ and a former Chair of the House of Commons Science and Technology Committee.⁴²¹

In addition, select committees in the Lords are not restricted to particular departments, and are able to consider broader issues that straddle departmental boundaries, thereby “helping to secure joined-up government.”⁴²² The prevalence of specialist expertise has, so Bogdanor argues, allowed the Lords to become a “forum for informed public debate”,⁴²³ considering issues over a longer time period than can be permitted in the House of Commons. It has been demonstrated that this is also a characteristic of the chamber as a whole when exercising its scrutinising and revising functions. As was shown in Chapter II, the House of Lords spent more than three times longer than the Commons scrutinising the Parliamentary Voting System and Constituencies Bill, while also finding time for wider topics of debate such as access to polls for disabled voters and improving electoral registration among black and minority ethnic groups, as prompted by members with specialist knowledge of these areas.

One final attribute of the present House of Lords is its relative independence from party and government control. King likens the House to a sort of “august body”⁴²⁴ where “issues of the day can be debated at a high level and relatively free from the party-political constraints that often inhibit members of the lower house.”⁴²⁵ Indeed, it is often said that the quality of debate in the Lords is far higher than that of the Commons. This, of course, is difficult to prove, but as Brazier notes, debates in the Lords are certainly of a “different quality – much less party political, joined by experts from many walks of life, not in general constrained by worries about whether a particular speech or point might upset the Whips, or might help or hinder the speaker’s hopes for ministerial office.”⁴²⁶ The party-aligned members of the House of Lords, many of which have had long political careers and are coming to the end of their professional lives, are far less afraid of defying the party line, and backbench rebellions are not uncommon. The power of the whips, and thus the grip of the parties over members of the House of Lords is significantly weaker than over members of the House of Commons, since members fear neither the consequences of defying the party line, nor the impact it could have on their career prospects.

⁴²⁰ The Earl of Selborne

⁴²¹ Lord Willis of Knaresborough

⁴²² Bogdanor, *The New British Constitution*, fn.352, p.166

⁴²³ *Ibid.*

⁴²⁴ King, *The British Constitution*, fn.349, p.306

⁴²⁵ *Ibid.*

⁴²⁶ Brazier, *Constitutional Reform*, fn.354, p.68

As Norton argues, the appointed nature of the House's membership means that it is able to "look at measures from a different perspective"⁴²⁷ to that of the elected House of Commons since "the experience and expertise of members, and the absence of election, helps reduce the impact of party considerations."⁴²⁸ He notes that members of the House of Commons are elected on the basis of competition between parties and therefore operate in a highly partisan environment. This has the result that any expertise possessed by members of the Commons may be "washed out by the imperatives of party need."⁴²⁹ Members of the Lords, so Norton contends, operate in a far less partisan environment because "the effect of experience and expertise is to limit the impact of unthinking party loyalty: members are less likely to go along with their party if they know that what it proposes runs counter to their own knowledge (or the knowledge of members they recognise as experts in their field)."⁴³⁰

Peers sit for life and cannot be expelled, and parties in the Lords have little in the way of sanctions to deploy against disobedient members. Peers do not receive a salary and so "have no paymaster to whom they feel beholden."⁴³¹ Since members choose for themselves how much time they wish to dedicate to the business of the House, "parties are thus dependent on their members to attend, but members are not usually dependent on their parties."⁴³² It is true that when the House does divide, members tend to vote along party lines,⁴³³ but less than 2% of amendments achieved in the House are as a result of a division.⁴³⁴ Most change is achieved through agreement,⁴³⁵ and it is up to the government to persuade the other parties or the crossbenchers through reasoned argument that they have the stronger case.⁴³⁶

The presence of a sizeable crossbench element entirely independent from party considerations does much, not only to facilitate the House's role as a check on government, but also to prevent the rise of the sort of adversarial, partisan politics which dominates the House of Commons. Given their numbers, the crossbenchers have the potential to hold the balance of power in the House when the politically-aligned members of the House are in disagreement. Russell and Sciara have shown however, that a combination of low Crossbench turnout in the division

⁴²⁷ Norton, P. 'Adding Value? The Role of Second Chambers' (2007) 15(1) *Asia Pacific Law Review* 3, p.13

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² *Ibid.* at p.14

⁴³³ Norton, P. 'Cohesion Without Discipline: Party Voting in the House of Lords' (2003) 9 *Journal of Legislative Studies* 55

⁴³⁴ Norton, 'Adding Value?', fn.427, p.14

⁴³⁵ And, of course, by the government bringing forward scores of its own technical amendments.

⁴³⁶ Norton, 'Adding Value?', fn.427, p.14

lobbies coupled with the fact that members in the group do not always vote in the same way, means that the Crossbenchers hold the balance of power in the Lords far less often than their size would suggest, and that it is in fact the opposition parties, and in particular the Liberal Democrats that are responsible for most government defeats in the House of Lords.⁴³⁷ But as Russell and Sciara have also argued, the Crossbenchers have a wider, more subtle influence which cannot be measured solely by performance in the division lobbies.⁴³⁸ The specialist expertise of crossbench members allows them to influence other members of the House, be it through proposing amendments to legislation or making speeches on areas in which they are highly regarded, and due to the fact that they make “daunting opponents”⁴³⁹ for government ministers, are often able to extract concessions from behind the scenes.⁴⁴⁰ They also often act as what Russell and Sciara refer to as “honest brokers”,⁴⁴¹ helping to resolve difficult policy conflicts, as Lord Weatherill did in 1998 when he proposed the famous amendment to retain the 92 hereditary peers in the House of Lords Reform Act.

Russell and Sciara note that crossbench peers can also act as ‘catalysts’ on controversial policy issues by tackling subjects which the parties may not feel able to approach, as Lord Joffe did when he sparked nationwide debate with his private member’s bill on voluntary euthanasia in 2005.⁴⁴² Finally, the Crossbenchers are sometimes seen as “a jury to whom politicians in the chamber appeal.”⁴⁴³ Due to their overall neutrality, the Crossbenchers are sometimes seen as “an audience worth courting by all political sides of the House”,⁴⁴⁴ and consequently can appear to sit in judgement on the arguments made by the opposing sides. This ensures that issues are debated on their merits, and amendments made with the intention of improving the legislation in question rather than to score political points. As Russell and Sciara note, the presence of the Crossbenchers can be seen as “crucial to the well-known ‘less partisan atmosphere’ and (sometimes disputed) high quality of debate that exists in the House of Lords in comparison with the Commons.”⁴⁴⁵

⁴³⁷ Russell, M. and Sciara, M. ‘Why Does the Government Get Defeated in the House of Lords?: The Lords, the Party System and British Politics’ (2007) 2 *British Politics* 299

⁴³⁸ Russell, M. and Sciara M. Russell, M. and Sciara, M. ‘Independent Parliamentarians en masse: the Changing Nature and Role of the Crossbenchers in the House of Lords’ (2009) 62(1) *Parliamentary Affairs* 32

⁴³⁹ *Ibid.* at p.44

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.* at p.45

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.* at p.44

⁴⁴⁴ *Ibid.* at p.45

⁴⁴⁵ *Ibid.* at p.46

It is unsurprising then that Brazier describes the House as “one which contributes usefully to the shape of legislation and to discussions of the issues of the day.”⁴⁴⁶ As Pearce contends:

*“the virtues of a good second chamber are those of intelligent contradiction, of debate continued beyond the lines of party militias. It requires bright specialist knowledge in all the key fields of life and work. The life peer system has done this and not done it at all badly.”*⁴⁴⁷

The Weakness of the Status Quo

As Lord Bingham of Cornhill asks, given the qualities of the House of Lords that have thus far been identified, “why should any question arise about its continuation into the indefinite future in very much the form which it now enjoys?”⁴⁴⁸ The answer provided by the former Senior Law Lord is that the House of Lords, for nearly two centuries, has been perceived as subject to a “disabling lack of democratic legitimacy.”⁴⁴⁹ The fundamental weakness in the current composition of the House of Lords is the inherent lack of direct democratic legitimacy in its almost exclusively appointed membership, a situation with “few parallels anywhere in the world.”⁴⁵⁰ The 2011 White Paper states that “the House of Lords plays an important role in our legislature and, as a second chamber, is a vital part of our constitutional arrangements.”⁴⁵¹ But the foreword makes abundantly clear that although “the House of Lords performs its work well... [it] lacks sufficient democratic authority.”⁴⁵²

As Brazier has noted, despite the great virtues of the House as it is currently composed, “critics of the House of Lords will no doubt come back to the central question of how appropriate it is in a democracy to have a chamber which is dominated by appointed life peers, supplemented by 92 hereditaries.”⁴⁵³ Those who favour reform will always point to the fact that the House of Lords is unelected, and as a result of what they perceive to be its illegitimate membership, is unaccountable, unrepresentative and undemocratic. The House, as it was composed before 1999, lacked democratic legitimacy. King suggests that the present chamber is “not a whit more democratic in its composition than its hereditary-dominated predecessor.”⁴⁵⁴

⁴⁴⁶ Brazier, *Constitutional Reform*, fn.354, p.68

⁴⁴⁷ Pearce, E. ‘An Elected Upper House and Other Fallacies’ (2009) 80(4) *Political Quarterly* 495, p.497

⁴⁴⁸ Lord Bingham of Cornhill, ‘The House of Lords: its future?’, fn.380, p.264

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *House of Lords Reform Draft Bill*, fn.377 p.10 para.2

⁴⁵² *Ibid.* at p.5

⁴⁵³ Brazier, *Constitutional Reform*, fn.354, p.68

⁴⁵⁴ King, *The British Constitution*, fn.349, p.307

Brazier suggests that “no modern state seeking to create a new legislature would devise anything as odd as a House most of whose members sat on the basis of the unrestricted patronage of the Head of Government.”⁴⁵⁵ The House does not pretend to be in any way representative of society at large. Rather than a microcosm of the British people, the chamber is dominated by wealthy and well-educated professionals, most of whom are white, middle- and upper--class men. It is clear from the discussion in the previous section that there are a number of key advantages to having a second chamber composed almost entirely of appointed members, but as King notes, “in the age of rampant democracy, almost no one outside the existing House of Lords advocates one.”⁴⁵⁶ Bogdanor makes the point that one of the great difficulties in making a second chamber more representative and democratic is identifying a principle of representation different from that used as the basis for elections to the House of Commons.⁴⁵⁷ The House of Lords, so he argues, has “succeeded in evading this problem since it does not claim to embody any principle of democratic representation at all.”⁴⁵⁸ Unfortunately this lack of democratic legitimacy is becoming increasingly problematic since, as Bogdanor notes, “only an elected chamber, so it is increasingly coming to be argued, can provide an upper house fit for the conditions of the twenty-first century.”⁴⁵⁹

Phillipson suggests that the House’s lack of democratic legitimacy is problematic not just as a matter of principle, but also because it means that the often worthwhile and commendable legislative work carried out by the chamber goes to waste because it is simply overridden or even ignored by the House of Commons.⁴⁶⁰ The House’s lack of legitimacy, it is argued, undermines the value of its work. Phillipson contends that, until both the government and the public view the position and powers of the House as “justifiable in a democracy”,⁴⁶¹ it will lack the “confidence and extra-parliamentary support to oppose the government effectively.”⁴⁶²

This lack of democratic legitimacy is the fundamental principle relied upon by those who seek wholesale reform of the House of Lords. The proposals contained within the coalition’s White Paper and Draft Bill aim to create a House based on democratic principles, one that no longer looks out of place in modern Britain.⁴⁶³ However, one must also confront the consequences of

⁴⁵⁵ Brazier, *Constitutional Reform*, fn.354, p.70

⁴⁵⁶ King, *The British Constitution*, fn.349, p.311

⁴⁵⁷ Bogdanor, *The New British Constitution*, fn.352, p.146

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Phillipson, ““The greatest quango of them all””, fn.347, pp.377-378

⁴⁶¹ *Ibid.* at p.359

⁴⁶² *Ibid.*

⁴⁶³ It is worth noting that concerns have already been expressed regarding the suggestion in the White Paper that members of the reformed second chamber would serve single, non-renewable 15 year terms (see House of

this injection of democratic legitimacy, and its implications for the functioning of the second chamber.

The Problem with an Elected House

The Government's proposals favour a hybrid chamber. The Draft Bill and accompanying White Paper set out plans for an 80% elected House, with a 20% independently appointed element. However, as noted above, the Government have made it clear that they are open to considering the possibility of a wholly elected chamber if that is what is supported as the Draft Bill is scrutinised. If, as the Draft Bill progresses through its pre-legislative scrutiny, a consensus emerges in favour of a wholly elected House, then it is quite possible that the Government's plans could be revised and a wholly elected House could be back on the agenda. The Deputy Prime Minister made this quite clear to the House of Commons when introducing the Draft Bill:

*"The White Paper includes the case for a 100%-elected House of Lords. The 80:20 split is the more complicated option, and so has been put into the draft Bill in order to illustrate it in legislative terms. The 100% option would be easy to substitute into the draft Bill should that be where we end up."*⁴⁶⁴

The Second Chamber Paradox

Phillipson suggests that the arguments in favour of a wholly elected House are straightforward: "that a democratic mandate should be the only way to political power in a democracy and that the greater legitimacy and so potency such a House would have would give it a much more prominent voice in the policy-making process."⁴⁶⁵ This sentiment is echoed in the foreword to the Government White Paper, which states that "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."⁴⁶⁶ However, it is also necessary to consider the pitfalls of a wholly elected second chamber. Rodney Brazier outlines what he describes as the 'second chamber paradox' in the following terms:

Lords Reform Draft Bill, p.13 paras.24-25). It has been suggested that such a move would not actually increase the democratic nature of the chamber since members would lack accountability to the electorate (see Lord Norton of Louth, *Hansard* HL col.1251 (22nd June 2011) and Lord Armstrong of Ilminster, *Hansard* HL col.1257 (22nd June 2011)). This issue will no doubt be addressed by the Joint Committee during its deliberations on the Draft Bill.

⁴⁶⁴ The Deputy Prime Minister (Mr Nick Clegg) *Hansard* HC col.156 (17th May 2011)

⁴⁶⁵ Phillipson, "The greatest quango of them all", fn.347, p.367

⁴⁶⁶ *House of Lords Reform Draft Bill*, fn.377, p.5

“A reconstituted second chamber could not be elected by the same method and at the same time as the House of Commons, because it would then be a pointless duplicate of that House; but if it were elected by a different method and at different times that could result in a chamber with a political make-up different from that of the Commons, thus making conflict between the two Houses inevitable. If the second chamber were to be elected by proportional representation, the objection that is currently made that the House of Lords has no political legitimacy would disappear; but if it were so elected the new House would have greater political authority and be more representative than the Commons which is merely elected by the first-past-the-post method.”⁴⁶⁷

This paradox is expanded by Ian McLean, who likens attempts to introduce an elected second chamber to “steering round Scylla and Charybdis”,⁴⁶⁸ the former being a House elected at the same time and by the same system as the Commons, and the latter a House elected at a different time or by a different system, or both. As McLean notes, “as Scylla would be a clone of the Commons, it would have no point”,⁴⁶⁹ while Charybdis, if elected by some form of proportional representation, “could always claim greater popular legitimacy than the Commons.”⁴⁷⁰ If not elected under a proportional system, “it could make the claim whenever its last election was more recent than the last general election.”⁴⁷¹

To some extent these problems are circumvented by the way in which the Coalition proposals have been formulated. The Draft Bill envisages members of the reformed second chamber being elected at the same time as general elections to the House of Commons in order to maximise voter turnout and ensure the least possible disruption to the Government’s legislative programme.⁴⁷² Thus, the danger of the second chamber ever having a more recent collective mandate than the House of Commons is averted. However, the Draft Bill favours the use of the Single Transferable Vote system for elections to the reformed chamber.⁴⁷³ Though it is likely therefore, that no party would have a majority in the reformed House, this system of proportional representation could indeed render the second chamber more representative of the electorate than the House of Commons which, following the May 2011 referendum, looks

⁴⁶⁷ Brazier, *Constitutional Reform*, fn.354, p.67

⁴⁶⁸ Mclean, I. ‘Mr Asquith’s Unfinished Business’ (1999) 70(4) *Political Quarterly* 382

⁴⁶⁹ *Ibid.* at p.383

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² *House of Lords Reform Draft Bill*, fn.377, p.13 paras.26-7

⁴⁷³ *Ibid.* at pp.113-16, paras.28-47

certain to retain the first-past-the-post system for the foreseeable future.⁴⁷⁴ Significant strain might be placed on the relationship between the two Houses if the upper House were to reflect more accurately the votes cast by the electorate at the general election. However, this threat is eluded by the intention of the Government to stagger elections to the reformed chamber, whereby only a third of members would be elected at each general election.⁴⁷⁵ Thus, although members of the reformed chamber might be able to point to the fact that they were elected by a more representative electoral system, they would also have to accept that only a third of members at any one time had a mandate as recent as that held by members of the House of Commons. These measures go a considerable way to reducing the likelihood that the reformed House of Lords would be able to claim greater democratic legitimacy than the House of Commons, and help to ensure that the lower House would be able to retain its primacy.

A Threat to Commons' Supremacy?

This does not mean, however, that an elected second chamber, whether wholly elected or only predominantly elected, could not pose a considerable threat to the legislative agenda of the lower chamber, nor does it remove entirely the possibility of conflict between the two Houses. Bogdanor suggests that it would be “a fallacy”⁴⁷⁶ to assume that the Parliament Acts of 1911 and 1949 have been the “sole factor in establishing the supremacy of the House of Commons in the constitution.”⁴⁷⁷ He contends that the “comparative lack of influence of the House of Lords depends at least as much upon its lack of legitimacy as upon the statutory restrictions on its powers.”⁴⁷⁸ The powers left to the House of Lords under the Parliament Acts are considerable. Not only has the House been reluctant to make excessive use of the delaying power it retains over primary legislation and the absolute veto over secondary legislation, it has also voluntarily restricted its own powers through the acceptance of the Salisbury Convention. According to Bogdanor’s argument, the House of Lords does not seek to exercise its theoretical powers, not only because it is not regarded as democratically legitimate by the electorate, but also because it does not *perceive itself* to be democratically legitimate.⁴⁷⁹ In any conflict between the two Houses the House of Commons can always point to the upper chambers lack of legitimacy, and the Lords will often (although not always) bow to the will of the elected chamber.

⁴⁷⁴ The referendum held on Thursday 5th May 2011 offered the electorate the opportunity to switch from the first-past-the-post system to the alternative vote system. On a turnout of 42.2%, 67.9% said ‘No’ to AV, while only 32.1% favoured such a change.

⁴⁷⁵ *House of Lords Reform Draft Bill*, fn.377, p.13 para.25

⁴⁷⁶ Bogdanor, V. ‘Reform of the House of Lords: A Sceptical View’ (1999) 70(4) *Political Quarterly* 375, p.376

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

But a wholly elected second chamber constituted under the Single Transferable Vote system could be perceived by the people and by its own members to be both representative and legitimate, and “whatever its theoretical powers, be in a stronger position to challenge the Commons by using powers which hitherto have been in desuetude.”⁴⁸⁰ It would seem reasonable to suppose that a more democratic and representative chamber might be more likely to make use of the powers it retains, and thus more likely to challenge the will of the House of Commons, than is the current House of Lords.

One has only to consider the difference in the behaviour of the House of Lords since the removal of the hereditary peers in 1999. With the expulsion of all but 92 hereditary peers, the membership of the chamber was no longer dominated by individuals who received the right to sit and vote merely by the accident of birth, and was instead comprised of individuals specifically chosen for life peerages in recognition of their experience and expertise, or hereditary peers elected to remain and represent their hereditary colleagues. Further, with the removal of the in-built Conservative bias, a vote to defeat government legislation could not be carried by one party alone. Thus the House has, in the post-1999 era, begun to perceive itself as a more legitimate body, and has been far less hesitant in opposing the will of the House of Commons. As Bogdanor notes, there have been far more “government defeats in the post-1999 period than before, and around 40% of these defeats have been accepted by the government, which has not sought to overturn them in the Commons.”⁴⁸¹ This has been demonstrated further by Russell, who contends that since 1999, not only has the number of defeats risen, but also “peers are backing down less in confrontations with government and established conventions are under pressure.”⁴⁸²

Russell demonstrates that not only was the number of defeats per year inflicted by the House of Lords in both the 2001-5 Parliament and the 2005-10 Parliament “significantly higher than in those preceding”,⁴⁸³ but also the number of bills per Parliament where the House of Lords insisted on its amendments increased significantly. Between 2001 and 2005, for example, there were seventeen instances where the House of Lords insisted on at least one amendment to a bill, including two cases where the Lords insisted four times.⁴⁸⁴ Russell indicates that there is

⁴⁸⁰ *Ibid.*

⁴⁸¹ Bogdanor, *The New British Constitution*, fn.352, p.159

⁴⁸² Russell, M. ‘A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons for Bicameralism’ (2010) 58 *Political Studies* 866, p.877

⁴⁸³ *Ibid.* at p.873

⁴⁸⁴ *Ibid.*

also evidence to suggest that some important conventions may be breaking down.⁴⁸⁵ By convention the House of Lords does not make use of its full veto over secondary legislation, and indeed has not done so since 1968.⁴⁸⁶ However, in 2000 the Lords defeated the secondary legislation on arrangements for the London Mayoral elections, and then used its veto again in 2007 in relation to the Manchester ‘supercasino’.⁴⁸⁷ Some of the conventions relating to primary legislation may also be under pressure. As Russell notes, in 2004 the House “unprecedentedly voted at second reading to send the Constitutional Reform Bill to a specially convened select committee”,⁴⁸⁸ causing costly delay to the bill, and has “twice used a wrecking tactic at second reading to completely block a bill, in 2000 and 2007, both times on limiting access to trial by jury.”⁴⁸⁹

All of this points quite markedly to an increased collective assertiveness in the House of Lords. In a survey of members of the House of Lords in 2007, Russell found that 86% believed that peers’ confidence to demand policy change had increased since reform, while 76% agreed that the 1999 reform had increased the legitimacy of the House of Lords.⁴⁹⁰ This view was shared by a majority of MPs when surveyed in 2004. In fact, 57% of MPs believed the House of Lords to be more legitimate post-reform, an opinion held by 75% of Labour MPs.⁴⁹¹ As Russell notes, there have even been instances of Labour MPs actively encouraging the House of Lords to obstruct the government, such as in 2003 when former Health Secretary Frank Dobson wrote to members of the Lords urging them to oppose foundation hospitals, and in 2005 when former Foreign Secretary Robin Cook claimed that the rebellion of Labour MPs in the Commons had prompted Lords to challenge the government on its anti-terrorist legislation.⁴⁹²

Support for this increased assertiveness is not limited to Westminster. A 2005 poll found that around two-thirds of the public believed that if a bill had little public support, it was justified for the House of Lords to obstruct it.⁴⁹³ As Russell concludes, bolstered by the views of the public, peers appear to be far more comfortable in asserting themselves, even in defiance of the

⁴⁸⁵ *Ibid.* at p.874

⁴⁸⁶ When the House vetoed the Southern Rhodesia Sanctions Order

⁴⁸⁷ Russell, ‘A Stronger Second Chamber?’, fn.482, p.875

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.* at p.876

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

democratically elected chamber.⁴⁹⁴ If an entirely appointed House lacking any democratic mandate perceives itself to be more legitimate, and more able to frustrate the will of the elected House simply by the removal of the hereditary component of its membership, one can only imagine what effect an injection of direct democratic legitimacy will have on the relationship between the two Houses.

It is unsurprising therefore that Bogdanor has questioned whether the Salisbury Convention could be maintained in a wholly or mainly elected chamber.⁴⁹⁵ Peers accept the so-called 'self-denying ordinance' because they appreciate the fact that they lack the democratic legitimacy enjoyed by members of the House of Commons. But one must consider whether elected members of a reformed second chamber would consider themselves bound by its terms when they themselves will enjoy ample democratic legitimacy?

The inherent danger of an elected House, whether entirely elected or merely predominantly elected, is that the increase in democratic legitimacy will result in a greater willingness to challenge the supremacy of the House of Commons and make use of its considerable powers to obstruct the political agenda of the Government more frequently, with the potential for legislative impasse. As Bogdanor notes, "the post-1999 House of Lords, feeling itself to be more legitimate than the pre-1999 House, has used its power much more than its predecessor did."⁴⁹⁶ It is not unreasonable to suggest that members of a wholly or largely elected upper house "might well say that they are more legitimate than their largely appointed predecessors."⁴⁹⁷ The suspensory veto over primary legislation and the absolute veto over secondary legislation could be utilised far more frequently, and as Bogdanor contends, the Salisbury Convention "might well not survive an elected House."⁴⁹⁸ An elected House would be a more legitimate House, which in turn would almost definitely be a stronger House. Even if the primacy of the lower House is maintained, the reformed upper chamber could well be "a more formidable body than the current House of Lords, and a thorn in the side of the government's legislative programme."⁴⁹⁹

However, the difficulties imposed by a more democratically legitimate, and thus more assertive second chamber are not entirely without solution. It is true that, as Scully notes, the legitimacy

⁴⁹⁴ *Ibid.* at p.877. See also Russell, M. and Sciarra, M. *The House of Lords in 2005: A More Representative and Assertive Chamber* (London: Constitution Unit, 2006) and Russell, M. and Sciarra, M. *The House of Lords in 2006: Negotiating a Stronger Second Chamber* (London: Constitution Unit, 2007)

⁴⁹⁵ Bogdanor, *The New British Constitution*, fn.352, p.166

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.* at p.169

conferred by a democratic mandate does tend to “make parliamentarians less abashed about utilising the powers available to them”,⁵⁰⁰ but this need not necessarily provoke a form of constitutional crisis hitherto unknown in the United Kingdom. Second chambers in other democracies are able to exercise greater legislative powers than the House of Lords whilst also possessing the democratic legitimacy conferred by direct election without creating legislative gridlock or a breakdown in the constitutional relationship between the two chambers. In Australia, for example, where the Senate has the power to veto legislation, deadlock provisions exist to enable governments “in the final instance to use their lower house numbers to resolve protracted inter-house disagreements.”⁵⁰¹ In certain circumstances, a double dissolution may be triggered. As Russell explains:

“A bill must be amended or rejected by the Senate, and the Senate’s proposals rejected by the lower house. After this, three months must elapse before the Senate restates its position and this is rejected again in the lower house. At this point the Prime Minister may request that the Governor-General dissolve both chambers and call elections. If the dispute persists after the elections the final decision on the bill may be taken by a joint sitting. In such a sitting lower house members outnumber Senators by two to one; thus the bill is likely to pass.”⁵⁰²

This is, of course, a drastic measure, with serious political consequences. The governing party could find itself forced out of power, not to mention the costs and political upheaval of holding an election. However, the use of a joint committee or joint session of both houses is a common method of adjudication, operating in some form in Japan, Russia, South Africa, India, Switzerland and the USA.⁵⁰³ In France the *Commission Mixte Paritaire* may be called if, after having been considered twice by both chambers, agreement on the bill in question cannot be reached.⁵⁰⁴ The Committee, comprising members from both chambers, must formulate a compromise position, which is then voted on by both houses, though if the proposal fails the lower house has the deciding vote. In Germany the Bundesrat retains an absolute veto on legislation concerning the states. Where there is disagreement over a bill for which Bundesrat approval is essential, the mediation committee – the *Vermittlungsausschuss* – must devise a proposal that is acceptable to the upper house.⁵⁰⁵ The committee may be called twice, but if its

⁵⁰⁰ Scully, R. ‘Dealing with Big Brother: Relations with the First Chamber’ (2001) 7(1) *Journal of Legislative Studies* 93, p.100

⁵⁰¹ Uhr, J. ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, p.7

⁵⁰² Russell, M. *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press 2000), p.141

⁵⁰³ Russell, M ‘Second Chambers Overseas’ (1999) 70(4) *Political Quarterly* 411, p.415

⁵⁰⁴ Russell, *Reforming the House of Lords*, fn.502, p.142

⁵⁰⁵ *Ibid.* at p.143

proposals are rejected a second time the bill falls, creating “a powerful incentive for government and the lower house to compromise.”⁵⁰⁶

Of course in the United Kingdom, in the event of irresolvable dispute between the two chambers, the Commons may (following one year’s delay) bypass the Lords by means of the Parliament Acts. As Phillipson notes, three quarters of bicameral legislatures around the world have wholly or mainly elected second chambers, while very few suffer from legislative gridlock, and those that do, such as Australia and the USA, have systems in which the two houses have equal powers, or no mechanism for one to override the other.⁵⁰⁷ As for the issue of maintaining the Salisbury Convention and other customs governing the relationship between the two Houses, this too could quite readily be resolved. Codification of such conventions was considered by the Joint Committee on Conventions in 2006. The Committee rejected legislation or any other form of codification which would turn conventions into rules on the basis that such a move would remove crucial flexibility.⁵⁰⁸ In the debates which followed, members of both Houses questioned the contention that the relationship and conventions identified by the Committee could apply to a differently composed second chamber, and expressed concern over whether certain conventions could survive in a reformed second chamber which included an elected element.⁵⁰⁹

But as Phillipson notes, should the government wish to further secure the future supremacy of the House of Commons, the maintenance of such conventions could be achieved through some form of codification.⁵¹⁰ For example, should the government wish to secure the future of the Salisbury Convention, it could, as Phillipson suggests, be set out in the preamble to the statute establishing the new chamber, or could be included in the statute itself and rendered “a non-justiciable duty upon the Lords.”⁵¹¹ Either way, it would be unfair to suggest that a more legitimate and thus more assertive second chamber would provoke some form of constitutional crisis to which there is no solution. The codification of important conventions would be a possibility, while the primacy of the House of Commons would be assured by means of the Parliament Acts.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Phillipson, “The greatest quango of them all”, fn.347, p.375

⁵⁰⁸ Joint Committee on Conventions, *Conventions of the UK Parliament* (Report of Session 2005-2006) HL 265

⁵⁰⁹ See *Hansard* HL cols.573-638 (16th January 2007) and *Hansard* HC cols.808-87 (7th January 2007)

⁵¹⁰ Phillipson, “The Greatest Quango of them all”, fn.347, p.375

⁵¹¹ *Ibid.*

However, the Parliament Act procedure is lengthy and allows peers to impose considerable delay to both the legislation in question and indeed the whole legislative programme of the government. Invoking the Parliament Act procedure has long been viewed as a last resort, with governments often preferring to concede amendments and secure a compromise than forcing the bill in question through.⁵¹² The powers of the Lords to amend and delay remain, despite the Parliament Acts, quite considerable, and will no doubt be utilised further by a more legitimately constituted house. This point was acknowledged by the former Liberal Democrat leader, Lord Ashdown of Norton-sub-Hamdon in a recent debate in the House of Lords. When speaking of the provisions of the Draft Bill he accepted that “of course this will change the balance between us and the other chamber.”⁵¹³ This change to the balance of power between the two Houses, Lord Ashdown argued, “will not challenge the *primacy*”⁵¹⁴ of the House of Commons, but it may well “challenge the absolute *supremacy*”⁵¹⁵ of the lower chamber.⁵¹⁶

Quality of the Candidates: A Loss of Expertise?

A fundamental question over a wholly or mainly elected second chamber is who exactly is going to stand for election? It has been noted that a key strength of the current House of Lords is the independent expertise and specialist experience possessed by many of its members, who have achieved great success and recognition in their professional lives. But one must consider whether such people would be likely to seek election to the reformed House. Brazier contends that, “people earning their living, or living and working away from London, are not going to be attracted to Parliament if they have to commit themselves to being there regularly”,⁵¹⁷ while the “paraphernalia of elections and the demands of constituents would scarcely be added incentive.”⁵¹⁸ The Government propose that members of the reformed House will not have constituency duties, as indicated in the White Paper.⁵¹⁹ But as Lord Sewel remarked in debate, “Who is going to stop them? Is a Minister going to be ordered not to reply to letters? Is a

⁵¹² As indeed the Blair government did when seeking the passage of the House of Lords Reform Act in 1999.

⁵¹³ Lord Ashdown of Norton-Sub-Hamdon, *Hansard* HL col.1189 (21st June 2011)

⁵¹⁴ *Ibid.* (emphasis added)

⁵¹⁵ *Ibid.* (emphasis added)

⁵¹⁶ Of course in strictly legal terms, the House of Commons retains supremacy in relation to primary legislation in that it can ultimately have the final say, but does not always have primacy on a day to day basis because the demands of politics mean that it must, on occasion, give way to the House of Lords. The sentiment expressed in Lord Norton’s statement however, (i.e. that the proposals will not alter the position of the House of Commons as the pre-eminent chamber, but will affect the balance of power between the two Houses) is a valid one.

⁵¹⁷ Brazier, *Constitutional Reform*, fn.354, p.70

⁵¹⁸ *Ibid.*

⁵¹⁹ *House of Lords Reform Draft Bill*, fn.377, p.14 para.30 and p.24 para.111

candidate going to stand for election and say, "Vote for me, but I won't help you?"⁵²⁰ Of course it would be possible to stipulate in statute that members of the second chamber are not to have constituency duties, but as Viscount Younger of Leckie stated in debate:

*"Constituents would vote in a senator for reasons beyond the fulfilment of duties in the House of Lords as we know them today. Even if senators were not expected to do so, and even if they stated that laws or conventions did not permit them to do so, they would additionally and rapidly be drawn into regular communication with electors who would seek advice and require answers to problems and concerns in return for their votes..."*⁵²¹

Lipsey suggests that it is "implausible"⁵²² that the House of Lords would still attract the same "talent and experience"⁵²³ if it were elected, since its members (excluding the ex-MPs) are "people who rejected a political career with campaigning at its centre; they are hardly likely to fancy flocking to the hustings now."⁵²⁴ Much of the expertise for which the House is known is a direct consequence of the age of its members, many of whom have had long professional careers. Such people, Lipsey contends, are unlikely to submit themselves to the electoral process.⁵²⁵ As Lipsey remarks, "knocking on doors is hardly a pastime for your average sextarian or septarian."⁵²⁶

Lord Bingham of Cornhill suggests that it is equally difficult to see how a significant independent element could be maintained in a wholly elected House.⁵²⁷ Lord Bingham contends that it is "all but inconceivable"⁵²⁸ that the sorts of people that currently sit on the crossbenches; retired judges, military commanders, scientists and diplomats, lawyers and academics, many of whom are "of mature age"⁵²⁹ and "independent of any political allegiance",⁵³⁰ would "seek or earn the support of any political party or be willing to engage in the contest of an election without it."⁵³¹ The success (or lack thereof) of independent candidates at recent general elections to the House of Commons gives some idea of the likely prospect of a significant independent presence in a wholly elected upper House. There are currently 186 politically-

⁵²⁰ Lord Sewel, *Hansard* HL col.1210 (21st June 2011)

⁵²¹ Viscount Younger of Leckie, *Hansard* HL col.1226 (21st June 2011)

⁵²² Lipsey, 'What the House of Lords is Really For?', fn.378, p.403

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ Lord Bingham of Cornhill, 'The House of Lords: its future?', fn.397, p.268

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

unaffiliated members sitting on the crossbenches of the House of Lords, which accounts for around 24% of those currently entitled to sit and vote.⁵³² The House of Commons on the other hand has just one independent member.⁵³³

This view is shared by Shell, who acknowledges that direct election of “whatever kind, is still unlikely to bring into membership of the second chamber more than a handful of ‘the great and the good’, the kind of people that currently sit on the crossbenches in the present House of Lords.”⁵³⁴ Those who have “achieved distinction in other pursuits”,⁵³⁵ so Archer argues, “are unlikely to devote themselves to electioneering.”⁵³⁶ This view is supported by Mitchell who contends that direct election cannot produce “the kind of members best suited to the hardworking, detailed, revising role of a complimentary chamber”,⁵³⁷ a view corroborated by the interaction of the House of Commons with the Parliamentary Voting and Constituencies Act 2011, as examined in Chapter II. The danger is that the House might instead consist of what King rather bluntly refers to as “a miscellaneous assemblage of party hacks, clapped-out retired or defeated MPs, has-beens, never were’s and never-could-possibly-be’s.”⁵³⁸

Of course it is very difficult to accurately predict the likely candidates for election to a reformed House, and there is little in the way of empirical evidence to which one can refer. However, the Wakeham Commission did conclude that “total reliance on direct election would in practice be incompatible with securing membership for people with relevant experience of and expertise in other walks of life”⁵³⁹ and consequently would be “unlikely to produce members with the ability to speak directly for the voluntary sector, the professions, cultural and sporting interests, and a whole range of other important aspects of British society.”⁵⁴⁰ Direct election would, according to the Wakeham Commission, ensure that members of the second chamber would “almost certainly come from a narrow class of people”⁵⁴¹ and would, in practice, mean that “British

⁵³² Figures taken from the House of Lords website: <<http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party/>> accessed 10th January 2012

⁵³³ Lady Silvia Hermon, formerly an Ulster Unionist member who left the party in protest over its alliance with the Conservatives.

⁵³⁴ Shell, D. ‘The Future of the Second Chamber’ (1999) 70(4) *Political Quarterly* 390, p.394

⁵³⁵ Archer, P. ‘The House of Lords, Past, Present and Future’ (1999) 70(4) *Political Quarterly* 396, p.398

⁵³⁶ *Ibid.*

⁵³⁷ Mitchell, A. ‘Lords and Leg Cos: Two Second Chamber Sagas’ (2008) 14(3) *Journal of Legislative Studies* 251, p.258

⁵³⁸ King, *The British Constitution*, fn.349, p.310

⁵³⁹ Royal Commission on the Reform of the House of Lords, *A House for the Future* Cm 4534 (2000), p.106, para.11.9

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.* at para.11.8

public life was dominated even more than it is already by professional politicians.”⁵⁴² This, according to Puttnam, would “damage and disfigure our political culture”⁵⁴³ and, as Lord Bingham concludes, result in the loss of the House’s “greatest strength and the feature which distinguishes it most sharply from the Commons.”⁵⁴⁴

It is true that, by advocating non-renewable terms and eliminating the prospect of immediate election to the Commons, the Coalition proposals do reduce the likelihood of attracting people who wish to serve their political apprenticeships, “the kind of candidates who typically seek election to the House of Commons, who if successful may try to build a political base in the reformed House of Lords with that intention.”⁵⁴⁵ But given that their career path will be limited, it has been argued, elected members of the reformed second chamber would be unlikely to be of a high calibre precisely *because* they will only serve a single 15-year term in a House with limited powers and no prospect of transferring to the Commons (at least until a period of time has passed). Lipsey remarks that “it used famously to be said that many backbench Labour MPs were those who had failed to get on the General Council of the TUC, failed to get on their Union’s Executive and failed to get on the National Executive of the Labour Party.”⁵⁴⁶ Elected members of the reformed chamber would, he suggests, be those who had “failed to make the Commons, failed to make the European Parliament, failed (if Scots or Welsh) to make the Parliament or Assembly, and failed to get on their local council.”⁵⁴⁷ This argument is supported by Bogdanor who also suggests that, given the likelihood that the ablest people would still wish to stand for the Commons, there is no evidence to suggest that an elected second chamber would “yield a pool of hitherto untapped talent sufficient to generate a house able to perform functions of scrutiny and review effectively.”⁵⁴⁸

The Government suggest that long, non-renewable terms will allow for the same level of independence from party and government that characterises the current membership of the House.⁵⁴⁹ But this argument is also somewhat problematic. Members of a wholly elected House would mostly owe their election to their political parties, who in turn would be sure to select the most loyal and obedient candidates. Bogdanor contends that there is consequently a significant risk of replicating the battle lines and tight party discipline of the House of Commons,

⁵⁴² *Ibid.*

⁵⁴³ Puttnam, D. ‘A Democratic and Expert House’ (1999) 70(4) *Political Quarterly* 368, p.369

⁵⁴⁴ Lord Bingham of Cornhill, ‘The House of Lords: its future?’, fn.380, p.268

⁵⁴⁵ *House of Lords Reform Draft Bill*, fn.377, p.28

⁵⁴⁶ Lipsey, ‘What the House of Lords is Really For?’, fn.378, p.404

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Bogdanor, ‘Reform of the House of Lords: A Sceptical View’ fn.476, p.378

⁵⁴⁹ *House of Lords Reform Draft Bill*, fn.377 p.13 para.24

along with the whipped, adversarial style of politics.⁵⁵⁰ Indeed he suggests that the constraints of party discipline may be even stronger than in the House of Commons if the candidates, as the Government propose, were to be elected in large, multi-member constituencies where personal contact between voter and candidate would be limited.⁵⁵¹

Of course, in answer to this argument it could be pointed out that, in line with the research conducted by Russell, wholly elected second chambers in other comparable democracies do tend to adopt a far more deliberative and considered approach to the scrutiny of legislation than their respective first chambers.⁵⁵² They tend to be, on the whole, less partisan in nature and demonstrate a greater concern for constitutional and human rights issues.⁵⁵³ Thanks to their longer terms of office, the greater average age of their members, and their (usually) weaker powers over legislation when compared with the first chamber, second chambers overseas promote a much less confrontational atmosphere and, as a result, a reduction in party discipline.⁵⁵⁴ Consequently, elected second chambers do still tend to be “mature and deliberative chambers with a less adversarial atmosphere.”⁵⁵⁵

However, as Phillipson contends, this argument fails to take account of the “unique constitutional arrangements and political culture of the United Kingdom.”⁵⁵⁶ Phillipson points to the fact that the United Kingdom’s constitution offers no judicial protection against “unambiguous legislation that abrogates fundamental human rights”,⁵⁵⁷ nor are there any parliamentary safeguards against such legislation. The UK Parliament is therefore unusual amongst other western democracies, many of which have requirements for special majorities or referenda before such legislation can be allowed to pass. This, Phillipson argues, combined with the general political culture of the United Kingdom whereby the “untrammelled ability of the government of the day to respond to events in whatever way it sees fit appears to remain its most valued attribute”,⁵⁵⁸ leaves us with a political order that “represents the principle of unbridled majoritarianism”⁵⁵⁹, making the inclusion of independent members in the upper house “of peculiar, compelling importance.”⁵⁶⁰

⁵⁵⁰ Bogdanor, *The New British Constitution*, fn.352, p.163

⁵⁵¹ *Ibid.*

⁵⁵² Russell, *Reforming the House of Lords*, fn.502, pp.102-4

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.* at p.103

⁵⁵⁶ Phillipson, “The greatest quango of them all”, fn.364, p.370

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.* at p.371

⁵⁵⁹ *Ibid.* at p.370

⁵⁶⁰ *Ibid.*

Of course Phillipson's objection could easily be dealt with by the inclusion of a minority appointed element within the reformed second chamber, as will be discussed later. However there is an additional problem. It has been demonstrated that despite the general trends of deliberation and non-partisanship identified by Russell, direct election to the second chamber can bring with it tight party control over both the electoral process and the way in which members of the second chamber carry out their functions. Research conducted by Farrell and McAllister into the Australian Senate – for many the archetypal elected second chamber - confirms the strong discipline that the major parties in Australia exercise over the Senate, particularly through domination of the electoral process and the selection of increasingly party-oriented candidates.⁵⁶¹ They conclude that the pivotal consideration for Australian Senators when exercising their functions is party affiliation, despite the Senate's perceived origins as a 'State's house'.⁵⁶² In fact, Senate candidates were found to be more party-oriented than their lower house counterparts, which, as Farrell and McAllister conclude, has serious implications, both in terms of the ability of the second chamber to amend and oppose government legislation, and the ability of Parliament as a whole to act as a check on the executive.⁵⁶³ It is quite possible that this situation could be reproduced in the United Kingdom's reformed second chamber.

If we return to Lijphart's criteria, as revised by Russell, the inherent problem with an entirely elected chamber is that it could tip the balance too far in favour of legitimacy at the expense of distinctiveness. Phillipson contends that such a move would strike a bad balance between Russell's criteria since, though such a House would have very strong legitimacy, its distinctiveness would be "almost entirely lost."⁵⁶⁴ The use of a proportional electoral system such as the Single Transferable Vote, along with staggered elections would ensure that the reformed House would not merely be a duplicate of the House of Commons in terms of political balance, but it could become a duplicate in terms of character and ethos. The dangers involved with a wholly elected chamber are twofold. Not only would direct election to the upper house risk the loss of the deliberative, non-partisan atmosphere of the chamber and the relative independence of its members from party control, but it would also risk the loss of the distinctive expertise and experience that characterises the present chamber.

⁵⁶¹ Farrell, D.M. and McAllister, I. 'Legislative Recruitment to Upper Houses: The Australian Senate and House of Representatives Compared' (1995) 1(2) *Journal of Legislative Studies* 243

⁵⁶² *Ibid.* at p.258

⁵⁶³ *Ibid.* at p.259

⁵⁶⁴ Phillipson, "The greatest quango of them all", fn.347, p.368

It is not possible to conclusively prove that either of these two dangers would actually be realised should the chamber become wholly elected, but it is clear that a significant bulk of academic opinion consider it to be a real and significant possibility. Phillipson concludes that, in democratising the House of Lords, we could find ourselves with “an elected chamber full of whipped professional politicians nodding legislation through without the searching, independent-minded and detailed scrutiny which the current House rightly prides itself on.”⁵⁶⁵ The chosen method of composition for the second chamber, so Phillipson argues, must guarantee the presence of members who will instil a “particularly strong culture of mature, objective, and long-termist scrutiny of the wisdom and necessity of any changes, in a chamber insulated from to an extent from the short-term political considerations which generally drive governments and political parties.”⁵⁶⁶ It seems unlikely that this could be realised through direct election alone.

The Problem with a Mixed House

Of course, although a wholly elected House is still a distinct possibility, the proposals set out in the Draft Bill favour a hybrid House, with 80% of its members directly elected, but retaining a 20% appointed element. This has a number of advantages over an entirely elected House. The inclusion of an appointed element will ensure that a degree of independent expertise is retained in the chamber, and will mean the sorts of individuals that currently occupy the crossbenches would take a fifth of the seats in the reformed House. Further, the fact that only 80% of the House would be elected would, along with the lengthy terms in office and staggered elections, go some way to ensuring that the reformed House would not consider itself to be more democratic and representative than the wholly elected House of Commons, ensuring the continued primacy of the lower House.

However, many of the criticisms levelled at the notion of a wholly elected chamber apply with equal force to a mixed House. It was noted above that a directly elected second chamber would be likely to develop a heightened sense of its own legitimacy, and prove to be a greater challenge to the House of Commons, much as the current House became more assertive with the removal of the hereditary peers in 1999. There seems to be little reason to believe that the inclusion of a 20% appointed element would make the reformed House much less of an obstacle to the government’s legislative programme. The problem of finding suitable candidates to stand for elections to the reformed House is also just as much an issue for the mixed House as it is for

⁵⁶⁵ *Ibid.* at p.353

⁵⁶⁶ *Ibid.* at p.371

the wholly elected House, and the arguments voiced above relating to the possible loss of expertise and the danger of more partisan House apply with equal weight. It was demonstrated earlier in this chapter that only 27% of members of the present House have a primary or secondary background in representative politics. Thus 73% of members have some form of experience or expertise in a profession or subject area other than professional politics. The retention of a 20% independently appointed element in a reformed House does not therefore escape the loss of expertise argument. However, there are a number of further difficulties posed by a hybrid House.

Varying Degrees of Legitimacy

One obstacle to the Government's proposals for a mixed House has been voiced by Vernon Bogdanor:

"A mixed chamber would, by definition, contain members enjoying different degrees of democratic legitimacy. The danger then is that any vote carried by a group with a lesser degree of democratic legitimacy will be seen as less valid than a vote carried by a group with greater democratic legitimacy... In a new second chamber composed of an elected element and a nominated element, votes carried by the latter would be regarded as carrying less weight than those carried by former. Who elected you? would be the cry directed at the hapless nominated members whenever they carried a vote against their elected colleagues."⁵⁶⁷

Bogdanor's prediction is, as Phillipson argues, unlikely to occur in reality since, if the elected members constitute a majority in the House, the appointed element would rarely, if ever, be able to defeat the elected members.⁵⁶⁸ Indeed, the coalition proposals favour the inclusion of 60 appointed members, who of course, could not alone defeat the 240 elected members. But although a majority of elected members might mean that the nominated members could never *single-handedly* defeat the elected members, the problem does not disappear. This was observed by Lord Butler: "let us envisage that on a controversial issue the government of the day and the opposition parties are in conflict, but one side has a small majority, which is overturned by the votes of the minority of appointed members. If we have accepted election as a necessary precondition for legitimacy, where is legitimacy then?"⁵⁶⁹ If the Government believe that a direct

⁵⁶⁷ Bogdanor, 'Reform of the House of Lords: A Sceptical View', fn.476, p.380

⁵⁶⁸ Phillipson, "The greatest quango of them all", fn.347, p.361

⁵⁶⁹ Lord Butler, *Hansard* HL col.770. (21st January 2003), cited in Phillipson, "The greatest quango of them all", fn.347, p.361

democratic mandate from the people is required for the House to possess the requisite level of legitimacy, then it is quite possible that a vote carried by the appointed element could be viewed as an illegitimate vote. However, as Russell has suggested, since there are few examples of second chambers with a mixed composition operating overseas, it is “difficult to predict the dynamics of a house with mixed membership.”⁵⁷⁰ As such, any predictions as to the likely relationship between appointed and elected members in a reformed house are little more than speculation. Further, as Phillipson notes, “if a mixed House had been approved by both Houses of Parliament on a free vote, and so had received all-party endorsement, it would be difficult for elected members to carp at the presence of the non-elected members which Parliament itself had agreed should be there.”⁵⁷¹ Nonetheless, since we have no evidence on which to base an accurate prediction, divisions over the perceived legitimacy of non-elected members remains a possibility.

The Strathclyde Paradox

A fundamental objection to a mixed House can be seen as an extension of the so-called ‘Strathclyde paradox’, named after the then Leader of the Conservative Party in the Lords and current Leader of the House, Lord Strathclyde. The argument, in its simplest form, goes as follows: “If election is so good, why should the public not elect *all* our political members? If it is bad, why elect any at all?”⁵⁷² Phillipson dismisses this argument as a piece of “school-boy logic”⁵⁷³ since it “rests upon the false premise that electing members is straightforwardly either good or bad.”⁵⁷⁴ In fact, election has both advantages and disadvantages. Election is positive, so Phillipson argues, in that it provides legitimacy for the House to assert itself against the House of Commons,⁵⁷⁵ but one might not want all of the chambers’ members to be elected, since the reformed House should also have a distinct composition from that of the Commons, be relatively independent from party control, and have the necessary expertise to carry out its work.⁵⁷⁶

But there is some strength in Lord Strathclyde’s argument. As noted earlier, in order to determine the most desirable method of composition for the House, it is important to bear in mind the functions it is to perform. If the primary task of the reformed House is to be the

⁵⁷⁰ Russell, ‘Second Chambers Overseas’, fn.503, p.417

⁵⁷¹ Phillipson, “‘The greatest quango of them all”, fn.347, p.360

⁵⁷² Lord Strathclyde, *Hansard* HL col.830 (22nd January 2003)

⁵⁷³ Phillipson, “‘The greatest quango of them all”, fn.347, p.359

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.* at p.360

⁵⁷⁶ *Ibid.*

detailed scrutiny and revision for which the current House is often praised, then it would logically follow that the composition of the House should be tailored to fit that purpose. The inclusion of an appointed element in the coalition proposals appears to resemble an acknowledgement on the part of the Government that elected members alone might not be best placed to perform the role currently assigned to the House of Lords, and that the presence of an appointed element is desirable to ensure that the House is equipped to continue with its scrutinising and revising functions. This is evident from the following statement in the coalition White Paper:

“Many people, however, value the contribution to Parliament from independent, non party-political voices. The wisdom and experience of people who are preeminent in their field and have done great things can be of benefit to Parliament’s consideration of legislation. These people would not consider seeking elected office and would not see themselves as politicians.”⁵⁷⁷

As Phillipson acknowledges, a wholly elected House would “preclude the appointment of members who would add expertise, independence, and thus distinctive value to the House.”⁵⁷⁸ But if independent, expert members are the best people to perform the functions of the House of Lords, why include any elected members at all? The obvious reply would be that, as previously discussed, while the membership of an all-appointed chamber is markedly different from that of the Commons, fulfilling Russell’s criterion of *distinct composition*, it lacks sufficient democratic *legitimacy* to fully utilise its powers. The fact that no one party has a majority in the House of Lords and the presence of the independent crossbench element, along with the experience and expertise of both politically aligned and non-aligned members, provides the chamber with ample distinctiveness, but with no elected members, so it is argued, the House is prevented from having sufficient democratic legitimacy to assert itself against the will of the House of Commons. Such a House apparently fails Russell’s final requirement of *perceived legitimacy*. But is this actually the case?

It has been argued that, given the scrutinising and revising functions attributed to the House, there is in fact another route to legitimacy that does not involve direct election. This argument suggests that, while appointed members may not have the legitimacy that stems from a direct democratic mandate, they do have another form of legitimacy; “the legitimacy of expertise, of

⁵⁷⁷ *House of Lords Reform Draft Bill*, fn.377, p.12, para.14

⁵⁷⁸ Phillipson, ““The greatest quango of them all””, fn.347, p.360

experience and...even the legitimacy of age”,⁵⁷⁹ all of which are “not only useful in an amending and examining Chamber, but essential if the role assigned to it is to be discharged effectively.”⁵⁸⁰ As Lord Lang recently contended, “democratic legitimacy is not bestowed simply by ticking the directly elected box; it is achieved by time, by custom and practice, by function, by performance and popular acceptance.”⁵⁸¹

This argument was utilised by a number of peers in opposition to the Government’s Draft Bill in recent debates on Lords reform. Baroness Boothroyd contended that, while members of the House are not directly elected, “nor are the monarchy, the judiciary, the chiefs of the armed services, the Prime Minister, his deputy Mr Clegg or – let us face it – the Cabinet directly accountable.”⁵⁸² The “democratic imperative”⁵⁸³ of direct election, so Lord Lawson contended, “no more applies to the method of selecting members of the second chamber in this country than it does to selecting either the judiciary or, indeed, the very important members of the Monetary Policy Committee of the independent Bank of England, whose legitimacy is not in dispute.”⁵⁸⁴ Indeed, “newspaper proprietors and editors, and even columnists or TV commentators”⁵⁸⁵ have no democratic legitimacy and yet are, Lord Reay argued, “important players in our democracy.”⁵⁸⁶ Appointed members, Lord Howarth argued, derive their legitimacy from a similar source:

*“Elections are not the only source of legitimacy. Judges, academics and faith leaders have legitimacy. The legitimacy of the House of Lords derives from the quality of the advice that it offers through debates, amendments, the work of Select Committees and so forth. The quality of that advice derives from the expert knowledge and experience of the Members of the House...”*⁵⁸⁷

This form of legitimacy, so some peers argue, is sufficient to enable the House to carry out the functions of revision and scrutiny which it is expected to perform. This is precisely the argument made by Lipsey, who rests his argument on the idea that “the kind of things the Lords

⁵⁷⁹ Viscount Tenby, *Hansard* HL col.781 (22nd January 2003), cited in Phillipson, “The greatest quango of them all”, fn.347, p.363. This concept is explored extensively in Kelso, A. ‘Reforming the House of Lords: Navigating Representation, Democracy and Legitimacy at Westminster’ (2006) 59(4) *Parliamentary Affairs* 563

⁵⁸⁰ *Ibid.*

⁵⁸¹ Lord Lang of Monkton, *Hansard* HL col.1278 (22nd June 2011)

⁵⁸² Baroness Boothroyd, *Hansard* HL col.1173 (21st June 2011)

⁵⁸³ Lord Lawson of Blaby, *Hansard* HL col.1203 (21st June 2011)

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Lord Reay, *Hansard* HL col.1247 (21st June 2011)

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Lord Howarth of Newport, *Hansard* HL col.1319 (22nd June 2011)

revises are not the great and political issues underlying bills.”⁵⁸⁸ Rather, they are the “fine detail, in which neither the electorate nor its representatives in the Commons take much interest.”⁵⁸⁹ As Lord Howarth argued in debate:

*“The House of Lords is no more than an advisory chamber. Its role is revision and scrutiny, which is what the Government want it to be. Of course there are, from time to time, impassioned and prolonged debates between the two Houses...but ultimately the appointed House of Lords always defers to the democratic authority of the elected House of Commons.”*⁵⁹⁰

Such arguments are founded on the idea that, because the House of Lords is not the legislative coequal of the House of Commons, it can only legislate where it persuades the Commons to agree with it, and cannot in the end prevail against the elected House. If one were to accept this as a true reflection of the role currently played by the House of Lords, one might indeed argue that the sort of direct legitimacy that is derived only from election is not required for such a task. Of course, if the Government had stated an intention to place the upper House on a more equal footing with the House of Commons, if we were to expect the reformed House to challenge fundamental policy decisions and frustrate the legislative agenda of the lower House in a way hitherto unseen, then the argument for direct democratic legitimacy would indeed be stronger. But the Draft Bill seems to suggest that what is expected of the second chamber is that it continue to perform the same role that it does at present, carefully revising and scrutinising the fine detail of legislation, occasionally requiring the Commons to think again, but ultimately bowing to the will of the elected House. Would it not be fair to argue that a reduced form of legitimacy is sufficient for such a purpose? Appointed members might rely on their wisdom, experience and expertise to rationalise their existence, since these are the essential characteristics required to perform the functions of revision and scrutiny.

Lipsey contends that the legitimacy of expertise could be quite enough to enable the House to carry out its revising function, and for its members to act as a check on the actions of the Government. He suggests that, “because the Lords do not owe their elevation to party alone, they will be less inclined to pull their punches in their party’s interest.”⁵⁹¹ Further, because they tend to “come from dense networks of professional connections, Lords will be tipped off about matters that may escape the Commons.”⁵⁹² Lipsey continues:

⁵⁸⁸ Lipsey, “What the House of Lords is Really For?”, fn.378, p.403

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Lord Howarth of Newport, fn.587

⁵⁹¹ Lipsey, ‘What the House of Lords is Really For?’, fn.378, p.403

⁵⁹² *Ibid.*

“If you were a health minister, whose questioning would you fear – that of the member for Sarum South or Robert Winston, a world expert on fertility? If culture, the member for Puddletown East, or David Puttnam and Melvyn Bragg? The weight of the critics adds weight to the criticism, and ensures that ministers and the government take it seriously.”⁵⁹³

Phillipson rejects this argument on the basis that it seeks to “deliberately misstate the role of the House.”⁵⁹⁴ He rejects the comparison with the judiciary and other regulatory bodies on the basis that, while judges, for example, are unelected, and thus derive legitimacy through other means: “independence, integrity, expertise in the law”,⁵⁹⁵ the comparison, so Phillipson argues, fails to take account of the inherent differences between the role of the judiciary and the role of a chamber of Parliament:

“in comparison with the legally unlimited power wielded by Parliament, the judicial branch exercises only a relatively narrow band of power, which is ultimately either given to it by Parliament (in the case of statutory interpretation) or confined to issues that Parliament has acquiesced in leaving in judicial hands (the common law)... In making their decisions, judges are not called upon to exercise their own unconfined judgement, still less their party-political views. They are not asked to decide, de novo, what they think desirable for society. The House of Lords as a legislative body is, precisely, asked to do this... ”⁵⁹⁶

Phillipson asserts that the characterisation of the House of Lords as a form of “advisory Council of wise men and women, to which the Commons listens if it wishes to but can readily ignore”,⁵⁹⁷ is a “blatant misrepresentation of the reality of relationships between the Houses.”⁵⁹⁸ It is certainly true that such a characterisation is difficult to reconcile with statistics on government defeats in the Lords. In the 2008-9 session, the government was defeated in 25 out of 89 divisions in the House of Lords (28%), while in 2009-10 the government lost 14 out of 43 divisions (33%).⁵⁹⁹ Though it is true that the House of Lords can be legally overridden by virtue of the Parliament Acts and, in practice, does often give way when the Commons reject its amendments, in many cases “they *do not* back down upon such disagreement and pressure of time then forces the government to accept the Lords’ amendments.”⁶⁰⁰ As Baroness Quinn put it

⁵⁹³ *Ibid.*

⁵⁹⁴ Phillipson, “The greatest quango of them all”, fn.347, p.365

⁵⁹⁵ *Ibid.* at p.364

⁵⁹⁶ *Ibid.* at p.365

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ McGuinness, F. and Rutherford, T. *House of Lords Statistics*, Standard Note 3900, House of Commons Library (26th April 2011)

⁶⁰⁰ Phillipson, “The greatest quango of them all”, fn.347, p.366.

to the House, if the chamber were a “purely advisory body”,⁶⁰¹ the question of legitimacy might be less problematic, but in practice the House not only amends legislation but has, on occasion, “stopped legislation in its tracks.” The House of Lords thus exercises “*direct political power*”,⁶⁰² the legitimacy for which, so Phillipson contends, can be derived only from election.⁶⁰³

It is not difficult, however, to find examples of unelected bodies exercising such power in other comparable democracies. As Oliver points out, in many countries, other bodies outside of Parliament have the right to refuse to consent to legislation, or even set aside legislation passed by Parliament.⁶⁰⁴ For example, Supreme Courts in many countries have the power to strike down or disapply legislation which they deem to be unconstitutional. Constitutional councils such as the French *Council d'Etat* may pronounce on the constitutionality or workability of legislation, thereby influencing the validity of laws.⁶⁰⁵ Given that France is an example of a country with an elected second chamber one might, as Oliver does, infer that such elected bodies are not suited to the performance of these functions, thereby necessitating the presence of additional institutions which must contribute to the legislative process.⁶⁰⁶ As Oliver observes, “consent-refusing activity carried out by such independent, unelected, expert bodies is a central part of the democratic arrangements in those countries: democracy there is not taken to mean that elected legislators in the Parliament are entitled to pass, on bare majorities of those present and voting, any law they wish, regardless of its compatibility with the constitution, human rights or international obligations.”⁶⁰⁷ But thanks to the prevalence of the Diceyan doctrine of Parliamentary sovereignty in the United Kingdom, it would be impossible for external institutions to fulfil such a role in this country. At the root of the problem, so Oliver argues, is the way in which we conceptualise second chambers.⁶⁰⁸

This theory does offer a partial response to Phillipson’s argument, but of course, it has to be recognised that constitutional courts such as the *Council d'Etat* may only strike down or refuse to assent to legislation on the basis that it fails to comply with the constitution. The powers possessed by the House of Lords are far broader, since they may oppose the government and force change to legislation on any political issue at all.

⁶⁰¹ Baroness Quinn, *Hansard* HL col.1231 (21st June 2011)

⁶⁰² Phillipson, “The greatest quango of them all”, fn.347, p.366

⁶⁰³ *Ibid.*

⁶⁰⁴ Oliver, D. ‘The Modernization of the United Kingdom Parliament?’ in Jowell, J. and Oliver, D. *The Changing Constitution* (6th edn Oxford: Oxford University Press, 2007), p.176

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

But perhaps the problem is not the way in which we conceptualise second chambers, but the way in which we view the concept of legitimacy. As Russell has argued, a dichotomous view of legitimacy, whereby unelected chambers are considered illegitimate and elected chambers are legitimate is “too simplistic.”⁶⁰⁹ As previously discussed, there has been, since 1999, a noticeable change in the behaviour of the House of Lords whereby it has proven more willing to assert itself against the will of the elected lower House. Furthermore, it has been noted that the House of Lords is now perceived by members of both chambers of Parliament to be more legitimate than it was, and enjoys a degree of public support despite its unelected basis.

This can be seen also in the way in which governments now attempt to anticipate and accommodate the opinions of the Lords. Russell outlines the way in which the government’s own procedures now “explicitly anticipate and seek to avoid conflict with the Lords”⁶¹⁰ by requiring ministers to provide the Cabinet’s Legislative Programme Committee with a ‘Lord’s Handling Strategy’ outlining plans for dealing with any likely points of contention in the upper House before a proposed bill can be approved for introduction to Parliament.⁶¹¹ Civil servants are now “encouraged to make early contact with the Government Chief Whip’s staff in the Lords to devise a joint strategy”,⁶¹² which may involve “holding concessions in reserve for discussion in the Lords.”⁶¹³ As Russell notes, this procedure can, “*in extremis*”,⁶¹⁴ mean that “if a minister cannot convince colleagues that a measure will be passed by the upper house, it may even fail to be introduced to Parliament.”⁶¹⁵ In addition, ministers now often hold open consultation meetings in the Lords on bills before they are formally debated.⁶¹⁶ The fact that the government has “changed its internal process for approving bills to anticipate the Lords’ response, and is facilitating early discussion with peers to avoid legislative conflict”⁶¹⁷ points not only to an increase in the House’s assertiveness, but also to a heightened sense of its legitimacy, not only in the eyes of its own members, but also in those of the government.

Phillipson argues, however, that although even a very small increase in the House’s legitimacy can result in a more assertive stance, the fact remains that “without a strong democratic mandate, and thus an arguable claim to legitimacy”,⁶¹⁸ the House is likely to defer to the

⁶⁰⁹ Russell, ‘A Stronger Second Chamber?’, fn.482, p.882

⁶¹⁰ *Ibid.* at p.879

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.* at p.880

⁶¹⁷ *Ibid.*

⁶¹⁸ Phillipson, “The greatest quango of them all”, fn.347, p.379.

Commons in the long run.⁶¹⁹ However, Russell and Sciara's studies of the House's behaviour over recent years demonstrate that not only is the frequency and severity of government defeats in the House of Lords "on an upward trajectory",⁶²⁰ the defeats in question are also having a lasting policy impact.⁶²¹ Indeed, "far from being routinely reversed in the House of Commons, many Lords defeats are substantially accepted. Furthermore many of these are on key policy issues."⁶²² Their results show that defeats in the Lords do often 'stick', and that it would be incorrect to suggest that the vast majority are overturned in the House of Commons. Russell and Sciara find that, in fact, roughly six out of ten Lords defeats result in some kind of lasting policy change, and around four out of ten could be considered to be resolved more in the Lords' favour than that of the government.⁶²³ Of course, defeats in the House are merely "the most visible sign"⁶²⁴ of the chamber's impact on government policy. As Russell and Sciara conclude, "it is well established that proposals made by non-government actors in the Lords are often adopted by government by agreement, often after some degree of compromise,"⁶²⁵ as was witnessed in Chapter II in relation to the Parliamentary Voting System and Constituencies Act. But if the House is able to "exert influence through defeats, with government unable or unwilling to overturn its policy interventions, its negotiating power is clearly relatively strong."⁶²⁶

It would seem then that "despite its continuing unelected basis, the House of Lords has a growing role in the policy process."⁶²⁷ Furthermore, support for the House in utilising its still considerable powers has clearly strengthened since the removal of the bulk of hereditary peers in 1999. As Russell's research shows:

*"despite the continued unelected basis of the House of Lords there is significant support for its right to block government legislation, even amongst Labour MPs. A comfortable majority of the public support the Lords' right to block measures that are unpopular, or on which Labour MPs have rebelled. In making this judgement the public show no interest in whether the measures were in the government's manifesto."*⁶²⁸

⁶¹⁹ *Ibid.*

⁶²⁰ Russell and Sciara, 'Why Does the Government get Defeated in the House of Lords?', fn.437, p.300

⁶²¹ Russell, M. and Sciara, M. 'The Policy Impact of Defeats in the House of Lords' (2010) 10(4) *British Journal of Politics and International Relations* 571

⁶²² *Ibid.* at p.571

⁶²³ *Ibid.* at p.574

⁶²⁴ *Ibid.* at p.586

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*

⁶²⁷ Russell and Sciara, 'Why Does the Government get defeated in the House of Lords?', fn.437, p.319

⁶²⁸ Russell, M. *Views from Peers, MPs and the Public on the Legitimacy and Powers of the House of Lords: Paper to a Seminar in the Moses Room, House of Lords* (12th December 2005) (London: Constitution Unit), p.1

It would appear therefore that the House of Lords is now perceived by members of both chambers of Parliament, as well as by members of the public, as a more legitimate chamber than it was prior to 1999, regardless of its unelected basis. As Russell argues, though the House of Lords may not “equal the legitimacy of the Commons”,⁶²⁹ and continues to “use its powers with caution”,⁶³⁰ it does have certain important features that are lacking in the Commons.⁶³¹ The House of Lords has a “more proportional party balance”,⁶³² in contrast to the inherent over-representation of the governing party in the House of Commons, and benefits from the presence of numerous “‘experts’ and independent members”⁶³³ within its membership.⁶³⁴ As Russell argues, “in this ‘anti-political’ age, interventions by such a chamber to constrain single-party governments will often have public support.”⁶³⁵ Russell concludes therefore that legitimacy is better understood as a continuous rather than a dichotomous variable, in that “it is a matter of more or less legitimacy, not of absolutes.”⁶³⁶ But she also goes further to state that “legitimacy can be influenced by other factors aside from democratic election”,⁶³⁷ which may include party balance, or the presence of independent, expert members.⁶³⁸

As noted at the outset, Russell’s requirement of *perceived legitimacy* requires that the second chamber be seen to have enough legitimacy, and carry the appropriate level of public support, to properly utilise its powers.⁶³⁹ Since 1999, the House of Lords has come to perceive itself as a more legitimate body, and has not only asserted itself against the government with increasing frequency, but has found itself in a position where its ability to defeat the government has a lasting and meaningful impact on government policy. It would seem that Shell’s characterisation of the United Kingdom as a system of “de facto unicameralism”⁶⁴⁰ (referenced in Chapter I) is in fact quite inaccurate. This is attributable not only to the removal of the hereditary peers, and with them, the inbuilt Conservative bias of the House, but also to the fact that this has led to the creation of a more proportional party balance which, rather ironically, reflects the share of general election votes more closely than the House of Commons.

⁶²⁹ Russell, ‘A Stronger Second Chamber?’, fn.482, p.882

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ Russell, *Reforming the House of Lords*, fn.502, p.254

⁶⁴⁰ Shell, D. ‘The Future of the Second Chamber’ (2004) 57(4) *Parliamentary Affairs* 852 p.854

The continued presence of independent, expert members has also contributed to the House's perception of its own legitimacy. Phillipson is certainly correct in that the House of Lords does not possess the legitimacy of the House of Commons, the legitimacy that stems only from direct election. But this does not mean that the House is, as a consequence, illegitimate *per se*. Rather, it is submitted, the House of Lords possesses a *different* form of legitimacy, a *lesser* legitimacy, but one which has allowed the House to flex its political muscles with increasing frequency and, in recent years, have a growing influence in the legislative process. This legitimacy, it would appear, is sufficient to satisfy the public and many members of the lower House, who also recognise the increase in the House's legitimacy, and support the House in its interventions.

Strengthening the House's Legitimacy

This perceived legitimacy, it is submitted, could easily be strengthened further without the introduction of directly elected members and without the implementation of the sort of far-reaching reform currently contemplated by the coalition Government. The most indefensible aspect of the current membership of the House of Lords is, it is submitted, not the fact that members of the House are appointed, but rather *the way in which* they are appointed. The power of the Prime Minister and, to a lesser extent, party leaders, over the composition of the chamber is highly problematic for the House's perceived legitimacy. Parallels can be drawn here between our own House of Lords and the Canadian Senate. As Docherty observes, the Canadian Senate remains the "whipping post of democratic institutions"⁶⁴¹ not just because it is appointed, or because it does a poor job of representing regional interests, but also because it is viewed by many as a kind of "legislative hall of shame."⁶⁴² The Senate is, as Docherty notes, "a Valhalla for retiring politicians."⁶⁴³ MPs retire there while their party is in power, while appointment also serves as a "useful reward"⁶⁴⁴ for the party faithful, "those who perform loyally in the trenches."⁶⁴⁵ What Docherty describes as the "*carte blanche* power to appoint"⁶⁴⁶ serves as a useful political tool for the Prime Minister to reward the efforts of those who "toil behind the scenes",⁶⁴⁷ and ensures that the Senate remains a chamber of "former lower house

⁶⁴¹ Docherty, 'The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About' (2002) 8(3) *Journal of Legislative Studies* 27, p.38

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.* at p.42

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.* at p.30

⁶⁴⁷ *Ibid.* at p.31

legislators and partisan loyalists.”⁶⁴⁸As long as it remains such, Docherty predicts, “there is little to suggest it will improve its public image.”⁶⁴⁹

Does this not provide a useful lesson for the United Kingdom? As Russell argues, “the Canadian experience serves to underline the importance which fair and transparent appointment procedures could have in gaining credibility for an appointed house.”⁶⁵⁰ As she points out, there is no tradition in Canada of making appointments to the Senate from outside of the governing party, and seats are “almost invariably given as a prize for long party service.”⁶⁵¹ Many Senators have formerly been party organisers, fundraisers or donors, and Senate seats are frequently left vacant for long periods to encourage competition amongst candidates that they may work harder or commit more funds to the party.⁶⁵² Russell suggests that the United Kingdom does not suffer from the same use of political patronage by Prime Ministers for purely political ends that has plagued appointments to the Canadian Senate, and notes that “this form of behaviour by a British Prime Minister would be seen as quite unacceptable even within our existing conventions.”⁶⁵³ Though many former members of our lower House do find themselves ennobled and continuing their contribution to Parliament from the red benches of the House of Lords, the appointment of members of other political persuasions, as well as independent experts to sit on the crossbenches, has remained customary. Nonetheless, we have seen only recently from the current Prime Minister how political patronage can be used in an unprecedented way to fundamentally alter the party balance in the upper house,⁶⁵⁴ and we need only recall the ‘cash for honours scandal’ of 2006-7 for evidence the inherent dangers of unbridled patronage in the United Kingdom.

The use of Prime Ministerial patronage in Canada has only added to the “generally low esteem in which the Canadian Senate is held.”⁶⁵⁵ As Russell concludes, the “perceived abuses of the appointment system for cynical political ends”⁶⁵⁶ has led to a fundamental sense of disdain amongst the Canadian public, and to an attitude in the press which “at best ignores, and at worst ridicules the Senate.”⁶⁵⁷ This must surely serve as a stark warning to the United Kingdom of the

⁶⁴⁸ *Ibid.* at p.33

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Russell, M. *An Appointed Upper House: Lessons from Canada* (London: Constitution Unit, 1998), p.10

⁶⁵¹ *Ibid.* at p.5

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.* at p.10

⁶⁵⁴ See Russell, M. *House Full: Time to get a grip on Lords Appointments* (London: Constitution Unit, 2011)

⁶⁵⁵ Russell, *An Appointed Upper House*, fn.650, p.5

⁶⁵⁶ *Ibid.* at p.6

⁶⁵⁷ *Ibid.*

dangers of continuing with Prime Ministerial appointment, be it in a wholly appointed House, or, as the Government propose, a House retaining an appointed element.

The Government appears to have acknowledged the importance of ending Prime Ministerial patronage, and introducing a more open and fair appointments system, should the reformed House retain an appointed element. The White Paper proposes the establishment of an Appointments Commission on a statutory basis to make recommendations for appointment to the reformed House.⁶⁵⁸ The Commission would be accountable to Parliament, and its work would be overseen by the Joint Committee on the House of Lords Appointment Commission.⁶⁵⁹ It would be a body corporate, and all of its powers would be set in statute, but would have responsibility for setting its own criteria and process for appointment.⁶⁶⁰ Commissioners would be appointed by the Queen and would serve long, non-renewable terms.⁶⁶¹ Ministers and members of the Commons would be barred from membership of the Commission, but there would be no ban on former or current members of the House of Lords from serving as Commissioners.⁶⁶²

The creation of such a body would clearly add some necessary impartiality and transparency to the appointment of the non-elected element in the reformed upper House. But if the House were to remain an entirely appointed body, the creation of a Statutory Appointments Commission could add to the already growing sense of legitimacy in the current chamber. If legislation were passed to create an independent Appointments Commission on a statutory footing, which would control all appointments to the House of Lords, the unbridled control of political leaders over the membership of the second chamber would be entirely removed. Thus one of the most offensive aspects of the appointments process would be brought to an end, and *all* members, without exception, would genuinely be appointed on their own merits, with no scope for the misuse of patronage that engulfed the political classes in 2006 and 2007. Such a change could also remedy the deficiencies in the breadth of expertise and experience in the House of Lords previously identified in this chapter. It has been noted that, while the House of Lords, as presently constituted, can boast many members with specialist knowledge and experience in a range of subject areas, the balance between different professional backgrounds and subject areas is not perfect, and some areas are “less well represented.”⁶⁶³ Such deficiencies could be

⁶⁵⁸ *House of Lords Reform Draft Bill*, fn.377, p.18 paras.55-66

⁶⁵⁹ *Ibid.* at para.56

⁶⁶⁰ *Ibid.* at para.57

⁶⁶¹ *Ibid.* at paras.60-61

⁶⁶² *Ibid.* at paras.61-62

⁶⁶³ Russell and Benton, fn.385, p.5

remedied should the power to appoint members to the upper House be transferred to a Statutory Appointments Commission.

Such a body could be tasked with identifying areas in which the chamber lacks sufficient expertise or professional areas which are under-represented in the House, and seek to make appointments which would broaden the expertise of the chamber and reflect more accurately the diversity of the British people, much as the current House of Lords Appointments Commission has sought to do in recent years when recommending individuals for appointment to the crossbenches.⁶⁶⁴ By bringing an end to Prime Ministerial patronage, a Statutory Appointments Commission could ensure that all members, without exception, are appointed on merit. Specialist knowledge of or experience in a particular field could become a prerequisite of membership of the second chamber. The current over-representation of those with a professional background in representative politics could be ended. Peerages could of course still be offered to former members of the lower House, but not necessarily in the same quantity, and only where the individual in question has expertise or experience deemed valuable to House, never merely in recognition of long or loyal party service.

The removal of powers of patronage from the Prime Minister and allocation of responsibility for appointment with a Statutory Commission would not only allow individual members of the House of Lords to feel more legitimate, but would provide the House as a whole with a heightened sense of legitimacy. This legitimacy would be derived from the fact that its continued appointed nature had been approved by the directly elected lower House. If the House of Commons passed a bill retaining a wholly appointed House, but amending the appointments procedure through the creation of a Statutory Appointments Commission, it would signify that the House of Lords had the confidence and approval of the elected representatives of the people in the House of Commons, thus providing it with a further boost to its legitimacy. Such a bill could, much like the Private Member's Bill currently before the House of Lords in the name of Lord Steel of Aikwood,⁶⁶⁵ put an end to what have become farcical hereditary by-elections, and ensure that the House would in future contain appointed peers alone. It could also, as Lord Steel's bill does, provide for the retirement of members of the upper House, as well as the suspension and disqualification of peers. The introduction of such incremental changes could make significant improvements to the appointment process, and to the House as a whole, without necessitating the kind of radical reform to the composition of the

⁶⁶⁴ *Ibid.* at p.2

⁶⁶⁵ House of Lords Reform Bill [HL] 2010-11. Lord Steel's Bill received its Second Reading in the House of Lords (where it originated) on 3rd December 2010.

House envisaged by the Government's Draft Bill. Reforming the appointments process in this way could greatly enhance the public image of the House of Lords, making Lords appointments more open, fair, impartial and transparent, and could go some way to further increasing the *perceived legitimacy* of the House. This would, in turn, render the chamber more able to fully utilise its powers.

Conclusion

In proposing a predominantly elected second chamber, despite the retention of the 20% appointed element, the Coalition Government are, it is submitted, tipping the balance too far in favour of legitimacy at the expense of independence, expertise and experience. As stated above, the fundamental concern when determining the membership and method of composition of the second chamber should be the role and functions those members are to perform. The Government envisages the reformed House performing the very same functions currently performed by the House of Lords. If revision and amendment of legislation and scrutiny of government policy is to remain the fundamental purpose of the second chamber, then the Government's first concern, it is submitted, should be recruiting the best people to fulfil this role. If the best people to carry out this function are independent, expert, appointed life peers, as the Government seems to have acknowledged, then an appointed House should surely be retained. The contrast in approaches to the scrutiny and amendment of the 2011 Parliamentary Voting System and Constituencies Act by appointed members in the Lords and elected members in the Commons, as outlined in Chapter II, would seem to suggest that this is indeed the case. The ability of the members of the chamber to perform the duties allocated to them should be the fundamental concern when determining the future composition of the chamber.

The argument that the inherent lack of legitimacy in the current House of Lords necessitates the introduction of directly elected members neglects the fact that legitimacy is in fact, as Russell has argued, a continuous rather than a dichotomous concept.⁶⁶⁶ It is certainly true that the appointed nature of the House of Lords ensures that it will never be able to claim the same degree of democratic legitimacy that is possessed by the elected House of Commons. But this does not make the House of Lords illegitimate *per se*.

The legitimacy of the House was strengthened after 1999 by the removal of the hereditary peers and the creation of a more proportional party balance. The legitimacy of the House could be

⁶⁶⁶ Russell, 'A Stronger Second Chamber?', fn.482, p.882

increased further still by reforming the appointment process to bring an end to Prime Ministerial patronage. Members of the House of Lords also point to their independence, experience and expertise as a source of legitimacy. While this legitimacy does not match the democratic mandate of members of the lower House, it has proved sufficient to allow the House of Lords to assert itself with increasing frequency and severity against the will of the House of Commons since the 1999 reforms were implemented. It has placed the House in a position where its defeats of the government are not simply reversed as a matter of routine, but instead often have a lasting and meaningful impact on government policy. Furthermore, the House is perceived as a more legitimate body than it previously was not only by members of both parliamentary chambers, but also by the public at large. This 'lesser' form of legitimacy has proven adequate for the House to carry out its vital functions of scrutiny, amendment and review. The House may lack the democratic legitimacy of directly elected members, but one has to question the usefulness of democratically legitimate members elected by the people under a proportional system if they are unable to adequately carry out the functions of revision, amendment and scrutiny which the House of Lords is expected to continue to perform. As Lord Luce, perhaps rather bluntly put it to the chamber:

"What if the point of saying, "Hooray, we are democratically legitimate" if, in the process, we can no longer so effectively fulfil the function that this Government rightly want this chamber to fulfil?"⁶⁶⁷

Russell's criterion of *perceived legitimacy* requires that the House of Lords be seen to have the requisite level of legitimacy and public support to utilise its powers. The confidence of the House to make use of its powers, and the approval of the public for the House in doing so, has increased since 1999. Incremental reform to the appointments process could improve the situation even further. As such, it is quite possible that the requirement of *perceived legitimacy* could be satisfied, while still retaining an appointed upper chamber, and without causing unnecessary damage to the ability of the House of Lords to perform its functions. This argument, it is submitted, should be fully considered by the coalition government before any hasty decisions are implemented, and before the membership of the House of Lords is altered in a fundamental way. The inclusion of an elected element would instil greater legitimacy into the House of Lords, legitimacy of a strength that could only come from election. If that is what the Government believe is required in our second chamber, then they are unlikely to be dissuaded from the pursuit of wholesale reform. But such a move would also result in a dramatic diminution in the House's ability to perform its functions. If the Government wishes to retain an

⁶⁶⁷ Lord Luce, *Hansard* HL col.1202 (21st June 2011)

efficient and effective revising chamber, and avoid any form of challenge to the supremacy of the House of Commons then, it is submitted, the acceptance of a weaker form of legitimacy could be a sacrifice worth making.

CHAPTER IV: THE POWERS OF THE SECOND CHAMBER

As Brigid Hadfield has made clear, one cannot consider the powers to be assigned to a reformed second chamber in isolation from its composition and democratic legitimacy.⁶⁶⁸ Indeed, as Phillipson explains, “broadly speaking, the more legitimate a second chamber is, the greater its powers may permissibly be.”⁶⁶⁹ However, though the proposals contained within the 2011 White Paper and accompanying Draft Bill aim to radically alter the composition of the upper House, no such change is proposed to the formal legal powers of the House of Lords.⁶⁷⁰ The White Paper states the Government’s belief 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.”⁶⁷¹ It makes perfectly clear that the Government does not intend to amend the Parliament Acts, and that it aims to preserve the series of conventions that govern the day-to-day relationship between the two Houses.⁶⁷² These conventions, according to the White Paper, “have served the relationship between the Houses well and...represent a delicate balance which has evolved over the years.”⁶⁷³

The Government believes that “the powers of the second chamber and, in particular, the way in which they are exercised should not be extended and the primacy of the House of Commons should be preserved.”⁶⁷⁴ The White Paper sets out the belief that the present balance between the two Houses, as expressed in the Parliament Acts of 1911 and 1949 and the aforementioned conventions, “serves the legislative process well, and gives the second chamber the opportunity to make a substantive contribution while not at the same time undermining the relationship between the Government and the House of Commons.”⁶⁷⁵ However, no attempt is made in the Draft Bill to codify the existing powers of the House of Lords. Rather, Clause 2 accepts that the position is largely a matter of convention:

- (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

⁶⁶⁸ Hadfield, B. ‘Whither or Whether the House of Lords’ (1994) 35 *Northern Ireland Legal Quarterly* 320, p.349

⁶⁶⁹ Phillipson, G. ‘The Powers of a Reformed Second Chamber’ (2003) *Public Law* 32, p.33

⁶⁷⁰ *House of Lords Reform Draft Bill*, Cm 8077 (2001), p.11 paras.7-11 and Clause 2 of the Draft Bill

⁶⁷¹ *Ibid.* at p.11 para.7

⁶⁷² *Ibid.* at para.8

⁶⁷³ *Ibid.* at para.9

⁶⁷⁴ *Ibid.* at para.10

⁶⁷⁵ *Ibid.*

- (c) otherwise affects the powers, rights, privileges or jurisdiction of either House of Parliament, or the conventions governing the relationship between the two Houses.

While the Draft Bill contains proposals for a predominantly elected second chamber with a 20% appointed element, the White Paper leaves open the possibility of a wholly elected House. Given that the new chamber would be more legitimate, in democratic terms at least, than the current, entirely un-elected House, it would, as Phillipson observes, “seem paradoxical, to say the least, to accompany such a substantial increase in the House’s legitimacy with anything less than *at the least* a maintenance of its existing powers.”⁶⁷⁶ Indeed, Phillipson notes that any diminution in the House’s powers would seem “perverse”,⁶⁷⁷ given that the “whole purpose of reform is to increase the capacity of the House to make a contribution to the legislative process and the protection of liberal constitutional values and human rights.”⁶⁷⁸

However, while no diminution in the power of the House is contemplated in the present reform package, neither is any attempt to enact a statutory definition of the upper House’s powers. As Peter Riddell notes, the legal powers of the House “remain substantial, despite the limitations imposed by the 1911 and 1949 Parliament Acts.”⁶⁷⁹ Indeed, as Dennis Carter has remarked, those who demand a more powerful House of Lords “do not seem to realise just how much power the House of Lords already possesses.”⁶⁸⁰ Thus, as Phillipson observes, and as discussed in the previous chapter, since the current House rarely exercises its legal powers to the full, “a more legitimate House could exercise considerably more political muscle without any increase in its legal powers, simply by adopting a less self-denying approach to the use of existing powers of delay.”⁶⁸¹

However, the problems involved with a more legitimately constituted second chamber, and the ensuing dangers of increased assertiveness and potential legislative impasse were dealt with in detail in the preceding chapter, as was the likely future of the conventions which govern the relationship between the two Houses. Attention will therefore turn to some more specific issues relating to the powers of the reformed second chamber.

⁶⁷⁶ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669, p.33

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Riddell, P. ‘The Second Chamber: In Search of a Complementary Role’ (1999) 70(4) *Political Quarterly* 404, p.404

⁶⁸⁰ Carter, D. ‘The Powers and Conventions of the House of Lords’ (2003) 74(3) *Political Quarterly* 319, p.319

⁶⁸¹ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669, p.33

However, before proceeding to examine such issues, it will be useful to place the existing powers of the House of Lords in a comparative context.

The Powers of the House of Lords in a Comparative Context

As Russell has noted, “in the majority of cases the powers of the second chamber are less than those of the first.”⁶⁸² Of the 58 second chambers around the world, only the United States of America and Bosnia Herzegovina have second chambers with greater powers than the lower House, while 15 have roughly equal powers and 41 have fewer powers.⁶⁸³ Typically “government is not subject to a confidence vote in the upper House”,⁶⁸⁴ and often the second chamber “can only delay, rather than veto, legislation.”⁶⁸⁵ Further, the powers of the second chamber over financial legislation are usually less than over ordinary legislation.⁶⁸⁶ Generally speaking therefore, the House of Lords does tend to fit the international mould. However the way that disputes are resolved between the two Houses is somewhat less typical. Indeed, the United Kingdom is unusual in that the House of Lords’ suspensory veto is defined in terms of the length of time required to pass before the House of Commons can overrule the Lords.⁶⁸⁷ As Russell notes, “while suspensive vetos are common overseas it is more usual for the delay to be caused simply by the maximum period of time the upper House has to consider legislation.”⁶⁸⁸

There are some second chambers around the world which are co-equal with the lower House. Russell categorises Italy as a ‘symmetrical’ system, in that its upper and lower Houses are co-equal in terms of their formal legal powers.⁶⁸⁹ Indeed, as Patterson and Mughan observe, the Italian Senato is “on a par with the lower House in legislative powers”,⁶⁹⁰ and “uniquely plays the same role as the lower House in the confirmation of the prime minister and cabinet ministers, and in consideration and approval of financial legislation.”⁶⁹¹ Bills may be introduced in either of the two chambers, and any bill, including the budget, may be amended or even rejected by either chamber. A bill cannot

⁶⁸² Russell, M. ‘Second Chambers Overseas’ (1999) 70(4) *Political Quarterly* 411, p.414

⁶⁸³ *Ibid.*

⁶⁸⁴ *Ibid.*

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Russell, M. *Reforming the Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), p.121

⁶⁹⁰ Patterson, S.C. and Mughan, A. ‘Fundamentals of institutional design: the functions and powers of parliamentary second chambers’ (2001) 7(1) *Journal of Legislative Studies* 39, p.42

⁶⁹¹ *Ibid.*

become law until it is agreed by both chambers, and, if agreement cannot be reached, “the bill will simply shuttle between them until they do, or until it is dropped.”⁶⁹² Thus, the two chambers have “the same functions, fulfil the same tasks, and exercise the same powers.”⁶⁹³ Further, “when dealing with the government, they have the same weapon: the vote of no confidence.”⁶⁹⁴ It is for this reason therefore, that the Italian parliament has been described as a case of “perfect bicameralism.”⁶⁹⁵ Other examples of constitutionally coequal second chambers include the US Senate and the Swiss Ständerat.⁶⁹⁶

At the other end of the spectrum are those countries classified by Russell as ‘extremely asymmetrical’, in that the formal powers of the second chamber are subordinate to those of the first. Ireland and Spain are two examples. In both cases, the upper chamber has only “a very limited period in which it may consider legislation, and any upper House amendments or veto may be easily reversed by the lower House”,⁶⁹⁷ and thus, the only inconvenience which can be caused is “a relatively short delay to bills.”⁶⁹⁸ Indeed, Michael Laver concludes that, in the case of Ireland, the legislative powers of the Seanad Éireann are “so modest that that they scarcely justify maintaining an entire second house of the legislature.”⁶⁹⁹ The 90-day delaying power of the Irish upper House, which is reduced to 21 days in the case of money bills, confines the Senate to a position “very much subservient to that of the Dáil.”⁷⁰⁰ Meanwhile, the Spanish Senado “falls among the weakest of democratic upper houses.”⁷⁰¹ Indeed, though it can “perform an advisory function, engage in enquiries and oversight of the executive, and play some role in the selection of governmental personnel”,⁷⁰² its legislative actions can be “overridden by a majority vote in the lower house and it can, in any event, only delay legislation.”⁷⁰³

⁶⁹² Russell, *Reforming the Lords*, fn.689, p.121

⁶⁹³ Pasquino, G. ‘The Italian Senate’ (2002) 8(3) *Journal of Legislative Studies* 67, p.70

⁶⁹⁴ *Ibid.* at p.71

⁶⁹⁵ Lodici, C. ‘Parliamentary Autonomy: The Italian Senato’, in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), pp.235

⁶⁹⁶ On the former see, Sinclair, B. ‘Coequal Partner: The US Senate’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999) pp.32-58, and on the latter, Butikofer, S. and Hug, S. ‘The Swiss Upper House: “Chambre de Reflexion” or Conservative Renegades?’ (2010) 16(2) *Journal of Legislative Studies* 176

⁶⁹⁷ Russell, *Reforming the House of Lords*, fn.689, p.122

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Laver, M. ‘The Role and Future of the Upper House in Ireland’ (2002) 8(3) *Journal of Legislative Studies* 49, p.55

⁷⁰⁰ *Ibid.* at p.53

⁷⁰¹ Flores Juberías, C. ‘A House in Search of a Role: The Senado of Spain’, in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.284

⁷⁰² Patterson and Mughan, ‘Fundamentals of Institutional Design’, fn.690, p.44

⁷⁰³ *Ibid.*

The French Sénat is another example of a relatively subordinate chamber, although Russell suggests that whilst its powers are “less than ‘moderately symmetrical’ in relation to the lower house, its ability to influence legislation is far from insignificant”,⁷⁰⁴ and it is thus more powerful than the Irish and Spanish upper chambers.⁷⁰⁵ There is no time limit within which the Sénat must consider legislation, allowing for more “leisurely and considered”⁷⁰⁶ legislative scrutiny, and the Sénat cannot automatically be overridden by the lower House, although the first chamber does have the last word if the mediation process between the two chambers is unsuccessful.⁷⁰⁷ Thus the Sénat has the power to cause considerable delay to government bills, affording it substantial bargaining power in the legislative process. As Mastias observes, the French upper House, “combining persuasion and amendment, negotiation and accommodation, pressure and retreat, reflection and imagination...has managed to carve out a place for itself in the new political regime.”⁷⁰⁸

Between these two extremes are those chambers which Russell describes as ‘moderately asymmetrical’, in that the formal constitutional powers of such chambers are considerable, but are “inferior in some way to the lower House.”⁷⁰⁹ In Canada and Australia for example, there are only minor differences between the respective powers of the two chambers, which apply to financial legislation and constitutional amendments. The Australian Senate is “overwhelmingly on a par with the House of Representatives save for formal constitutional provisions prohibiting the Senate from amending tax or budget bills.”⁷¹⁰ Indeed, the Senate is “virtually equal in legislative power to the lower house, making it one of the most powerful upper houses among Westminster-derived parliamentary systems.”⁷¹¹ The Senate’s power to amend or reject ordinary legislation is unlimited, and in the event of disagreement the House of Representatives’ only option is to invoke the deadlock procedures.⁷¹²

⁷⁰⁴ Russell, *Reforming the House of Lords*, fn.689 at p.124

⁷⁰⁵ *Ibid.* at p.123

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

⁷⁰⁸ Mastias, J. ‘A Problem of Identity: The French Sénat’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.195

⁷⁰⁹ Russell, *Reforming the House of Lords*, fn.689 at p.121

⁷¹⁰ Patterson and Mughan, ‘Fundamentals of Institutional Design’, fn.690, p.43

⁷¹¹ Uhr, J. ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, p.4

⁷¹² These are outlined briefly in Chapter 1. See also Uhr, J. ‘Generating Divided Government: The Australian Senate’ Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH Ohio State University Press, 1999) pp.93-119

The powers of the Canadian Senate are similarly formidable. As Docherty notes, “the Senate has the statutory power to defeat bills sent to it from the lower house”,⁷¹³ a power which “goes beyond merely delaying government legislation to actually sending it back to the lower house defeated.”⁷¹⁴ However, due to its appointed nature and the aforementioned cynicism of the Canadian electorate over the use of political patronage, the Senate has generally been reluctant to make use of its potential legislative muscle, and has generally contented itself with revising and delaying legislation put forward by the House of Commons.⁷¹⁵

The indirectly elected German Bundesrat may also be said to have moderately asymmetrical powers over draft legislation.⁷¹⁶ The Bundesrat is composed of state officials who vote *en bloc*,⁷¹⁷ and “may veto legislation adopted by the lower house if state interests are paramount.”⁷¹⁸ The Bundesrat must give assent to all bills affecting either the finances of the Länder, or matters under their control,⁷¹⁹ which means that the Bundesrat has an absolute veto over approximately half of all bills.⁷²⁰ Indeed, even bills which include just one clause falling within the Länder’s influence are subject to the absolute veto, so within the realm of state-related legislation the Bundesrat is a powerful chamber indeed. It is, as Patzelt describes, a “very federal house.”⁷²¹

So where does the House of Lords fit within this international spectrum of second chambers? Russell concludes that the formal powers of the House of Lords over ordinary legislation are moderate by international standards.⁷²² The provisions of the Parliament Acts allow the Lords to delay most ordinary government bills by up to a year. This may be less formidable than the power of the Italian, Canadian and Australian Senates to block all bills completely, and the power of the German Bundesrat to veto around 60% of bills,⁷²³

⁷¹³ Docherty, M. ‘The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About’ (2002) 8(3) *Journal of Legislative Studies* 27, p.34

⁷¹⁴ *Ibid.*

⁷¹⁵ See Franks, C.E.S. ‘Not Dead Yet, But Should it be Resurrected? The Canadian Senate’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press 1999) pp.124-150

⁷¹⁶ Russell, *Reforming the House of Lords*, fn.689, p.121

⁷¹⁷ Patterson and Mughan, ‘Fundamentals of Institutional Design’, fn.690, p.43

⁷¹⁸ *Ibid.*

⁷¹⁹ Russell, *Reforming the House of Lords*, fn.689, p.121

⁷²⁰ *Ibid.*

⁷²¹ Patzelt, W.J. ‘The Very Federal House: The German Bundesrat’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.59

⁷²² Russell, *Reforming the House of Lords*, fn.689, p.264

⁷²³ *Ibid.*

but the House of Lords has significantly more power at its disposal than the three month suspensory veto of the Irish Seanad and the two month equivalent of the Spanish Senado.

In addition, the House of Lords retains the power to veto delegated legislation, though this is rarely used in practice,⁷²⁴ and under the Parliament Acts, the right to veto any attempt to extend the life of Parliament beyond five years. In addition, the reduced powers of the House of Lords over those pieces of legislation designated as ‘money bills’ by the Speaker of the House of Commons, which can only be delayed for a maximum of one month, are “relatively common in other second chambers.”⁷²⁵ However, like the Canadian Senate, the reluctance of the House of Lords to make frequent and excessive use of its delaying powers and absolute veto over delegated legislation stems from its appointed nature and reluctance to challenge the primacy of the democratically elected House of Commons. Thus while the House of Lords has, in recent years, made “various constructive contributions to legislation through deliberation, delay, amendment and compromise,”⁷²⁶ it has traditionally show both “diligence and restraint in discharging its legislative responsibilities.”⁷²⁷ As has previously been demonstrated however, the House of Lords has had an increasing impact on government legislation in recent years, and utilises its powers far more frequently than it did prior to 1999.

Nonetheless, although the formal legal powers of the House of Lords may not always be fully utilised in practice, they do broadly satisfy Russell’s criterion. Russell suggests that in order to satisfy the requirement of *adequate powers*, a second chamber should have sufficient means to bargain with government and impact on legislation and policy.⁷²⁸ To do so, she concludes, the powers of the chamber should be “moderate to strong.”⁷²⁹ Russell contends that the power to delay most legislation by a year, and ‘money bills’ by one month, is “certainly enough to make government and the Commons think again when faced with resistance from the Lords”,⁷³⁰ and that the existing powers of the House of

⁷²⁴ *Ibid.* at p.269. The veto over secondary legislation was used only once prior to the 1999 reforms, and that was over the Southern Rhodesia Sanctions Order in 1968. The power was not used again until 2000 when the House defeated secondary legislation on arrangements for the London Mayoral elections. There was one further defeat of a piece of delegated legislation in 2007 concerning the Manchester ‘supercasino.’

⁷²⁵ *Ibid.* at p.145

⁷²⁶ Patterson and Mughan, ‘Fundamentals of Institutional Design’, fn.690, p.44

⁷²⁷ See Shell, D. ‘To Revise and Deliberate: The British House of Lords’ in Patterson, S.C. and Mughan, A. *Senates: Bicameralism in the Contemporary World* (Columbus OH: Ohio State University Press, 1999), p.216

⁷²⁸ Russell, *Reforming the House of Lords*, fn.689, p.254

⁷²⁹ *Ibid.*

⁷³⁰ Russell, M. ‘Is the House of Lords Already Reformed’ (2003) 74(3) *Political Quarterly* 311, p.315

Lords are “already sufficient for it to function as a strong check on government.”⁷³¹ As was seen in Chapter II, the powers available to the Lords were sufficient for them to extract valuable concessions from the Government on the Parliamentary Voting Systems and Constituencies Act 2011, and press controversial amendments without endangering the primacy of the elected House. Furthermore, almost every recent attempt at Lords reform, including the Royal Commission report,⁷³² the PASC report,⁷³³ and the report of the Joint Committee,⁷³⁴ has concluded that the powers of the chamber should not be altered. It is certainly defensible then that the Government’s Draft Bill seeks to make no fundamental change to the powers of the second chamber. Such a course of action would not only fulfil the stated objective of preserving the primacy of the House of Commons, but in a comparative context, would also leave the United Kingdom in the ‘middle ground’ in terms of the division of power between its upper and lower chambers.

Dealing with Delegated Legislation

However, there are ways in which the powers of the House of Lords appear somewhat anomalous, an example of which concerns the House’s powers over secondary legislation. As noted above, the House of Lords retains the power to veto all delegated legislation, but due to the relatively extreme nature of this power,⁷³⁵ it is rarely if ever used.⁷³⁶ But, the House of Lords also has, as Russell notes, “a reputation for outstripping the Commons” in terms of the scrutiny it provides for such legislation”:⁷³⁷

“Members of the Lords take part in the Joint Committee on Statutory Instruments, and the chamber spends more time debating delegated legislation than the House of Commons. In addition the House of Lords has a powerful committee for scrutiny of Delegated Powers and Deregulation, which considers whether new bills delegate powers inappropriately. No single committee takes on the equivalent role in the House of Commons.”⁷³⁸

⁷³¹ *Ibid.* at p.316

⁷³² Royal Commission on the Reform of the House of Lords, *A House for the Future* Cm 4534 (2000), pp.32-47

⁷³³ Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (Fifth Report of Session 2001-2002) HC 494 (2002), Part Two paras.69-80

⁷³⁴ Joint Committee on House of Lords Reform, *House of Lords Reform: First Report* (First Report of Session 2002-2003) HL 17 (2002) Part Two pp.8-14

⁷³⁵ At least when compared with the Lords’ power of ordinary legislation.

⁷³⁶ See fn.724

⁷³⁷ Russell, *Reforming the House of Lords*, fn.689, p.147

⁷³⁸ *Ibid.* at p.147.

It is not, as Russell argues, altogether out of the ordinary for a second chamber to have an increased role when it comes to secondary legislation.⁷³⁹ In many other countries the upper chamber “takes a greater interest in delegated legislation than the lower house”,⁷⁴⁰ which can result in the upper house being “quite interventionist in this area, and having a direct impact much beyond that which applies in the House of Lords.”⁷⁴¹ The Australian Senate and the German Bundesrat offer examples of this.⁷⁴²

The issue of delegated legislation is not considered at all by the Government’s Draft Bill. However, in 2000 the Wakeham Commission put forward an argument for the reform of the House’s powers over delegated legislation. The report argued that there had been no serious challenge since 1968 to the convention that the House of Lords does not reject Statutory Instruments.⁷⁴³ As a consequence, the House’s influence over secondary legislation is “paradoxically less than its influence over primary legislation.”⁷⁴⁴ Because the House’s powers in relation to such legislation are “too drastic”⁷⁴⁵ they are not made use of in practice. Instead, the report argued, “the second chamber should be given a tool which it can use to *force* the Government and the House of Commons to take its concerns seriously.”⁷⁴⁶ There is little point, so the report contended, in the second chamber having “a theoretically greater power which it does not in reality exercise.”⁷⁴⁷ Rather, it should have “powers which it can actually exercise, and which would require the Government and the House of Commons to take some positive action either to meet its concerns or override its reservations.”⁷⁴⁸ The report therefore proposed the following:

- where the second chamber votes against a draft instrument, the draft should nevertheless be deemed to be approved if the House of Commons subsequently gives (or, as the case may be, reaffirms) its approval within three months; and

⁷³⁹ *Ibid.*

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.* at pp.147-49 and pp.269-70.

⁷⁴³ Royal Commission on the Reform of the House of Lords, *A House for the Future* Cm 4534 (2000), p.71, para.7.11

⁷⁴⁴ *Ibid.* at p.76 para.7.31

⁷⁴⁵ *Ibid.* at para.7.33

⁷⁴⁶ *Ibid.* at para.7.35

⁷⁴⁷ *Ibid.*

⁷⁴⁸ *Ibid.*

- where the second chamber votes to annul an instrument, the annulment would not take effect for three months and could be overridden by a resolution of the House of Commons.⁷⁴⁹

There are three arguments that can be voiced against such a change. The first is a reiteration of the arguments of Phillipson and Bogdanor discussed above, namely that it would seem “perverse to reduce the House’s powers at the very time that its legitimacy is being substantially increased.”⁷⁵⁰ A second problem with the Royal Commission’s reasoning is that it offers no explanation for why the delaying power of the Lords over delegated legislation should be reduced to a mere three months, rather than to a year to match its power over primary legislation. As Phillipson asks, “why should delegated legislation attract such an extraordinarily emasculated power of delay?”⁷⁵¹

Indeed, as the PASC report makes perfectly clear, such a power hardly constitutes a delay at all, since the House of Commons would be able to revive delegated legislation in a vote held within hours of its rejection by the House of Lords.⁷⁵² Finally, as Phillipson argues, the argument put forward by the Royal Commission appears to be based on the assumption that the customary unwillingness of the House of Lords to make use of its powers over delegated legislation would be continued in a reformed chamber.⁷⁵³ As Phillipson notes, “there is every reason to suppose that the reason for the Lords’ historic reluctance to reject delegated legislation outright was at least partly attributable to precisely the same cause as the restraint the House shows towards primary legislation, namely the general perception of its lack of legitimacy.”⁷⁵⁴ Should the House’s legitimacy be increased as the Government currently propose, it would not be entirely unreasonable to presume that the House’s power over such legislation might be used more frequently.

However, there is some strength to the argument forwarded by the Royal Commission. If the House of Commons is to be maintained as the supreme chamber, and if the second chamber is to remain as the House of Lords currently is, far from its legislative co-equal, it could be argued that an absolute veto over delegated legislation is too formidable a power to be retained. Indeed, the strength of this argument is increased when one considers the likelihood that this

⁷⁴⁹ *Ibid.* at para.7.36

⁷⁵⁰ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669, p.34

⁷⁵¹ *Ibid.*

⁷⁵² Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (Fifth Report of Session 2001-2002) HC 494 (2002), para.78

⁷⁵³ Phillipson, ‘The Powers of a Reformed Second Chamber’ fn.669, p.34

⁷⁵⁴ *Ibid.*

power could be brought into use more frequently if the Government succeed in providing the chamber with an injection of democratic legitimacy through the introduction of elected members. But reducing the House's power over secondary legislation does not necessarily entail the complete emasculation of the House in relation to such legislation. It is difficult to see why the Lords' power over delegated legislation could not be simply placed on a par with its powers over primary legislation. Such a situation exists in Germany, where the Bundesrat has the same powers over secondary legislation as it does in relation to ordinary legislation. As Russell concludes, "based on the experiences from overseas, there is no reason why the functions of the upper House should not be extended to the amendment of statutory instruments, and its power over these instruments brought into line with those over ordinary legislation."⁷⁵⁵

The Second Chamber as a Constitutional Safeguard

Another area in which the House of Lords appears unusual when considered in a comparative context is in relation to its powers over legislation amending the constitution or altering fundamental human rights. However, this is another issue which is not fully considered in the Government's Draft Bill. As Phillipson notes, "if the House is left as it is, with no special powers over Bills altering the basic constitutional arrangements of the state or the protection afforded to internationally recognised human rights, this will leave the United Kingdom's second chamber in a glaringly anomalous position compared to nearly all those overseas."⁷⁵⁶ Indeed, as Russell observes, "even chambers which have relatively weak powers with respect to ordinary legislation may have absolute powers of veto over constitutional change."⁷⁵⁷ Out of 20 Western democracies considered by Russell, aside from the UK, the only countries where the second chamber does not have special powers over constitutional measures are "those where other safeguards – such as automatic referendums over constitutional change – are built into the system."⁷⁵⁸ However, the constitutional role of the House of Lords is "limited",⁷⁵⁹ and the UK's arrangements have been described as "highly unusual"⁷⁶⁰ in terms of the role played by the upper chamber in constitutional protection. Aside from the ability of the Lords to veto any bill which attempts to extend the life of Parliament, the upper House has no significant role in relation to constitutional legislation, although the chamber "does see one of its roles as

⁷⁵⁵ Russell, *Reforming the House of Lords*, fn.689, p.269

⁷⁵⁶ Phillipson, 'The Powers of a Reformed Second Chamber' fn.669, p.35

⁷⁵⁷ Russell, *Reforming the House of Lords*, fn.689, p.275

⁷⁵⁸ *Ibid.* at p.276

⁷⁵⁹ Russell, M. 'Responsibilities of Second Chambers: Constitutional and Human Rights Safeguards' (2001) 7(1) *Journal of Legislative Studies* 61, p.61

⁷⁶⁰ *Ibid.*

constitutional protection, and at times has taken a particular interest in constitutional matters.”⁷⁶¹

It is true that in the UK “some limited acknowledgement”⁷⁶² is given to the significance of constitutional legislation in that, by convention, bills considered to be of ‘first-class constitutional importance’ take their committee stage on the floor of the House of Commons.⁷⁶³ However, no special conditions have to be met before such bills are allowed to become law.⁷⁶⁴ Aside from the aforementioned power to veto any bill which purports to extend the life of a Parliament, the House of Lords’ power over constitutional legislation is no greater than over any other type of bill. This is, as Russell notes, “a result of the ill-defined nature of the constitution and of constitutional amendment in the British system.”⁷⁶⁵ In many other countries around the world, bills that alter the constitution are subject to a more rigorous legislative process than ordinary legislation, which can often involve an enhanced role for the upper chamber.⁷⁶⁶ This could involve a veto over constitutional bills, or could mean that such legislation is subject to qualified majority voting or automatic referendums.⁷⁶⁷

As Russell finds, in many cases “constitutional amendments must pass in both houses, not only by the simple majority that applies to ordinary legislation, but by a tougher ‘qualified’ majority.”⁷⁶⁸ In Italy, for example, an absolute majority is necessary to pass legislation that amends or alters the constitution,⁷⁶⁹ and in Germany a two thirds majority of members in both Houses is required.⁷⁷⁰ In Spain, constitutional legislation must be passed by a three fifths majority in both chambers of parliament, failing which the bill proceeds to a joint mediation committee.⁷⁷¹ If at the end of this process, the bill in question has the approval of a two thirds majority in the lower house, an absolute majority is required in the Senado.⁷⁷² Thus, “in stark contrast to the chamber’s relatively weak powers over ordinary bills”,⁷⁷³ the Spanish Senate effectively retains the power to block constitutional legislation if it so wishes. In addition, a

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.* at p.64

⁷⁶³ See Seaton, J and Winetrobe B.K. ‘The Passage of Constitutional Bills in Parliament’ (1998) 4(2) *Journal of Legislative Studies*, 33, pp.36-38

⁷⁶⁴ Such as qualified majority voting, for example.

⁷⁶⁵ Russell, ‘Responsibilities of Second Chambers’, fn.759, p.64

⁷⁶⁶ *Ibid.*

⁷⁶⁷ For a useful summary, see Russell, *ibid.* at p.65 Table 2

⁷⁶⁸ *Ibid.* at p.64

⁷⁶⁹ In other words, a majority of all members of the House, not just those voting.

⁷⁷⁰ Russell, ‘Responsibilities of Second Chambers’, fn.759, p.64

⁷⁷¹ *Ibid.*

⁷⁷² *Ibid.*

⁷⁷³ *Ibid.*

referendum may be triggered if, within 15 days of the constitutional bill in question being passed, one tenth of members of either chamber request it.⁷⁷⁴ Similarly in Italy, other than in cases where the bill in question was passed by a two-thirds majority in both Houses, a referendum may be called by one-fifth of members of either House, by five regional assemblies, or by a petition of 500,000 electors.⁷⁷⁵

In France the Sénat has greater powers over constitutional bills than over ordinary legislation. As noted above, after mediation on ordinary legislation the lower House has the last word, but on constitutional bills the Sénat retains an absolute veto.⁷⁷⁶ Such bills also require approval via either a referendum, or by a three-fifths majority in a joint sitting of parliament.⁷⁷⁷ This procedure applies not only to bills which directly amend the constitution, but also to what are known as ‘organic’ bills, legislation of a “constitutional nature”⁷⁷⁸ which does not actually require a direct amendment to the constitution.⁷⁷⁹ Thus, as Russell notes, “in Germany, France, Italy and Spain the upper chamber can act as a real block to constitutional change.”⁷⁸⁰

However, it is true that in some cases the second chamber does not possess such powers over constitutional bills. In Canada, the upper House retains an absolute veto over all ordinary legislation, but in relation to constitutional bills the Senate is limited to a six month delaying power.⁷⁸¹ However, as Russell notes, “instead of seeking the provinces’ approval through the Senate, this approval is now required directly through the regional assemblies.”⁷⁸² A similar arrangement exists in Australia. Despite having the power to veto all ordinary legislation, the Senate is unable to block constitutional change.⁷⁸³ However, this is “compensated by the requirement to seek approval by the states”⁷⁸⁴ through a referendum. In order to pass the bill must be supported by at least 50% of those voting in at least four of the six states, and by an overall majority of voters.⁷⁸⁵ It can be seen therefore that, unlike in the United Kingdom, in other countries where the upper House does not have special powers over legislation amending or altering the constitution, additional safeguards are built into the system to compensate for this.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Ibid.*

⁷⁷⁸ *Ibid.* at p.66

⁷⁷⁹ For example, a bill to change the electoral system.

⁷⁸⁰ Russell, ‘Responsibilities of Second Chambers’, fn.759, p.66

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*

In addition to blocking constitutional amendments, many second chambers have the power to challenge the constitutionality of other bills by referring them to the Constitutional Court on the grounds that they violate the constitution. In Spain, for example, a bill can be referred to the Constitutional Court by the Prime Minister, the Ombudsman, a judge, a regional government or parliament, a group of 50 lower house members, or a group of 50 senators.⁷⁸⁶ As Russell notes, “this can be an effective weapon against the government, and create a strong incentive for the government to act within the constitution.”⁷⁸⁷ In Germany, legislation can be referred to the Constitutional Court by the Bundesrat, or by individual Länder.⁷⁸⁸ The Court has “a *de facto* power of amending legislation, and can nullify acts which do not comply with the Basic Law.”⁷⁸⁹ In France, legislation may be referred to the Constitutional Council by a group of 60 members of the lower House, 60 Senators, or the President of either house,⁷⁹⁰ a power used frequently by the Sénat, which has come to perceive itself as something of a “protector of individual rights and freedoms.”⁷⁹¹

The Australian upper house also has “a long record of legislative scrutiny on human rights grounds, unparalleled in the lower house.”⁷⁹² Through the Standing Committee on Regulations and Ordinances, hailed by Uhr as “a rare and early example of an Australian parliamentary institution leading the world”,⁷⁹³ and the Scrutiny of Bills Committee, the Australian Senate scrutinises legislation against an extensive set of human rights criteria. As Russell notes, “both committees operate in a scrupulously bipartisan way, and have won many victories to protect the rights of Australians.”⁷⁹⁴

The House of Lords has no comparable power in relation to legislation affecting fundamental human rights and civil liberties.⁷⁹⁵ The current House does however have “a significant record

⁷⁸⁶ *Ibid.* at p.70

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.* at p,71

⁷⁹¹ *Ibid.*

⁷⁹² *Ibid.*

⁷⁹³ Uhr, J. *Deliberative Democracy in Australia* (Cambridge University Press: Cambridge, 1998) p.122, cited in Russell, ‘Responsibilities of Second Chambers’, fn.759 at p.71

⁷⁹⁴ Russell, ‘Responsibilities of Second Chambers’ fn.759 at p.71

⁷⁹⁵ It is worth noting that, while in no way equivalent to the referral powers mentioned in the preceding paragraph, provisions do exist within the United Kingdom’s devolution legislation which provide for the referral of bills emanating from the devolved bodies to the courts in order to resolve questions of vires. For example under s.33 of the Scotland Act 1998, if a bill passed by the Scottish is thought to be wholly or partly ultra vires it may be referred to the Supreme Court of the United Kingdom to decide whether any of its provisions would not fall within the Parliament’s legislative competence.

in defending human rights”,⁷⁹⁶ and has been responsible for the introduction of more than 10 Bills seeking to provide the UK with a Bill of Rights.⁷⁹⁷ The House of Lords has often “exercised its revising function to improve controversial legislation, or raise concerns about civil liberties issues”,⁷⁹⁸ a function aided by the presence in the chamber of legal peers and countless human rights experts who provide the house with valuable expertise, which is also enhanced by the party political independence of the crossbench element. The House of Lords should then, as Reidy argues, “be naturally disposed to play a role in defending human rights.”⁷⁹⁹ As she notes, “the absence of constituency duties means that peers can afford to dedicate more time both to duties within the House, such as scrutinising legislative proposals and partaking in parliamentary debate, and be available to engage with interest groups outside the House.”⁸⁰⁰

However, the fact remains that the House of Lords can boast no substantive powers in relation to human rights legislation that are comparable with the powers held by the second chambers discussed above. Of course the highly regarded Constitution Committee of the House of Lords has a significant role to play in examining the constitutional implications of public bills which come before the House and investigating issues of wider constitutional significance, while the Joint Committee on Human Rights provides detailed scrutiny of government bills with significant human rights implications and reports its findings and recommendations to both Houses, though neither has any substantive powers. But the House already “displays many characteristics and enjoys certain functions which make it an appropriate forum in which to defend human rights”,⁸⁰¹ and as Reidy notes, a reformed second chamber with greater democratic legitimacy such as that currently proposed by the present Government, “offers an even greater opportunity to build on the experience of the House and create a second chamber which is fully equipped to play a pre-eminent role in ensuring that human rights are democratically entrenched in parliament.”⁸⁰²

The House is equally anomalous in that it possesses no additional powers in relation to legislation amending the constitution.⁸⁰³ As Reidy and Russell note, “such constitutional

⁷⁹⁶ Reidy, A. *The House of Lords: In Defence of Human Rights* (London: Constitution Unit, 1999), p.3

⁷⁹⁷ *Ibid.*

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Ibid.* at p.5

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid.* at p.19

⁸⁰² *Ibid.*

⁸⁰³ Although as a matter of domestic constitutional doctrine, this is no great surprise.

protection is one of the classic roles of a second chamber.”⁸⁰⁴ Indeed, a role as ‘constitutional watchdog’ for the House of Lords could “serve to enhance effective parliamentary democracy.”⁸⁰⁵

The 2011 White Paper and accompanying Draft Bill do not address these arguments at all, other than to state the government’s intention to maintain the existing balance of power between the two Houses, and to preserve the pre-eminence of the House of Commons.⁸⁰⁶ It is difficult, therefore, to deduce their reasons for not considering enhanced powers for the upper House in this area. However, an example of the sort of argument voiced in opposition to providing the House of Lords with enhanced powers over constitutional and human rights legislation can again be found in the report of the Wakeham Commission in 2000. The Royal Commission rejected proposals to enhance the powers of the House of Lords on the basis that doing so would “alter the current balance of power between the two chambers and could be exploited to bring the two chambers into conflict.”⁸⁰⁷ Further, such a move would be “inconsistent with the requirements in our [the Commission’s] terms of reference ‘to maintain the position of the House of Commons as the pre-eminent chamber of Parliament’ and with our view of the overall role that the second chamber should play.”⁸⁰⁸

Phillipson suggests that such arguments are flawed on a number of grounds.⁸⁰⁹ Firstly, increasing the powers of the House of Lords over constitutional legislation would not, he argues, be inconsistent with maintaining the House of Commons as the pre-eminent House since, in all instances not involving constitutional or human rights issues, the Commons “would remain the superior House, able to bypass the Lords opposition after the delay of only a year, or, in the case of money bills, a month only.”⁸¹⁰ The pre-eminence of the House of Commons would therefore be maintained, regardless of the position in relation to constitutional and human rights legislation. Secondly, the Royal Commission supported the retention of the existing special powers of the House of Lords over legislation that attempts to extend the life of a Parliament, as laid down by the Parliament

⁸⁰⁴ Reidy, A. and Russell, M. *Second Chambers as Constitutional Guardians & Protectors of Human Rights* (London: Constitution Unit, 1999), p.2

⁸⁰⁵ *Ibid.* at p.3

⁸⁰⁶ *House of Lords Reform Draft Bill*, fn.670, p.11 paras.7-11, and Clause 2 of the Draft Bill

⁸⁰⁷ *A House for the Future*, fn.743, para.5.7

⁸⁰⁸ *Ibid.*

⁸⁰⁹ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669, p.36

⁸¹⁰ *Ibid.*

Acts.⁸¹¹ In fact, the Commission sought to strengthen this power, so that the Parliament Acts could not be amended to remove this safeguard without the consent of the Lords, by using the Parliament Act procedure itself.⁸¹² As Phillipson suggests, the retention of this power was seen as desirable “presumably because it represents an important democratic safeguard.”⁸¹³ But, Phillipson argues, “once it is accepted that the Lords should have special powers to safeguard democracy in this basic manner, then logic suggests extending the scope of such powers to cover other matters equally important to the maintenance of a liberal democracy.”⁸¹⁴

Finally, it is important to consider the wider constitutional context. The United Kingdom, as has already been demonstrated, is clearly in an anomalous position when compared with other Western democracies. As Phillipson contends, “there are numerous recent examples of Parliament being asked to rush through legislation threatening civil liberties in hasty response to short term crises, legislation which, once on the statute book, cannot be challenged in the courts.”⁸¹⁵

It is at least arguable therefore, that some form of additional safeguard should be put in place. This safeguard could take the form of enhanced powers for the second chamber so that legislation amending the constitution or altering fundamental human rights receives some form of entrenched protection within the legislative process. Of course there are some finer details that would need to be considered before such a change could be implemented. One would have to determine exactly what form this new power should take. It could, as Phillipson notes, take the form of an extended power of delay over such legislation, an absolute veto, the need for qualified majorities in both Houses, or perhaps the ability of the House to trigger a referendum.⁸¹⁶ In addition, some mechanism would need to be agreed upon for identifying when such a power would be triggered. The power to identify when a piece of legislation contains the requisite “constitutional” content might, as Phillipson suggests, be given to the Constitution Committee of the House of

⁸¹¹ *A House for the Future*, fn.743, paras.5.13-5.16

⁸¹² *Ibid.*

⁸¹³ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669, p.36

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.* Phillipson cites the Prevention of Terrorism (Additional Powers) Bill 1996, the Criminal Justice (Terrorism and Conspiracy) Bill 1998 and the Anti-Terrorism Crime and Security Bill 2001 as examples.

⁸¹⁶ *Ibid.* at p.39

Lords,⁸¹⁷ or perhaps to the Lord Speaker, who could certify bills as ‘constitutional’ in the same way that the Speaker of the House of Commons currently designates ‘money’ bills.⁸¹⁸

Of course there is the possibility that in some cases a judgement might be deemed controversial and may provoke disagreement, but as Phillipson notes, “this is simply a fact of life in relation to interpretative judgement, including those made by the courts, and does not provide a knock-down argument against such a proposal.”⁸¹⁹ Whatever the eventual consensus on the particulars of such a power, it is quite clear that so long as the second chamber has no enhanced power in relation to constitutional bills and legislation affecting fundamental human rights, the United Kingdom will remain in an anomalous position compared to other western democracies. It is at least arguable therefore, that if the Government wish to increase the democratic legitimacy of the second chamber through the introduction of elected members, they should at least consider the possibility of providing them with a new role as guardians of the constitution, and protectors of fundamental human rights.

Conclusion

Arend Lijphart’s criteria for an effective second chamber, as revised by Russell, require that the upper House have *adequate powers* to bargain with government and make an impact upon the legislative process.⁸²⁰ Russell has found that the current powers of the House of Lords over ordinary legislation are moderate by international standards, and so, broadly speaking, satisfy this criterion. It is defensible therefore that the coalition government’s Draft Bill envisages no fundamental change to the formal powers of the second chamber both in terms of maintaining the primacy of the House of Commons, and in order to protect the “delicate”⁸²¹ constitutional balance of power that has evolved over the centuries.

However, the powers of the House over delegated legislation are so drastic that, as has been illustrated, they have fallen into almost complete disuse. This has the paradoxical consequence that, though the theoretical powers of the House are greater in relation to

⁸¹⁷ *Ibid.* at p.38

⁸¹⁸ The Courts themselves put forward a definition of a ‘constitutional’ statute in *Thoburn v. Sunderland City Council* [2002] EWHC 195, [2003] Q.B. 151, though this may be regarded as overly broad.

⁸¹⁹ Phillipson, ‘The Powers of a Reformed Second Chamber’, fn.669 at p.39

⁸²⁰ Russell, *Reforming the House of Lords*, fn.689, p.254

⁸²¹ *House of Lords Reform Draft Bill*, fn.670, p.11 para.9

such legislation, the House actually exerts less influence over delegated legislation than it does over ordinary bills. However, it is also possible that, with the proposed injection of democratic legitimacy, a reformed second chamber might break with convention and make use of powers which had previously fallen into disuse, with the potential to generate conflict between the Houses. It is arguable therefore, that the power to veto delegated legislation should be replaced with a power which can be more readily utilised by the House whilst preserving the primacy of the elected lower chamber, so that secondary legislation can receive appropriate scrutiny and government can be held to account for its actions.

Further, the House of Lords remains in a highly anomalous position when considered against comparable Western democracies in relation to its powers (or lack thereof) over legislation amending the constitution or altering fundamental human rights. It might be slightly more difficult to argue for an increase in the House's powers over such measures if it were to remain as an entirely appointed chamber. But if the Government intends to press ahead with the introduction of elected members, thereby increasing the democratic legitimacy of the House, they should at least consider the possibility of bringing the chamber into line with international trends, and provide it with enhanced powers in relation to such legislation.

CONCLUSION

Reforming the House of Lords is, as Lord Wakeham notes, “what Sherlock Holmes would call a ‘three pipe problem.’”⁸²² He notes that “some of the best political minds of the twentieth century”⁸²³ have failed to draw up a realistic and workable blueprint for a reformed House of Lords, such is the complexity of the issue. “If there had been an easy answer”,⁸²⁴ Wakeham suggests, “someone would have found it long ago.”⁸²⁵ The Government has put forward its blueprint, one which envisages a predominantly elected chamber with a minority appointed element, performing the same functions and exercising the same powers as the present House of Lords. One cannot dispute that such a chamber would possess a form of democratic legitimacy that could never be achieved with an all appointed House. The presence of elected members with a direct democratic mandate from the people would equip the House with a *perceived legitimacy* that would satisfy Russell’s criteria for an effective second chamber. However, it has been argued that this increase in legitimacy would come at too great a price. Even with the retention of a minority appointed element, the Government’s plans, it is submitted, tip the balance too far in favour of legitimacy at the expense of the House’s distinctive character and its ability to carry out its functions.

In recent debate, Baroness Taylor of Bolton noted that “it is very difficult to mount a theoretical, academic defence of an unelected House.”⁸²⁶ The argument advanced in this thesis has rested on the premise that the fundamental consideration when determining the desired composition of the second chamber is the ability of its members to fulfil the functions attributed to it. Indeed, Lord Hope of Craighead goes so far as to suggest that the “only relevant question”⁸²⁷ for us to concern ourselves with relates to the functions which a second chamber is designed to perform. That question, Lord Hope contends, is “whether the second chamber can add value to the process of legislative scrutiny.”⁸²⁸ If, as the 2011 White Paper suggests, the House of Lords is to continue as it does now, with the task of revision and scrutiny as its *raison d’être*, then the primary consideration should be ensuring that the House continues to contain the very best people to carry out this function. The case study of the 2011 Parliamentary Voting System and

⁸²² Lord Wakeham, ‘The Lords: Building a House for the Future’ (2000) 71(3) *Political Quarterly* 277, p.277

⁸²³ *Ibid.*

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

⁸²⁶ *Hansard* HL col.1341 (22nd June 2011)

⁸²⁷ Lord Hope of Craighead, ‘What a Second Chamber can do for Legislative Scrutiny’ (2003) 5 *European Journal of Law Reform* 7, p.20

⁸²⁸ *Ibid.*

Constituencies Act illustrates how the appointed members of the House of Lords outperform their elected counterparts in the House of Commons in terms of the scrutiny and amendment they afford to legislation. In providing for the retention of an appointed element within the membership of the reformed House, the Government appear to have acknowledged that appointed members are able to provide the expertise, experience and independence of mind that could not be guaranteed in a wholly elected chamber, and would not necessarily be possessed by directly elected members. But these qualities, it is argued, are the very qualities that are essential for the House to effectively carry out its revising functions.

The fundamental objection to an all-appointed House, it has been seen, lies in its inherent lack of direct democratic legitimacy. An appointed House, so the argument goes, can boast a *distinctive* membership, but not the *perceived legitimacy* to make full use of its powers. It has been contended however that, as Russell acknowledges, legitimacy should be viewed as a continuous rather than dichotomous concept.⁸²⁹ Appointment may not provide the same level of legitimacy that flows from a democratic mandate, but that does not mean that appointed members are illegitimate *per se*. An appointed chamber can point to other characteristics which can be viewed as a source of legitimacy. These include, in the case of the House of Lords, the prevalence of expertise amongst its membership, the more proportional party balance when compared with the House of Commons, and the ability of the House to carry out its functions ably and efficiently. While this *lesser* form of legitimacy may not equate to that which can be boasted by members of the elected lower House, it has enabled the House of Lords, since 1999, to increase both its assertiveness and its impact on the legislative process. It has been shown that, not only does the House of Lords defeat the Government with increasing frequency and severity, but its defeats often have a lasting and meaningful impact on the policy process. When coupled with the fact that both the public and members of the lower House have been shown to regard the House of Lords as *more legitimate* than it was prior to 1999, this suggests that the House of Lords may already possess the requisite *perceived legitimacy* to exercise its powers and carry out its functions.

It has been argued also, that this *lesser* legitimacy could be increased further through reform of the system of appointment. No attempt has been made to suggest that the House of Lords, as currently constituted, is without a perfect upper chamber. It has been shown that the House does contain members from a wide variety of professional backgrounds with expertise and experience in a range of different fields, but it must also be acknowledged that this expertise is

⁸²⁹ As discussed above. See Russell, M. 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons for Bicameralism' (2010) 58 *Political Studies* 866, p.882

not perfectly balanced, and due to the continuation of Prime Ministerial patronage, is not a prerequisite of membership of the upper House. The removal of powers of patronage from the Prime Minister and party leaders and placing of responsibility for appointments with an independent Statutory Appointments Commission would not only serve to increase the *perceived legitimacy* of individual members, who could be certain that their elevation was based on merit alone, but would also heighten the sense of legitimacy of the chamber as a whole, which could point to the fact that its continued appointed nature had the approval of the people's elected representatives in the House of Commons. A Statutory Commission could also take steps toward ensuring a more desirable blend of knowledge and experience by making appointments that fill the gaps in the current House's expertise. The acceptance of a *lesser*, but not insignificant form of legitimacy as a basis for the continued existence of an appointed House of Lords, might be a sacrifice worth making if it meant, not only the retention of the House's *distinctive* character, but also the retention of an efficient and effective revising chamber.

One cannot deny that an elected second chamber would be a more democratic and more legitimate second chamber. But it would also be a more assertive chamber. It has been argued that, while the Parliament Act procedure continues to preserve the primacy of the House of Commons, a predominantly elected House could rival the House of Commons in a way an appointed House would not. It is true that, should they come under increasing pressure, the conventions that govern the relationship between the two chambers could be codified. It is true also that while many other second chambers around the world are elected, these countries do not suffer from great constitutional crises, and procedures are in place to deal with the event of legislative impasse. But the possibility remains that while the primacy of the House of Commons might be retained, a predominantly elected second chamber might challenge the will of the House of Commons in a way hitherto unknown.

It has been argued also that the powers of the House of Lords can be viewed as moderate when placed on the international spectrum. Given that Russell has concluded that the powers of the House are adequate for it to function as a check on government and the House of Commons,⁸³⁰ the Government is, it has been submitted, quite justified in not seeking to alter the formal powers of the upper House. However, it is also submitted that, should the Government press ahead with the introduction of elected members to the second chamber, it should at least consider the arguments in favour of bringing the House of Lords into line with other

⁸³⁰ As discussed above. See Russell, M. 'Is the House of Lords Already Reformed? (2003) 74(3) *Political Quarterly* 311, pp.314-315; and Russell M. *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), p.264

comparable upper Houses by giving the second chamber an enhanced role in relation to legislation which seeks to alter the constitution or fundamental human rights. Further, the Government should also consider providing the House with a more practical power over delegated legislation.

Baroness Taylor concluded her speech to the House of Lords in the following terms:

*"I do not think that the House of Lords is perfect. We could improve it... My defence is the practical fact that this House works. No one could have designed it in the way that it is but it has evolved into a very useful Chamber."*⁸³¹

This, it is submitted, is an argument to which the Government should pay great attention. It may not provide a complex, theoretical justification for the continued existence of an appointed chamber of Parliament, but it is, nonetheless, a very difficult statement with which to disagree. The situation the House of Lords finds itself in today is, as Baldwin notes, "the result of a long evolutionary process."⁸³² He suggests that, when considering the issue of Lords reform, one should remember the story of Sir Isaac Newton's bridge at Cambridge. He recounts the story as follows:

*"Newton, so the story has it, designed and constructed a wooden bridge over the River Cam. Now the design was so ingenious and the construction so precise that each of the component parts, once in place, held together without the need of bolts, nails, screws or indeed any other fastening. This perplexed and baffled all the great men of the time, none being able to comprehend why a bridge built in such a fashion could work. Yet work it did, as was abundantly clear for all to see. Such was their curiosity that following Newton's death they dismantled the bridge in order to ascertain how it worked. From doing this they learnt only two things, first, even by taking it to pieces they were unable to pinpoint how or why the bridge had worked, and secondly, having taken it to pieces they were quite unable to rebuild it."*⁸³³

This is, it is submitted, something the coalition should bear in mind before the House of Lords is altered in a fundamental and potentially irreversible way. Evolutionary, rather than revolutionary reform, could well be the answer to the Lords reform problem.

⁸³¹ *Hansard* HL col.1341 (22nd June 2011)

⁸³² Baldwin, N. 'The House of Lords: into the Future?' (2007) 13(2) *Journal of Legislative Studies* 197, p.208

⁸³³ *Ibid.* at p.209

APPENDIX 1 – A Brief History of Lords Reform

The House of Lords has existed in some form or other since at least the fourteenth century, for many centuries the legislative equal of the House of Commons, and often the chamber from which the Prime Minister was selected. As King observes, though frequently described as the ‘second chamber’, there was, until the early 20th century at least, “nothing secondary about it.”⁸³⁴ Only in the field of tax and finance did the House over time yield supremacy to the Commons. But the period between 1911 and 2011 has seen a steady evolution and transformation of the upper House from what one might consider to be a bizarre feudal relic to a crucial component within the legislative and political framework of this country.

The formal powers of the House of Lords were first curtailed and codified by Asquith’s Liberal government in 1911, following the refusal of the Conservative-dominated House to pass Lloyd George’s famous ‘Peoples’ Budget’ of 1909. The relationship between the two houses, one containing a majority of democratically elected Liberal members, the other overwhelmingly biased in favour of the Conservative party,⁸³⁵ had already shown signs of instability, particularly when their Lordships saw fit to veto Liberal home-rule legislation for Ireland in 1893. But the rejection of a budget was the final straw, and as King describes, “following two general elections, which returned the Asquith Government to power”,⁸³⁶ and with the “reluctant collaboration of the King”,⁸³⁷ the Lords were “finally dragooned into accepting that they were no longer to be coequal with the Commons.”⁸³⁸ The Parliament Act of 1911 completely removed the powers of the House over money bills,⁸³⁹ and replaced the absolute right to reject primary legislation with a suspensory veto, whereby any bill passed by the Commons in three successive sessions could be presented for Royal Assent without the approval of the Lords. The House retained one absolute veto under the Act, the power to reject a bill proposing to extend the life of Parliament beyond the statutory five years.

But the 1911 Act did more than just curtail the powers of an intransigent chamber. It also indicated for the first time that the hereditary principle was no longer an appropriate mechanism for selecting members of the upper house. The preamble to the 1911 Act indicated

⁸³⁴ King, A. *The British Constitution* (Oxford: Oxford University Press, 2009), p.298

⁸³⁵ This not only included those peers that took the Conservative Party whip, but also a large proportion of unaffiliated crossbench peers who could be characterised as “small c” conservative in outlook.

⁸³⁶ King, *The British Constitution*, fn.834, p.298

⁸³⁷ *Ibid.*

⁸³⁸ *Ibid.*

⁸³⁹ The House retained a less than impressive one-month delaying power.

that it should be seen as nothing more than in interim measure to contain the Lords until a new House could be “constituted on a popular instead of hereditary basis”,⁸⁴⁰ a substitution that could not “be immediately brought into operation”.⁸⁴¹ To this day, the intention of the preamble has yet to be implemented. Indeed, if the 1911 Act was intended to be nothing more than an interim measure, “the interim has been, to say the least of it, protracted.”⁸⁴²

The delaying power of the Lords was then reduced further from three sessions to two by Clement Atlee’s Labour administration with the passing of the Parliament Act 1949, itself enacted under the 1911 Act procedure. Perhaps more significant was the voluntary diminution in power accepted by the House in 1945, the so-called ‘self-denying ordinance’ known commonly as the Salisbury convention after its creator Lord Cranbourne, later 5th Marquess of Salisbury. Despite the changes implemented by the 1911 and 1949 Acts, the House of Lords retained considerable statutory powers. As Bogdanor notes, “even after 1949, it would have been possible for the Lords to wreak havoc on a government’s programme.”⁸⁴³ Indeed, the power to delay all legislation for a year meant that the Lords could “render the last year in office of a government of the Left completely futile.”⁸⁴⁴ The problem was that after the war, the House of Lords had become a “Conservative as well as conservative bastion.”⁸⁴⁵ The inherent bias of the aristocracy had manifested itself into an outright obstruction to socialist policy which, with a Labour majority in the Commons after 1945, looked set to provoke conflict between the two Houses of Parliament. Fearing a further reduction in power, or even outright abolition, the Lords opted for a policy of self-restraint, and accepted Lord Cranbourne’s proposal whereby government legislation, no matter how repugnant, would not be impeded by the Lords where the government had a mandate for such a change. Thus, if the legislation had featured in the governing party’s manifesto at the preceding general election it would not be obstructed in the Lords.⁸⁴⁶

But it is not only in the arena of legislative power that there has been notable change, so too has the composition of the House evolved and adapted over time. The legal powers of the House have not changed noticeably since the 1949 Act, but the body of people entitled to exercise such power has transformed significantly. As King puts it, “the house still stands, and it still stands at

⁸⁴⁰ Preamble to the Parliament Act 1911

⁸⁴¹ *Ibid.*

⁸⁴² King, *The British Constitution*, fn.834, p.299

⁸⁴³ Bogdanor, V. *The New British Constitution* (Oregon: Hart 2009), p.151

⁸⁴⁴ *Ibid.*

⁸⁴⁵ King, *The British Constitution*, fn.834 at p.299

⁸⁴⁶ Other important conventions developed over time, such as the principle of general restraint whereby the Lords virtually never vote against a Government Bill at Second Reading, and the Convention that the Government should get its legislation in reasonable time.

the same address, but hundreds of old residents have moved out and hundreds of new ones have moved in.”⁸⁴⁷ The transformation began in 1958 with the passage of the Life Peerages Act. Prior to the passing of this Act, the entire membership of the House, with the exception of a handful of Law Lords and Bishops, was constituted entirely by hereditary peers, male aristocrats who inherited their title along with the right to sit and vote from their fathers. Further, Labour and the smaller parties were dangerously under-represented. In 1955 for example, there were just 55 Labour peers compared with 507 Conservatives, 238 crossbenchers and 42 Liberals.⁸⁴⁸ Macmillan’s legislation allowed for the creation of peerages for life (peerages that would not be passed on after death), while retaining the hereditary element in the House. This not only allowed more Labour peers to be created, going some way to rectify the party imbalance in the House caused not least by the reluctance of Labour supporters to accept hereditary peerages,⁸⁴⁹ but also allowed women to be admitted to the House for the very first time. The Act allowed party politicians as well as notable experts to enter and contribute to the work of the House, but the effect of the Act should not be overstated. The House remained hereditary-dominated with a considerable Conservative bias for many more years.

Further change came in 1963 when the Peerages Act was passed, allowing those that inherited hereditary peerages to renounce their title and seat in the Lords. It was due to the passing of this Act that Tony Benn was able to continue his political career in the Commons, a career that had been put in jeopardy in 1960 when the death of his father meant that he was forced to succeed as Viscount Stansgate. The 14th Earl of Home also benefitted from the Act when he disclaimed his Earldom in 1963 to enter the House of Commons and become Prime Minister. The Act also allowed hereditary peeresses to take their seats in the House, a right already enjoyed by female life peers.⁸⁵⁰

Very little changed in the House of Lords for the next thirty or so years, until it was transformed once again by Tony Blair’s Labour government. Labour had fought the 1997 general election promising a two-stage reform. The first phase would see the removal of all hereditary peers from the House of Lords. The ending of the ancient right of the hereditary aristocracy to sit and vote in the House was to constitute an initial, self-contained reform to make the Lords “more

⁸⁴⁷ King, *The British Constitution*, fn.834 at p.300

⁸⁴⁸ Figures cited by Bogdanor, *The New British Constitution*, fn.843, p.155

⁸⁴⁹ *Ibid.*

⁸⁵⁰ Unfortunately the increase in women’s representation in the Lords to the present day has been rather modest, see Eason, C. ‘Women Peers and Political Appointment: Has the House of Lords Been Feminised Since 1999 (2009) 62(3) *Parliamentary Affairs* 399

democratic and representative.”⁸⁵¹ Proposals would then be considered and put forward by a Joint Committee of both Houses of Parliament to complete the reform process. The House of Lords Act implemented the first stage of reform in 1999, ending the right of the hereditary peers to sit and vote in the House. However, to secure the acquiescence of the Conservative peers and prevent prolonged resistance, a compromise was agreed with the leader of the Conservative party in the Lords, Lord Cranbourne, whereby 92 hereditary peers were allowed to remain.⁸⁵² The Weatherill amendment (so named because it was moved by former Commons Speaker Lord Weatherill) sought to retain some semblance of the hereditary peerage at least until the second stage of reform was carried out. Fifteen hereditary peers were elected by the whole House as office holders, with a further seventy-five elected by electoral colleges made up of the hereditary peers from their own party groupings.⁸⁵³ In addition, two hereditary royal office-holders were exempted; the Duke of Norfolk (Earl Marshall) and the Marquess of Cholmondeley (Lord Great Chamberlain). However, those not elected by their hereditary colleagues lost their right to sit and vote, and over six hundred peers were expelled from the House.⁸⁵⁴

However, since the passage of the 1999 Act, the second stage is still yet to be implemented. A number of attempts were made by Labour governments to establish a consensus, but all met with failure. A Royal Commission was established under the chairmanship of Conservative peer Lord Wakeham to “consider and make recommendations on the role and functions of the second chamber.”⁸⁵⁵ The report made 132 recommendations and proposed a reformed House consisting of around 550 members, the majority of which would be appointed by a statutory Appointments Commission, with a minority of 65, 87 or 195 elected regional members.⁸⁵⁶ The Commission proposed no radical change in the balance of power between the two Houses.⁸⁵⁷ However, the report was criticised for its gradualist approach and the timidity of its proposals,⁸⁵⁸ and though it was accepted by the government,⁸⁵⁹ its recommendations were

⁸⁵¹ *New Labour: Because Britain Deserves Better*, Labour Party General Election Manifesto, April 1997, p.32

⁸⁵² See Cockerell, M. ‘The Politics of Second Chamber Reform: A Case Study of the House of Lords and the Passage of the House of Lords Act 1999 (2001)7(1) *Journal of Legislative Studies* 119

⁸⁵³ For further detail see Lankina, T. and Phillips, M. ‘The House of Lords: The Working of the Electoral Process in the 1999 Act of Parliament (2009) 80(1) *Political Quarterly* 42

⁸⁵⁴ Hereditary titles themselves were not abolished, and hereditary peers were given the right to vote in general elections, and even stand for election to the Commons. The first to do so was the 3rd Viscount Thurso, a descendant of liberal politician Sir Archibald Sinclair, who took his seat in the Commons in 2001. Douglas Hogg (3rd Viscount Hailsham) and Michael Ancram (13th Marquess of Lothian) are other notable examples of peers who have enjoyed successful careers in the Commons without having to disclaim their peerages.

⁸⁵⁵ Royal Commission on the Reform of the House of Lords, *A House for the Future* CM 4534 (2000), Terms of Reference

⁸⁵⁶ *Ibid.* at pp.8-9

⁸⁵⁷ *Ibid.* at p.4

⁸⁵⁸ See Russell, M. and Cornes, R. ‘The Royal Commission on Reform of the House of Lords: A House for the Future?’ (2001) 64 *Modern Law Review* 82

never implemented. There then followed several periods of sporadic but protracted discussion, interspersed with periods of inaction and delay. Indeed, “there were occasional votes but certainly no decisions – save possibly decisions not to decide.”⁸⁶⁰

In May 2000 a non-statutory independent Appointments Commission was formed to relieve the Prime Minister of the task of nominating non-party political working peers to the crossbenches. The Commission has the additional role of vetting all nominations for membership of the House for propriety before their names are sent to the Queen. However, the Prime Minister retains the right to nominate peers from his own party, along with the considerable power to determine how many peers are created at any given time, and what the balance between the parties in the House is to be. Nominations from the other parties now come from the respective party leaders, and are then transmitted to the Queen by the Prime Minister. The powers of patronage retained by the Prime Minister therefore remain considerable.

The Labour Government published its White Paper *The House of Lords: Completing the Reform* in November 2001.⁸⁶¹ Its proposals included the removal of the remaining 92 hereditary peers, the creation of a statutory Appointments Commission to nominate independent members, and the inclusion of 120 elected members to represent the nations and regions.⁸⁶² However the White Paper’s proposals received little support within Parliament.⁸⁶³ The House of Commons Public Administration Select Committee then published a report on Lords reform in February 2002.⁸⁶⁴ The report recommended that the second chamber be predominantly elected, 60% in total. The remaining 40% would be appointed by the Appointments Commission; half of which would be nominated by the political parties, the other half independent, non-aligned members.⁸⁶⁵ Once again these proposals were not implemented and the Government announced in May 2002 that a Joint Committee of both Houses would be formed to consider options for reform and attempt to build a consensus.⁸⁶⁶ The Joint Committee published its first report in December 2002,⁸⁶⁷ which set out “an inclusive range of seven options for the composition of a reformed House of

⁸⁵⁹ See Baroness Jay of Paddington, *Hansard* HL cols.912 and 915 (7th March 2000)

⁸⁶⁰ King, *The British Constitution*, fn.834, p.303

⁸⁶¹ *The House of Lords: Completing the Reform* Cm 5291 (2002)

⁸⁶² *Ibid.*

⁸⁶³ *Hansard* HL, cols.561-682 and 692-824; *Hansard* HC cols.702-78 (10th January 2002)

⁸⁶⁴ Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (Fifth Report of Session 2001-2002) HC 494 (2002)

⁸⁶⁵ *Ibid.* at para.96

⁸⁶⁶ *Hansard* HC cols.516-33; *Hansard* HL cols.12-23 (13th May 2002)

⁸⁶⁷ Joint Committee on House of Lords Reform, *House of Lords Reform: First Report* (First Report of Session 2002-2003) HL 17 (2002)

Lords.”⁸⁶⁸ In February 2003 both Houses voted on the seven options forwarded by the Joint Committee, which ranged from a wholly elected House to a wholly appointed one. The House of Commons rejected all seven options, although the proposal defeated by the fewest votes was for an 80% elected chamber, while the Lords voted by three to one for a fully appointed House.⁸⁶⁹ Indeed it has been noted that, “by defeating eight resolutions to amend the status quo, the Commons was left with the status quo – but the status quo is barely distinguishable from one of the eight defeated outcomes, and one of the more decisively defeated at that.”⁸⁷⁰ With the House of Commons clearly confused as to its preference, the then Leader of the House Robin Cook could offer no better advice than that members “go home and sleep on this interesting position.”⁸⁷¹

In March 2005 the Constitutional Reform Act received royal assent. The Act made provision for the removal of the Law Lords from the House, placing them within a new Supreme Court,⁸⁷² and made significant modifications to the office of Lord Chancellor. This included removing the functions of Speaker of the House and allowing for the creation of a separate office of Lord Speaker, the first of which was Baroness Hayman who was elected in 2006. In February 2007 the government published another White Paper, *The House of Lords: Reform*.⁸⁷³ The proposals centred around a hybrid house with 50% of its members elected and 50% appointed. Parliament debated the White Paper along with a range of options for reform in March 2007. The Commons strongly endorsed the retention of a bicameral system, and supported the removal of the remaining hereditary peers.⁸⁷⁴ The 50/50 model was rejected, but a motion proposing an 80% elected and 20% appointed chamber was passed by 305 votes to 267, and the motion for a fully elected House succeeded by 337 votes to 224.⁸⁷⁵

Votes took place in the House of Lords the following week, and every option for reform was rejected, their lordships strongly endorsing a fully appointed House.⁸⁷⁶ The then Leader of the House of Commons, Jack Straw, heralded the newfound consensus and announced his intention to pursue cross-party talks.⁸⁷⁷ This culminated in the 2008 White Paper, *An Elected Second*

⁸⁶⁸ *Ibid.* at p.5

⁸⁶⁹ *Hansard* HC, cols.152-243; *Hansard* HL, cols.115-38 (4th February 2003)

⁸⁷⁰ Mclean, I., Spirling, A. and Russell, M. ‘None of the Above: The UK House of Commons Votes on Reforming the House of Lords, February 2003’ (2003) 74(3) *Political Quarterly* 298, p.300

⁸⁷¹ *Hansard* HC col.243 (4th February 2003)

⁸⁷² This did not occur until 2009

⁸⁷³ *The House of Lords: Reform* Cm 7027 (2007)

⁸⁷⁴ *Hansard* HC, cols.1389–488 and cols.1524–638 (7th March 2007)

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Hansard* HL, cols.741–59 (14th March 2007)

⁸⁷⁷ *Hansard* HC, col. 1636 (7th March 2007)

Chamber: Further Reform of the House of Lords,⁸⁷⁸ which set out plans for either a fully or 80% elected second chamber, with appointments to be made by a new statutory Appointments Commission should there be an appointed element. Once again, the provisions of this White Paper were never implemented.

Some less radical reforms were included in the government's Constitutional Reform and Governance Bill which was introduced into the House of Commons in July 2009. The Bill contained provisions to end by-elections to replace deceased hereditary peers, to disqualify members found guilty of a serious crime, to suspend or expel members, and to allow members to resign and disclaim their peerages. However, these provisions were all lost in the wash-up period before the 2010 general election, and were not implemented.

It can be seen from the brief chronology presented here⁸⁷⁹ that while there have been some successful attempts at adaption and evolution over the last century, the more recent history of Lords reform has been a story of protracted debate, indecision and delay.

⁸⁷⁸ *An Elected Second Chamber: Further Reform of the House of Lords* Cm 7438 (2008)

⁸⁷⁹ This is not an exhaustive chronology of Lords Reform. Other notable attempts at reform included the proposals in the consultation paper published by the Department for Constitutional Affairs in 2003, *Constitutional Reform: Next Steps for the House of Lords* (CP 14/03), which sought to remove the remaining hereditary peers and establish a statutory Appointments Commission. A detailed analysis of responses to the consultation was published (*Constitutional Reform: Next Steps for the House of Lords – Summary of Responses to Consultation* (CPR 14/03)), but the proposals were not pursued. Also of significance were the proposals put forward by a group of cross-party MPs (Paul Tyler, Kenneth Clarke, Robin Cook, Tony Wright and Sir George Young) in 2005 entitled *Reforming the House of Lords: Breaking the Deadlock*. These proposals for a majority elected hybrid House were debated in detail along with the accompanying draft bill (*Hansard* HC, cols.71-95WH), but again never reached the statute book.

APPENDIX 2- List of Peers' Primary and Secondary Professional Areas

Table 2: Primary and Secondary Professional Area of Members of the House of Lords

Area	Primary	Secondary	Total	% of House with this area as primary	% of House with this area as primary or secondary
Architecture, engineering and construction	5	8	13	1%	2%
Agriculture and horticulture	20	4	24	3%	3%
Banking and finance	59	28	87	8%	12%
Business and commerce	61	34	95	9%	14%
Other private sector	23	10	33	3%	5%
Legal professions	54	13	67	8%	10%
Manual and skilled trades	1	7	8	0%	1%
Culture, arts and sport	14	9	23	2%	3%
Journalism, media and publishing	25	10	35	4%	5%
Education and training (not HE)	5	13	18	1%	3%
Higher education	59	17	76	8%	11%
Medical and healthcare	15	12	27	2%	4%
Transport	5	2	7	1%	1%
Police	8	0	8	1%	1%
Representative politics	151	37	187	22%	27%
Political staff and activists	15	9	24	2%	3%
International affairs and diplomacy	18	3	21	3%	3%
Civil service UK	10	6	16	1%	2%
Armed forces	12	1	13	2%	2%
Royal family staff	2	0	2	0%	0%
Local authority administration	8	10	18	1%	3%
Other public sector	12	15	27	2%	4%
Trade unions	21	7	28	3%	4%
Voluntary sector, NGOs and think tanks	25	9	34	4%	5%
Clergy or religious	29	2	31	4%	4%
Unclassified	42	0	42	6%	6%
Total	699	265	964	100%	100%

(Source: Russell, M. and Benton, M. *Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords: Report to the House of Lords Appointments Commission* (London: Constitution Unit 2010), p.15)

APPENDIX 3 – Specialisms of Former MPs

Table 3: Primary, Secondary and Tertiary Specialisms of Former MPs in the House of Lords

Specialism	Primary	Secondary	Tertiary	Total
Farming and Agriculture	2	3	1	6
Trade and Industry	4	6	0	10
Energy	3	4	1	8
Environment	1	4	1	6
Economics and Finance Policy	14	7	0	20
Technology Policy	0	1	1	2
Culture, Media and Sport	7	0	0	6
Law	5	2	1	8
Constitutional Affairs	3	1	0	4
Scottish Affairs	6	1	2	9
Welsh Affairs	6	2	0	8
Northern Irish Affairs	8	0	2	10
Health	2	0	2	4
Education	9	3	0	12
Transport	3	0	2	5
Home Affairs	7	2	0	9
Social Services	0	3	0	3
Disability	1	0	0	1
Social Security	5	2	0	7
Defence	8	8	0	16
Foreign Affairs	13	5	2	20
International Development	6	0	0	6
Employment	5	4	1	10
Consumer Protection	1	0	2	3
Housing	0	3	0	3
Total*	119	61	18	198

*In addition 32 members were assigned no specialism in this analysis

(Source: Russell, M. and Benton, M. *Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords: Report to the House of Lords Appointments Commission* (London: Constitution Unit 2010), p.47)

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