

HOUSE OF LORDS REFORM

Critique of the paper prepared by Jack Straw for the Cross-Party Working Group on House of Lords Reform [dated 12 October 2006]

The kindest thing that can be said about the paper is that it is dire. The sum of the parts does not add up to anything. The paper comprises an array of disparate and discrete points with no obvious relationship between them and no apparent understanding of the implications of a number of the claims made.

The paper states that 'Form should follow function'. This, unfortunately, appears to be taken in a purely literal sense. That is, the section on form follows the section on functions. The introduction identifies the principal functions of a second chamber and lists four key principles. There is then a discussion of different options on composition, but without that discussion relating consistently to those functions and principles. *There is, in short, no joined-up thinking. There is no clear, consistent or empirically-supported case made for a partially elected House.*

Nowhere is there any criticism of how the post-1999 House of Lords has operated – there are no accusations of obstruction or filibustering for example – so it must be assumed that the proposals for reform have nothing to do with the House's *effectiveness*.

The introduction identifies the accepted functions of a second chamber (legislative scrutiny and revision, scrutiny of the executive, and debate), notes that the UK parliamentary system is 'built around the idea of a complementary second chamber, whose primary function is to act as a revising chamber for legislation' and then goes on (at para. 10) to identify key principles of composition which will help deliver complementarity. 'These principles relate to: (a) balance between the parties; (b) crossbench/ independent members; (c) religious representation; (d) racial and gender balance; (e) regional representation.'

The paper then develops these points. So far so good, but it then moves at paragraph 21 to the method of selection. At this point, it makes an assertion – unrelated to anything that has preceded it – that reform of the House of Lords must 'ensure that it is effective, legitimate and more representative in a way that it enhances public engagement with the parliamentary process'. There is no discussion of how this relates to functions or the 'key principles' stipulated in the introduction.

It then discusses three options: appointment, election or a mix. The section on appointment actually makes a strong case for an all-appointed House. 'The advantage of an all appointed House is that it would be the simplest option in terms of meeting many of the principles of composition set out

above. It would ensure that the House of Lords does not replicate the Commons and only those individuals with the relevant experience would gain a seat in the House. It would also be easier to ensure that the House reflected better the racial and gender makeup of the UK'. [para. 33] In terms of disadvantages [para. 34], no reference is made to functions or the key principles of composition, other than a claim that it would correct 'a bias towards the south east' (though noting 'unless appointment were done on a regional basis'). *In short, there is no case made for change on the very grounds that are asserted should underpin the second chamber.*

When it comes to the all-elected option, there *is* recognition of the problems in relation to functions and the key principles. A fully-elected House 'would prove difficult to ensure representation of non-political Crossbench members' – this 'could result in a valuable loss of experience to the Second Chamber' (I think this is intended to mean 'a loss of valuable experience'). 'It would be difficult to ensure that the principles of representation of the racial and gender mix of the UK and the representation of religious opinion were met, unless strict rules were in place when individuals stand for election....' A fully-elected chamber would become more political than the current House [para. 37] and it is likely that a wholly elected chamber 'would become so assertive of its role in practice to challenge the powers of the Commons, to overlap with the latter's functions'. [para. 38]

It then goes on to discuss different methods, and timings of elections, and identifies problems (especially in the Annex to the paper) with each of the three electoral systems: first past the post, list, and the single transferable vote. The arguments against are, in each case, compelling. *Inter alia*, the first past the post system creates a potential for rivalry with MPs and would lead to significant under-representation of smaller parties, list systems give electors little choice over the place of candidates in the list (that rests with parties whose powers of patronage would be thus even greater compared with the current system of appointment), and the single transferable vote is more difficult to operate for independent candidates and cross-party voting; not mentioned by the paper is that, in Ireland, the use of STV has encouraged an excessive degree of localism.

Having effectively made the case against an all-elected House, the paper then discusses the option of a hybrid House in three paragraphs. Given the declared preference for a 50/50 composition, these presumably stand at the heart of the case for that preference. 'The advantages of one method of entry cancel the disadvantages of the other, for instance, a proportion of election confers democratic legitimacy on the House, while an appointed element allows a House to have a more diverse membership, whilst retaining a proportion of non-political members' [para. 48]. That is it. No other advantages are offered. There is no evidence presented to justify these particular claims. There is no discussion of how this mixed membership will fulfil the functions outlined in the introduction – *certainly no explanation of how they will be fulfilled as well as, or better than, the current House* – and no discussion of how they relate to the key principles.

As for disadvantages, it conceded that there is the objection that it would create two classes of members 'with elected members claiming a greater degree of legitimacy and therefore authority, than appointed members'. It then declares: 'However we must bear in mind that the current House is a hybrid House made up of appointed members, Bishops (who leave on retirement as Bishops) and elected Hereditary peers and difficulties of this kind are not seen as an issue.' [para. 49] The most obvious of several retorts to this derives from the paper's own arguments. The claim for election is that it confers 'democratic legitimacy'. That is the whole point of the argument advanced (the paper makes no other). The existing membership of the House has one thing common to all members: none is popularly elected. It is a house of equals, and each has a writ of summons that is personal: members speak only for themselves. (Even the Bishops do not speak as representatives of the Anglican Church, they speak only for themselves.) Elected members would speak for a particular constituency and would claim the authority to do so. In the event of the appointed members making the difference to the outcome in a vote – the elected members failing to get their way – does anyone seriously suggest that this would not be used by elected members and those outside who wanted a different outcome? It is not a recipe for closure but for instability.

In sum, when the discussion is related to the functions and principles presented as forming the basis of the second chamber, the arguments lead ineluctably to preferring an all-appointed House. The paper makes no substantive or persuasive case for election on the basis of those functions and principles.

As for the separate claim that the House should be 'effective, legitimate and more representative', the current House is effective – what estimates that have been made suggest that the Lords makes more of a difference to legislation than the Commons – and is legitimate in terms of having members appropriate to fulfil the functions ascribed to it. As for 'more representative', there are different meanings of representation. In his Constitution Unit lecture on 24 October, Jack Straw made clear that he meant 'increasing the number of women in the House, and the number of people from minority ethnic groups'. As the paper itself recognises, the route to achieving this is through appointment. As elections to the House of Commons have shown, election is not the quickest route to achieving a significant increase in the representation of majority (women) and minority groups. As for enhancing 'public engagement with the parliamentary process', a report by Gemma Rosenblatt of the Hansard Society on this very topic suggests that the upper house is ahead of the elected house. 'In this instance', she writes (*House Magazine*, 30 Oct. 2006), 'Parliament's "A" students may be members of the House of Lords'.

Size of the House

The paper is also flawed in its attempts to construct a part elected House. We are told, at paragraph 53, that it would be appropriate to reduce the size of the House from its current membership 'to better reflect its revising function' and

that this would require a full-time membership. In the preceding paragraph, it notes that, 'although 656 members attended the House at least once, the average attendance was only 388, which better reflects the "working" size of the House of Lords.' No it doesn't. This claim can only be maintained if one can show that it is basically the same 388 members attending each day. The basis for assessing the size of the working House is not aggregate-level data but rather individual-level data (that is, looking at the number of times each member attends). The basis on which the paper opts for a House of around 450 members is thus not sustainable.

The claim that a smaller House is necessary 'to better reflect its revising function' has no obvious logic to it. How is it necessary? The reason the current House is an effective chamber of legislative revision, complementing the work of the Commons, is because it has members drawn from a range of backgrounds that can come in when their particular expertise is required. As a House of experience and expertise, it adds value to the political process. It is not at all clear how the quality of legislative revision will be improved, and a complementary role to the Commons maintained, by having a smaller body of elected or part elected full-time politicians.

The tenure of members

The advantages of the current life membership system can be maintained, we are told, if members were to serve 'three parliament terms equating to a minimum of 12 years, with no provision for reappointment or re-election'. Which is it? Three parliaments do not necessarily equate to twelve years. It could be two or three years, or it could be up to a maximum of fifteen years. Where would be the continuity and value if there were two elections in quick succession (as in 1974) or even three? Apparently, the Leader of the House has said that, in the event of three elections in quick succession, it would be possible 'to skip a parliament'! Who would decide? And how would this be embodied in statute?

It is also not clear how the provision for membership would attract the sort of person deemed necessary to fulfil the functions of the second chamber. The deterrent built into the proposal is also a give-away as to the type of person expected to seek election and to be put on a party list. It is argued by critics that an elected second chamber would attract people who have failed to get elected to the Commons (rather than, as now, people who have seen service at senior levels, including in the Commons). This point is, in effect, conceded in the paper at paragraph 57, where we are told 'To counteract the possibility of members using the House as a launchpad, members who have held seats in the House of Lords could be prevented from seeking election to the Commons for a period of say five years'. So, people who otherwise would prefer the Commons. And if the term is limited to a maximum (but could turn out to be very much less), how will service be attractive to people in mid or early career, rather than those close to retirement?

CONCLUSION

The paper is confused and fails to think through consequences. It is as important for what is not in it as for what it includes. There is no discussion of transitional arrangements. How do we get from here to there, not least in terms of the existing membership and the proposed House of 450 members? It is not explained how a chamber of full-time salaried members will improve the delivery of the functions that are ascribed to the second chamber (although it admits that the cost of a salaried smaller House could be at least three times greater than the existing appointed House). How will expertise be maintained if members are full-time members of the second chamber?

Electing some of the members of the second chamber will not confer 'democratic legitimacy' on the appointed members, yet the paper concedes implicitly that appointed members will have legitimacy (otherwise it would have opted for the all-elected option). It asserts that election would 'give justification to the authority of the House'. It is not clear why this should be so if there is a derisory turnout in an election. (The likelihood of a small turnout is conceded by proposals for the election to take place at the same time as other elections.) And why would the House be conceded more authority when electors hold a more positive view of the unelected second chamber than the elected first chamber?

The proposal for change is flawed because the elements are inconsistent and not thought through. They also rest on the basic fallacy that underpins calls for reform: that is, that election of the second chamber is the 'democratic' option and confers legitimacy. At the heart of representative democracy is the concept of accountability. Through one elected chamber, there is one body – the party in government – responsible for public policy. It is elected on a particular platform and if electors disapprove of what it does, they can remove it from office at the next election. There is no capacity to pass the buck. Once you start electing a second chamber, it will claim the mandate of election (even if not holding the same powers as the first) and one has the basis for divided accountability: whom do electors hold to account for the outcome of deals agreed between the chambers or a failure to produce any output? Divided accountability does not favour electors: it favours parties and (as in the USA) special interests. As for legitimacy, that derives from recognition that people are qualified to do a particular job. Surveys suggest that people recognise that members of the existing House of Lords are qualified to fulfil the functions ascribed to the second chamber. Jack Straw's paper is a muddled attempt to address a problem that he cannot prove exists.

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