

THE GOVERNMENT'S WHITE PAPER
The House of Lords: Reform (Cm 7027)

A HOUSE BUILT ON STRAW

The White Paper is not so much a White Paper as a disjointed options paper with the emphasis on form and process.

In his original paper, prepared in October 2006, Jack Straw wrote 'form must follow function'. In the White Paper, the functions of the second chamber get even less space than in Mr Straw's paper. They are basically confined to a sentence at the end of paragraph 1.2. The White Paper then goes on to state the premise on which the case for a part-elected second chamber rests. It is asserted rather than proved. If the premise is not proven, then the case for election falls.

The premise on which the White Paper rests appears at the beginning of paragraph 1.4. It has no obvious relationship to the discussion, on the relationship of the two chambers, which has preceded it. The premise is that 'In the Government's view, it is difficult, in a modern democracy, to justify a second chamber where there is no elected element in which the public has no direct input into who sits in it'. We are offered no definition of democracy or, for that matter, an explanation of how a modern democracy differs from a democracy. The rest of the White Paper is essentially given over to history (pages 10-22), some disparate international cases (pp. 22-24) and a discussion of reform options.

The only passing justifications for the Government's view, in terms of principle, appears in paragraph 6.13, where it is claimed election is necessary for rendering the House 'legitimate'. It equates legitimacy with accountability. 'A reformed House should be more accountable to the people of the United Kingdom than the current House'. It then declares 'This greater democratic legitimacy would not just increase confidence in the second chamber, but strengthen Parliament as a whole'. In the subsequent section (paragraphs 6.22 to 6.26), the need for a more representative House is asserted, but this is defined in terms of making it more reflective of different groups in society.

Blurred accountability

Let us unpack these different assertions. Is election of the *second* chamber a prerequisite for democracy? Proponents of reform argue that one elected chamber is necessary but not sufficient. It is equally possible to argue that one elected chamber is necessary *and* sufficient. Election of two chambers threatens rather than enhances the accountability at the heart of a representative democracy. At the core of representative democracy is the selection of representatives to ensure that the voice of the people is heard and, as appropriate, translated into public policy. In a 'modern' democracy, political parties serve to aggregate the voice of electors and to deliver a

programme of public policy put before the electors at a general election. In the UK, we have one body – the party in government – that is responsible for public policy. Government is chosen through elections to the House of Commons and the House of Commons alone. A party wanting to change public policy in this country has to seek election to the Commons. Electors know who is responsible for governing the nation and know who to hold to account at the next election. Election day is, in the words of Karl Popper, ‘judgement day’. A government that fails to deliver can be swept from office.

Once one introduces election of a second chamber, the core accountability starts to be challenged. Election of a second chamber will not necessarily render it co-equal with the first. What it will do, though, is create the basis for the second chamber to claim more powers than the existing House and to employ those powers. Members will have an electoral base and claim to act on behalf of those who elected them. It will be in a position to challenge, even to block, measures emanating from the Commons; it will certainly be in a position to do deals in order to pass legislation – deals that are likely to favour parties and (as in the USA) special interests rather than electors. Fundamentally, it will leave a position of blurred or divided accountability. If electors disapprove of the public policy that emerges from deals done between the two chambers, what body does the electors hold responsible for that policy? Election of both chambers undermines the fundamental accountability of government. It renders the two Houses less responsible, in that members can disavow responsibility for outcomes. It fragments power in such a way as to undermine accountability, not enhance it.

Basic flaws

There are three further problems with the Government’s claims. First, under its own proposal for a single non-renewable term, members individually cannot be held to account. If members are elected for a fixed term of 15 years (para. 7.97) then the moment they are elected, they can be as irresponsible as they wish. The House would differ from the existing House in terms of composition and power, but not in terms of answerability. Voters would be bestowing the House with a claim to ‘democratic legitimacy’ (Jack Straw’s words) but no means of affecting the exercise of the power that would flow from that.

Second, legitimacy does not derive axiomatically from election. Legitimacy derives from an acceptance that persons who fulfil particular tasks are the most appropriate (for example, through holding particular qualifications) to carry out the tasks assigned to them. Judges are not elected, but are deemed legitimate for determining judicial matters (and the law lords – soon to be translated to a Supreme Court – arguably exert greater power over public policy than the House of Lords). The same applies to a whole host of positions. Survey data reveals popular acceptance that the legitimacy of the House of Lords derives from independence. A Populus poll in 2006 found

that 75 per cent of those questioned believed 'The Lords should remain a mainly appointed House because it gives a degree of independence'.¹

Third, and related, the claim that election would increase confidence in the second chamber is unsupported and, on the basis of survey evidence, unsupported. There is no evidence of a lack of confidence in the House of Lords. An ICM poll in 2005 found that 72 per cent of those questioned thought the Lords did a good job (a 'very good' + 'fairly good' job) against 23 per cent who thought it did a bad job ('fairly bad' + 'very bad' job). These are figures that many other chambers would die for. *How* would election of another set of politicians increase confidence in the second chamber?

Consequences

This brings us on to the fundamental flaw of the White Paper. It is based on what I contend to be a false premise. But it is as remarkable for what it omits as for what it claims. There is no consideration of the consequences of an elected second chamber. There is, as we have seen, an assertion that it would be more 'legitimate' and 'accountable' but no discussion of the actual effects of the changes proposed. The whole discussion revolves around process – on delivering a particular change – with no consideration of the consequences of that change. How would a part-elected House add value? Would the changes proposed actually deliver a chamber better able to carry out the functions – the 'generally agreed' functions identified in Jack Straw's original paper – than the existing House?

The White Paper is devoid of any evidence to sustain a claim that an elected chamber would be better than the existing House. Indeed, much of what is in the White Paper itself can be used to argue the opposite. The fact that the existing House adds value is conceded in the reform proposals. Jack Straw favours a hybrid House to maintain delivery of a diverse and independent membership. That he does so largely helps destroy his own argument. Election is deemed necessary to inject legitimacy, but the retention of appointed members implies that existing members already have some degree of legitimacy. Either that or the legitimacy that attaches to elected members will somehow waft over the appointed members to bring them within its embrace.

What will elected members be able to bring to the carrying out of legislative tasks, apart from the 'legitimacy' of being elected but unaccountable? The White Paper for all intents and purposes accepts that election to the second chamber will attract people who have failed to get elected to the House of Commons. This is conceded in paragraph 9.33, where it is argued that, in order to avoid members building up a political base, 'members who have held a seat in the House of Lords could be prevented from seeking election to the House of Commons for a certain period of time after their Lords' term expired'. So instead of the Lords containing some members who have been senior figures in the House of Commons, they will be displaced by people who failed

¹ Peter Riddell, 'A deal on the Lords that rival parties could hardly reject', *The Times*, 7 April 2006.

to get into the Commons in the first place.² The 15-year single-term appointment also has important implications for the age profile of those likely to seek election.

Elections

The problem as to the nature of who would be elected is compounded by the form of election preferred by Jack Straw. It is a list system, an electoral method that strengthens the hold of political parties. A partially open list system allows electors to make some changes to the order of candidates, but experience elsewhere shows that whether it is an open or closed list system makes little difference to electoral behaviour. The people who would be put forward for election would be on party lists and, given the priority that would attach to election to the House of Commons, would not necessarily be party high flyers. (On a list system, they would be less visible than MPs.) How would this enhance the capacity of the second chamber to carry out its functions?

And how would legitimacy be strengthened if electors cannot be bothered to vote? Under the Government's proposals, it is not clear what they would be voting *for*? Among the options for the timing of elections discussed in the White Paper, that of having a free-standing election is not even included. It is taken as given that it will have to be tied to the election of another parliamentary body in order to get electors to turn out. To ensure a 15-year cycle, the Government opts for utilising European Parliament elections. This does not appear an obvious recipe to generate a turnout that will enhance popular confidence in the second chamber.

The White Paper, in short, gets its priorities completely the wrong way round. Form doesn't follow function. No substantive arguments are advanced for what is proposed. Above all, there is no evidence presented – none at all – that election would generate a second chamber better able to do its job than the existing House. Until it can do that – and the onus is on those proposing change to make the case for it – there are no grounds for proceeding with a major change to the nation's constitutional arrangements.

Conventions

Given these fundamental problems with the White Paper, it may seem churlish to pick up other inconsistencies and omissions. The Joint Committee on Conventions, in its report in November 2006, found that the conventions governing the relationship between the two Houses worked well but that in the event of a change of composition of the second chamber would need to be revisited. The Government concedes at paragraph 4.9 that a 'changes to the composition of the Lords will call the current conventions into question' but

² Some parliamentary candidates who fail to get elected to the Commons can be, and sometimes are, nominated for the existing House. The argument here is about the extent to which they would come to form the dominant part of the House. The argument is analogous to that employed by Peter Riddell in respect of career politicians in the House of Commons. See Peter Riddell, *Honest Opportunism* (London: Hamish Hamilton, 1993).

then goes on to assert – as it did in its response to the Joint Committee’s report – that in its view ‘the current conventions are the right ones for a reformed House to work with, certainly early in its life’ (para. 4.11), the last five words being the only concession added. The Government has thus already decided the outcome of a debate that it has said will need to be had in the event of a changed composition.

Comparisons

The White Paper also lacks empirical evidence for its claims. The discussion of practice elsewhere appears to offer little and the authors appear unaware of literature on reform of second chambers.³ (The important point is not the existence of second chambers elsewhere but rather experience elsewhere in seeking to reform the second chamber.) It also for some reason draws on Inter-Parliamentary Union figures from 1975 (para. 5.6) – asserting they are the IPU’s latest figures – for the number of bicameral legislatures, even though there are far more recent data on the number of second chambers;⁴ the current figures could in any event have been extracted from the IPU database.⁵ The purpose of the discussion is not clear. As mentioned above, the fact that bicameral legislatures do not usually host two co-equal chambers is not central to the discussion. We also know that some other democracies have elected or part-elected second chambers. (The fact that they exist tells us nothing more than that they exist. It tells us nothing about the value they add, or fail to add, to the political process.) We also know that there are other democracies that exist with second chambers that are not elected: just under a quarter of second chambers are appointed and some others, as in Ireland, not directly elected.⁶

Mechanism for deciding the issue

The White Paper also proposes that the vote on Lords reform take place using the alternative vote procedure – a major constitutional innovation, setting a dangerous precedent, and proposed in order to resolve a particular issue on which MPs failed to reach agreement in 2003. It is a means of forcing MPs to come to a conclusion on the least objected to, rather than the most preferred, option and a means of preventing Members from saying ‘no’ where several options are involved.

The implications of the voting method proposed have been recognised by MPs and, in the light of the response to the proposal, it has wisely been abandoned. However, the rest of the White Paper remains. The fundamental flaws of the White Paper thus persist.

³ See especially Meg Russell and Mark Sandford, ‘Why are Second Chambers So Difficult to Reform?’ *The Journal of Legislative Studies*, Vol. 8(3), 2002; see also the other articles in the collection.

⁴ See, for example, Louis Massicotte, ‘Legislative Unicameralism: A Global Survey and a Few Case Studies’, *The Journal of Legislative Studies*, Vol. 7(1), 2001.

⁵ As Meg Russell did in 1999. See Meg Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), p. 22.

⁶ See Russell, *Reforming the House of Lords*, pp. 29-31.

Conclusion

To be against election is not to be against reform. There are various changes that could be introduced, including a statutory appointments commission, which would deliver some of the goals sought by Jack Straw. An appointments commission can deliver a House that is even more diverse than at present and do so more efficiently and effectively than election. The problems of election for generating diversity are apparent from attempts to widen membership of the House of Commons and are, in effect, conceded in the White Paper. Jack Straw raises the prospect of imposing quotas on parties in terms of gender and/or ethnicity and/or other factors (para. 7.94). It is possible to reform the House to deliver further benefits without destroying what the House presently achieves.

The White Paper seeks to replace a second chamber that is working well – that has not been shown to lack ‘legitimacy’ – with one that is likely to detract rather than add to carrying out what the public want it to do. The case for a complementary appointed chamber has previously been made.⁷ The House of Lords fulfils functions that are generally accepted as those appropriate to a second chamber and, certainly in the public’s estimation, it fulfils them well.⁸ As a complementary second chamber it fulfils tasks that are qualitatively distinctive and, as such, adds value to the political process. The political system has the benefits that flow from a second chamber without the adverse consequences (duplication, conflict) that may derive from two elected chambers. The present House adds value. *No one has been able to produce an alternative that can be shown to add value to the same extent as the existing House.*

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21 February 2007

⁷ See ‘Complementing the Commons’, on the website of the Campaign for an Effective Second Chamber: http://www.effectivesecondchamber.com/d/complementing_the_commons.pdf

⁸ Of those questioned in the ICM poll, 65 per cent thought the Lords did a good job in making the Government think again; 71 per cent thought it provided an effective check on Government. ICM poll for Politeia; fieldwork 18-20 March 2005. 1005 people were interviewed.

SUMMARY

- The White Paper is notably disjointed. It does not explain how the election of 50% of members under a list system will 'increase its effectiveness' [Jack Straw's statement]. How will the House that is proposed work better than the existing House?
- It fails to provide any empirical evidence for the claim (para. 6.12) that 'in many people's eyes, it [the House of Lords] still lacks the legitimacy to carry out its current role'. Surveys show that over 70% of people think that the Lords is doing a good job.
- It fails to explain why a second chamber of 540 members is desirable, other than that it is close to the recommendation of the Wakeham Commission for a House of 550 members.
- It does not deliver an accountable chamber. Single fixed-term elections mean that members, once elected, are not accountable to anyone.
- It enhances the power of political parties by providing for a list system of elections. (Experience elsewhere shows that, even with a partially open list system, voters rarely change the party preferences.) The new House would be under greater domination by the parties than the existing House.
- It does not explain how the claimed 'legitimacy' of elected members will embrace the appointed members.
- It essentially ducks the question of resources.
- It proposes a fixed 15-year term with a ban of seeking election to the House of Commons for a period thereafter. This in effect concedes that it will attract people who have failed to get into the Commons. It will also deter anyone in early or mid-career from seeking election. It is only attractive to those ending a career or already in retirement.
- The White Paper constitutes a recipe for instability and for delivering a second chamber devoid of the benefits of the existing House. It basically accepts that it will not bring closure since paragraph 10.5 states 'Of course, once reform has bedded down, it will be up to Parliament in the future to decide whether the proportion of the elected to appointed members settled on after the free vote continues to be the right one.'