

‘House of Lords Reform: What Next?’
Evidence to Political and Constitutional Reform Select Committee Inquiry

March 2013

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Preliminary comments

1. The committee has invited evidence on the next steps on Lords reform, following the failure of the coalition’s bill - which sought to move from the current appointed/hereditary chamber to a largely elected one. For the past 15 years, much of my research at the Constitution Unit (UCL) has focused on the Lords and its reform. My first book, *Reforming the House of Lords: Lessons from Overseas* was published by Oxford University Press in 2000. My third book (the second having been on other matters) will be likewise published by OUP in summer 2013, entitled *The Contemporary House of Lords: Westminster Bicameralism Revived*. It is based on substantial research about how the chamber has functioned since 1999, and also informed by reform debates during that period. I have served as a special adviser to the Leader of the House (Robin Cook) 2001-03, who had responsibility in the Commons for Lords reform, and as a consultant to the Royal Commission on the Reform of the House of Lords, and to the House of Lords Appointments Commission.
2. As someone who has closely followed this debate for 15 years, and been involved in a ‘hands-on’ way at times, the failure of the coalition’s bill came as no surprise. Not only recent events, but also longer history, demonstrate that ‘big bang’ Lords reform (i.e. a major reform which will be accepted as a lasting settlement) is extremely difficult. Indeed, despite numerous schemes, no such reform has ever succeeded. Two useful recent books - by Chris Ballinger, and Peter Dorey and Alexandra Kelso - chart the repeated failures of Lords reform throughout the 100 years post-1911.¹ But on the positive side, what Ballinger refers to as ‘a century of non-reform’ was punctuated by various important smaller-scale changes. These most obviously include the Parliament Acts 1911 and 1949, the Life Peerages Act 1958, Peerage Act 1963, House of Lords Act 1999 and Constitutional Reform Act 2005, but also various procedural and administrative reforms, and changes to convention - including regarding prime ministerial appointments. Collectively, these reforms have added up to a transformation of the Lords.
3. The lesson of history is therefore that incremental reform matters, and that it has a far greater chance of success than more ambitious proposals. Each successive reform over the last century has dealt with what contemporaries saw at the time as the most problematic and anomalous aspect of the chamber’s composition or powers. Each had been discussed for decades before finally being put into effect. And each was considered at the time to be a temporary stopgap, until ‘real’ reform could be achieved. Yet looking back on the century, real reform did occur through an aggregation of these small steps, each individually having been considered in its time temporary and inadequate.
4. The most important recent reform was the 1999 House of Lords Act, removing the great majority of hereditary peers. As my work has charted - and many members with long service in parliament will attest - this reform was significant.² It created a chamber that was far more party balanced, and in which members felt more legitimate and confident to contribute to the policy process. Accompanying changes, particularly to how Crossbench peers are chosen via the House of Lords Appointments Commission, were also very important, and reinforced this. But Labour’s billing of the 1999 Act as ‘stage one’ of a two-stage process served to mask its

importance, and helped fuel disappointment about the lack of ‘stage two’. As I suggest in my forthcoming book, ‘Labour’s reform might more appropriately have been presented as the next incremental step in a gradual process, which began more than a century earlier. In retrospect, this is how it looks’.³

5. The prospects for ‘big bang’ reform remain poor. The Conservative Party is clearly split on the issue. A similar split in the Labour Party was equally clear when that party was in office. Indeed, this same split existed throughout the 20th century: between those who favoured democratising the chamber’s membership and those who feared that a more ‘legitimate’ chamber would become too strong, and threaten government stability. The most fundamental disagreement is therefore about the appropriate powers for the second chamber, rather than its membership, as became clear in debates on the coalition’s bill. These differences of opinion exist cross-party. The necessary complexity of any bill introducing major membership reform - which recent events suggest would probably have to deal with powers as well - makes agreement among parliamentarians unlikely. As during the last century, smaller, more piecemeal measures therefore seem more practicable. As in the past, focusing on the most obviously anomalous aspects and dealing with those one by one will maximise the chances of agreement.
6. The remainder of this paper considers such measures, using the structure of questions presented by the committee. I should emphasise that I consider the last of these questions to be far the most urgent and important. My key recommendations are therefore at the end.

Mechanisms for controlling the size of the Lords

7. As the committee will know, there is a serious problem with the size of the Lords. Attention was drawn to this by a report that I co-ordinated for the Constitution Unit (and to which your chair was a signatory) in 2011.⁴ The chamber’s size has gradually crept upwards from 666 just after reform in 1999, to well over 800. This question is therefore important. But it is crucially linked to the question of a proportionality formula - discussed in paragraph 20 onwards, below.
8. The committee raises a number of options for managing/reducing the size of the chamber, the first of which is ‘no longer replacing hereditary peers in the House of Lords when they die’. This reform is desirable, but can only be a small part of the solution. All serious proposals for Lords reform since 1999 - large or small - have included removing the hereditary element. The primary reason for making this change is not about size, but about the indefensibility of a hereditary route into a 21st-century legislature, and the resultant reputational damage done to the Lords for so long as this remains. Few any longer defend the presence of the 92 hereditary peers on principle (though many of them as individuals do good work), and indeed very few ever defended the byelections. These were agreed initially only on the basis that they were unlikely ever to be used, because the ‘second stage’ of reform was supposedly pending. Each time a by-election occurs it risks exposing the chamber to ridicule. Perhaps for this reason, a survey I conducted of peers as long ago as 2007 found that 71% favoured ending the hereditary element. By now I imagine this proportion is even higher. The most straightforward approach would be to end the byelections. It would also perhaps be sensible to give the remaining hereditaries life peerages, so that it can no longer be claimed that any members sit due to pure accident of birth. This change would require legislation, but very few would oppose it. It would, however, have little impact on the size of the House.
9. The second proposal that the committee mentions is ‘measures to remove persistent non-attendees’. This is of marginal importance. If the desired objective is to reduce the overcrowding in the chamber (of which many members complain), or indeed to reduce costs, it would have little effect. Since the 2011 Leader’s Group report the arrangements for leave of absence have been tightened up, and (at end March 2013) 38 members are on leave of absence. It is arguably a problem that these members could return at any time, and that the ‘eligible’ membership of the chamber (764) masks a significantly larger total potential membership (813,

including those temporarily disqualified). But compared to other matters discussed here, this is far from the most pressing problem.

10. The third proposal mentioned is 'a moratorium on new peers'. This was called for in the Constitution Unit's *House Full* report, referred to in paragraph 7, and therefore has my support as a holding position. This recommendation has never been formally taken up, but notably since the report was published in April 2011 (to much media attention), there have been only two political appointments to the Lords, plus six Crossbench appointments. Rumours have been persistent that the Prime Minister will appoint more peers, but for at least two years he seems to have been constrained by the outcry that he knows will occur if and when such appointments are made. As a temporary stopgap, this unofficial moratorium thus appears to have worked, and numbers in the chamber have gradually dropped (though still not to their pre-2010 election levels). But a moratorium cannot last forever, and some more sustainable arrangements must be found. That is why the changes discussed later in this paper are so important. Until these changes are made, however, a moratorium remains appropriate.
11. The committee also suggests fixed term appointments as a possible solution. This proposal has some attractions, but would need careful design if it were not to have unintended effects. All proposals for longer-term Lords reform (whether for elected or appointed members) have envisaged that these members would serve fixed rather than life terms. Life membership of a legislature is extremely unusual internationally.⁵ It is far more normal for legislators to have time-limited terms (albeit often with the possibility of renewal). Proposals for the Lords have generally been for long terms of office, on a nonrenewable basis. This arrangement would help protect members' relative independence, including from the party whip. But it could prove difficult to agree what kind of fixed term would be appropriate for the Lords. A 15 year period has been most commonly proposed (for example by the Royal Commission, and the coalition's recent bill). Some have argued that this is too long (particularly for elected members), but it could also be seen as too short. Members of the Lords frequently give more than 15 years of active service, as indeed do many MPs. A 15 year limit would therefore perversely reduce legislative expertise, and institutional memory. It could also become problematic for those appointed at a relatively younger age. Within an appointment system, the ability for members to serve a second term (perhaps for 10 years, and in exceptional circumstances), might thus be desirable. But who has the power to reappoint then becomes crucial. If such a power lay with party leaders, it would compromise members' independence. Any reappointment should therefore lie with the House of Lords Appointments Commission, based on strict criteria.
12. An additional, but crucial, point if members become routinely able to depart the Lords (either because of fixed terms or permanent voluntary retirement) is that they should not be able immediately to stand for the Commons. This problem would not occur unless legislation was passed, as life peers are ineligible for election. But it is important to remember, in order to prevent the Lords becoming a 'training ground' for the Commons (as occurs in some bicameral systems elsewhere). Most proposals, from the Royal Commission onwards, have included a 'cooling off' period of 5-10 years.
13. The final possibility mentioned by the committee is the introduction of a retirement age. This would also have some advantages, while raising new questions, the most obvious of which is at what age retirement should be set. The Canadian Senate (previously appointed for life) now uses a retirement age of 75. Members of the UK senior judiciary retire at 70 or 75. But members of the Lords - many of whom have retired from other professions - are often active in their late 70s and beyond. Introducing a retirement age of 80 today would result in departure of around 130 current members of the Lords, and a retirement age of 75 would result in departure of around 230. Notwithstanding the fact that some older members make valuable contributions, the former of these (at least) may be desirable. As with fixed term appointments, a mechanism might be put in place to allow a five-year extension in exceptional circumstances,

managed by the House of Lords Appointments Commission. It should again be noted, however, that a relatively high retirement age would disproportionately remove from membership those who are less active. The effect on overcrowding would therefore be minimal than the overall figures suggest.

The current retirement scheme

14. The committee asks whether the current retirement scheme, introduced following the recommendations of the Leader's Group, has been effective. The straightforward answer to this question is clearly no: only two members have taken up this option to date, and even they formally retain the right to reverse their decision should they wish. For retirement to become truly permanent (i.e. irreversible) legislation would be needed. But the bigger problem is the lack of an agreed proportionality formula. Any member taking voluntary retirement at present simply weakens their party/group, with no guarantee that they will be replaced. Until a proportionality formula (see below) is established, any such system is likely to fail.

Expulsion of members

15. The committee raises the question of expulsion of peers who have been convicted of serious criminal offences. This is one matter on which there is widespread consensus. Legislative provisions to allow this were included in the previous government's Constitutional Reform and Governance Bill, the coalition's bill, and also repeatedly in bills promoted by Lord (David) Steel of Aikwood. However all of these bills have failed, in whole or in part, and the change has not been made. It is a desirable reform, but the number of relevant cases is very small. Though it might be easy to resolve, it is far less important than getting to grips with the size of the chamber, prime ministerial patronage, and therefore a proportionality formula.

Status of the House of Lords Appointments Commission

16. The committee asks about the 'desirability, composition and remit of a statutory Appointments Commission'. I would argue that the remit of the House of Lords Appointments Commission is very important, and worth reconsidering, while its status in statute or otherwise remains secondary. The Commission has done a good job, and its current composition seems correct.
17. The Appointments Commission currently has responsibility for selecting Crossbench members of the Lords, and vetting political appointees for propriety. As indicated above, the first of these contributions has been important. The Commission applies transparent criteria of merit to the selection of Crossbench peers, and also encourages active membership. Over the 13 years of its existence, the Commission has helped to transform the Crossbenches into a more active place, where members arrive better prepared, and there is now a clearer distinction between independent and party peers. It has also been possible to use these appointments to somewhat improve the gender and ethnic balance in the chamber, and fill clear expertise/professional gaps. But what the Commission can achieve while controlling only around 20% of appointments is clearly limited. With respect to party political appointments the checking for propriety is a minimalist position. I have argued for a number of years, as has the House of Commons Public Administration Committee, that the Commission's remit with respect to party peers should be slightly extended.⁶ If political parties were required to provide longlists of potential members to the Commission, from which it could select members, this would better enable the Commission to maintain a demographic and professional balance across the chamber as a whole. Alternatively, the Commission could invite parties to nominate candidates meeting specific demographic/professional criteria. In either case, there would need to be agreement about the appropriate criteria to apply, and these should be written into the Commission's terms of reference in a transparent way.
18. But in terms of maintaining balance in the chamber, by far the most important form of balance relates to that between the political parties (and independents), as dealt with in the next section.

19. As the House of Lords Appointments Commission is selecting members to serve in parliament, it is somewhat anomalous that it has no statutory basis. Changing this does seem desirable. However, the Commission to date has functioned well, and there is no reason to believe that it will not continue to do so. The existing non-statutory Commission could readily be given additional powers by the Prime Minister, on the same basis as those powers that it has been given to date. Getting these powers right is thus of far more fundamental importance than whether the Commission is made statutory or not.⁷

A proportionality formula for appointments

20. The committee finally asks about the ‘scope for establishing a consensus about the principles which should determine the relative numerical strength of the different party groups in the House of Lords, and for codifying such principles’. This is the most crucial of your questions. Leaving aside the issue of election, the biggest single problem with the current composition of the Lords is the Prime Minister’s unregulated patronage with respect to party peers. S/he continues to decide how many should be appointed, when, and with what balance between the parties. This is an inappropriate power for the head of the executive to hold over the composition of parliament, and could allow legislative outcomes to be manipulated (e.g. by a Prime Minister wanting to prevent Lords defeats by ‘packing’ their own side). Furthermore, it is this unregulated power that has led to the growing size of the chamber.

21. At present there is no clear understanding about the appropriate balance between appointments from the different parties, nor about the numbers that should be appointed. One positive aspect of the arrangements is the clear convention that the Prime Minister should create appointees from beyond their own party. However, prime ministers have consistently (and perhaps understandably) appointed disproportionately more peers from their party than others. For example Callaghan appointed 29 Labour peers, five Conservatives and one Liberal; Thatcher appointed 98 Conservatives, 56 Labour and 10 from the third parties; Major respectively appointed 75, 40 and 17.⁸ During 1997-2007 Blair then created 163 Labour peers to 62 Conservatives and 53 Liberal Democrats. His appointments were certainly numerous, but their pro-Labour bias was arguably needed to rebalance the chamber, given the Conservatives’ previous advantage. It was not until 2006 that Labour became the largest party. But this illustrates the problem: disproportionate Labour appointments were used to counterbalance the previous disproportionate Conservative appointments, and the chamber got ever larger.

22. It is perhaps worth noting that this is not a new problem. Prior to 1999 the old hereditary chamber had gradually swollen in size, for similar reasons. In the early 18th century it had around 200 members. By the start of the 19th it had grown to 350. By the start of the 20th century it had reached 600, and just prior to the 1999 reform total eligible membership exceeded 1200. If appointments remain unregulated, we could quickly reach that position again.

23. As the *House Full* report (see note 4) made clear, the commitment in the coalition agreement to bring party balance in the Lords into line with 2010 general election vote shares was completely unsustainable. It would have required the chamber’s membership to grow to around 1100. Although the coalition has not retracted that commitment, it would make no sense to return to it now, more than halfway through the parliament, when we are closer to the 2015 general election than the election of 2010. In general, any attempt to align the chamber’s membership with general election votes can clearly only operate as an upward ratchet (unless perhaps some members were forced to depart the chamber at the same time).

24. If rebalancing the chamber to reflect the general election result is unsustainable, the question is what a more sustainable formula would be. The obvious answer is that *new appointments* should be required to reflect general election votes, rather than this formula being applied to the chamber overall. Such a formula has been recommended by the Royal Commission, and most other bodies (including the Public Administration Committee, and the government) proposing

a long-term Lords membership that includes some appointed party peers.⁹ It has the benefit of clarity and transparency, and would also tend to level out the effect of electoral fluctuations if members are appointed for long terms. Such a formula could be applied to batches of appointments (of say 10 or 20), but equally could be used if members were appointed individually (say on a one-in-one-out principle, following deaths or retirements).

25. In addition, there would need to be agreement about the proportion of appointments that should go to independent Crossbenchers. Again, there has been near-consensus from previous proposals that this proportion should be set at 20%. It is the remaining 80% of appointments, therefore, that would be shared proportionally between the parties.
26. There are, however, two further difficult questions that have to be addressed for such a formula to work. These relate to the size of the chamber/number of appointments, and to the baseline membership from which any such new formula should begin.
27. As the growing size of the chamber is a key concern, it seems necessary to reach agreement not only on the share of appointments between the parties, but also on their overall number. Most parliaments have a fixed size, and most previous proposals for reform have envisaged this for the Lords. Without a size cap, a Prime Minister might remain tempted to make large numbers of appointments, as the proportionality formula would still tend to favour their party while they are in power. Hence a limit on the size of the chamber, and/or a limit on the number of appointments per year, is essential. The UK is the only country internationally where the size of the second chamber exceeds that of the first. At a minimum, therefore, the size of the Lords should not exceed the Commons. Going further, a limit of 600, or 550 (as proposed by the Royal Commission) might be appropriate.
28. To get to that point would clearly require the present chamber to shrink. One means of achieving this would be introduction of retirement provisions, as discussed above. A retirement age of 80, if implemented now, would bring the chamber close to the size of the Commons. Further voluntary retirements could help.
29. But there is an additional need for agreement about the starting point from which new appointments begin. As mentioned above, members will not agree to retire if they feel that this would disadvantage their party/group. Retirement of those over 80 would not be party neutral, as relatively fewer Labour and Liberal Democrat peers are this old, compared to Conservatives and Crossbenchers. An appropriate goal might be to establish equality between the two main parties in the short term, with volunteer retirees sought to reach this target if necessary. Here the present position is propitious, because Labour retains only a small numerical advantage over the Conservatives (222 to 213). Equality might therefore be relatively easily achieved. But agreeing such a formula would be delicate, and would almost certainly need to be agreed through cross-party talks, particularly if party peers were being asked to cooperate with the retirement element. No such formula would succeed if it were merely imposed.

Bringing these proposals together

30. In summary, this evidence has suggested that the most urgent and important steps are to achieve agreement about the following:
 - The maximum size of the chamber, which might be 550 - 650.
 - A retirement mechanism to initially achieve that target, which might combine a retirement age with further voluntary retirements.
 - A fair share of seats in the present chamber, which might be based on equality between the two largest parties.
 - A proportionality formula for future appointments up to the agreed size cap, which would most sensibly reflect most recent general election vote shares.

These proposals could ultimately be set down in legislation, but in the short term this is not essential. As the Prime Minister controls appointments, he can unilaterally announce a change in approach at any time. An agreement between the party leaders (and Crossbenchers), publicly announced, would lack legal force but would in effect be politically binding. As part of such a package the House of Lords Appointments Commission should be given control over inviting nominations from the parties when vacancies arise, according to the formula agreed.¹⁰ Until these changes are made, a moratorium on appointments seems appropriate.

31. There are other changes which are desirable, and can in practice only be achieved through legislation:

- Ending the hereditary byelections.
- Expelling members convicted of serious criminal offences.
- Allowing members to permanently and irrevocably retire from the chamber.

Each of these is relatively straightforward, and uncontroversial, and legislative provisions already exist. But they are secondary to the proposals in the previous paragraph. Indeed until those changes are made, any voluntary retirement scheme is likely to fail. At a future date, once the new system had settled down, it might eventually prove uncontroversial to put the Appointments Commission, proportionality formula, size cap, and any retirement age, on a statutory basis, had no further reform occurred.

Notes and references

- ¹ Ballinger, C. (2012). *The House of Lords 1911-2011: A Century of Non-Reform*. Oxford: Hart; Dorey, P., & Kelso, A. (2011). *House of Lords Reform since 1911: Must the Lords Go?* Basingstoke: Palgrave.
- ² Russell, M. (2010). A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999, and the Lessons for Bicameralism. *Political Studies*, 58(5), 866 - 885.
- ³ Russell, M. (forthcoming 2013). *The Contemporary House of Lords: Westminster Bicameralism Revived*. Oxford: Oxford University Press, Chapter 10.
- ⁴ Russell, M., Adonis, A., Allen, G., Boothroyd, B., Butler, R., Dean, B., Dholakia, N., D'Souza, F., Forsyth, M., Hazell, R., Jay, M., Mackay, J., Norton, P., Shell, D., Steel, D., Stevenson, D., Williams, S., Woolf, H. and Wright, T. (2011), *House Full: Time to Get a Grip on Lords Appointments*, (London: Constitution Unit).
- ⁵ The Canadian Senate switched from a system of life membership to retirement at age 75 in 1965. Small numbers of life members sit in some chambers: for example, each Italian President can appoint up to five life members of the Senate, and former presidents themselves become life senators as of right.
- ⁶ Public Administration Select Committee. (2007). *Propriety and Peerages (Second Report of Session 2007-08)* (No. HC 153). London: House of Commons.
- ⁷ This has been recognised by the Public Administration Committee (see note 6).
- ⁸ Figures are taken from Brocklehurst, A. (2008). *Peerage Creations, 1958-2008* (LLN 2008/019). London: House of Lords Library. Crossbenchers and others are excluded.
- ⁹ Royal Commission on the Reform of the House of Lords. (2000). *A House for the Future*. London: The Stationery Office; Public Administration Select Committee. (2002). *The Second Chamber: Continuing the Reform* (Fifth Report of Session 2001-02). London: House of Commons; Cabinet Office. (2007). *The House of Lords: Reform*. London: The Stationery Office.
- ¹⁰ The Commission might at the same time also be given greater control over demographic/diversity of party appointees, though this change could also be freestanding.