

Evidence to the Leaders' Group on Retirement from the House of Lords

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You have asked me to submit some thoughts regarding the task given to Lord Hunt of Wirral and his Group "to identify options for allowing Members to leave the House of Lords permanently". I hope that at least some of the points below are helpful to your work. They are informed by the research that I in particular, and the Constitution Unit more broadly, have conducted on the House of Lords and options for its reform over the last 12 years and more. I would of course be happy to provide more detailed thoughts on some of these topics should you require.

The desirability of allowing retirement from the Lords

There are two principal reasons why it is desirable to introduce provisions allowing members to 'retire', or leave the Lords permanently. The first is simply that some members of the Lords would like to leave. The second is that under the current system the size of the chamber is continually growing, in a manner that may soon become unsustainable.

On the first of these points, members clearly do already have the option of taking 'leave of absence' if they feel that they can no longer contribute to the work of the chamber. It is not my place to speak for members, and no doubt the Leader's Group will take evidence from members about the pros and cons of the leave of absence arrangements. But there are some obvious difficulties if this remains the only route out of the chamber (save for death) for most members.

The principal problem is that if a member takes leave of absence there is no certainty whether or not they will return. Many members do return from leave of absence, sometimes even when they have not expected to do so. Most famously Lord Phillips of Sudbury announced his 'retirement' from the Lords in 2006, only to return in 2009. These uncertainties make it unclear whether those on leave of absence should still be considered 'members' of the chamber for accounting purposes. At a minimum their presence on lists of members, etc, may make numbers in the Lords look more swollen than they are. But more importantly, the party balance in the chamber may be adversely affected, in ways that cannot be properly resolved when members have not permanently departed. For example, if 20 Conservative peers took leave of absence the Conservative leadership would feel their loss, but at the same time have difficulty defending the appointment of more Conservative peers to take their place. In turn, members themselves may feel that they are letting their party/group down if they take leave of absence, as there is no guarantee that they will be 'replaced' and their group may thereby be weakened. While it may be right that a peerage should be for life, it seems unfair on members that the honour of serving in the House of Lords should be a life sentence from which there is no escape. The issues of party balance, and links to the peerage, are both explored further below.

The second argument for introducing a retirement option is the ever-growing size of the House of Lords. When the bulk of hereditaries departed in 1999, the chamber was left with 666 members. Today it has 750 members (according to our records, and excluding 16 members on leave of absence). Since the last - extremely large - influx of appointees was dominated by

Labour nominees, the coalition parties may soon wish to appoint more members. The chamber could therefore soon be well over 100 members larger than it was just 11 years ago. Again, it is not my place to speak about the administrative difficulties that this creates, as I am sure that you will hear evidence on this from the House authorities. You may also hear about resultant political difficulties from members themselves. But there is, at the very least, a public relations problem if the chamber is seen to get ever larger. It is already, by a long way, the largest second chamber in the world.¹

The Constitution Unit has pointed out for many years that there is a looming problem over Lords numbers.² In particular, as we indicated in 2003, ‘There is a potential conflict between rebalancing the House after every general election and keeping its size manageable’ (Russell and Hazell, p. 12). This has not been a great problem over the past 10 years, as Labour remained in government for so long. Even in these circumstances the numbers have grown, however, while any rebalancing in the direction of the present government would clearly make matters worse. One solution would clearly be greater restraint in terms of appointments: both on the part of the political parties and the House of Lords Appointments Commission. Another element that could help would be a greater focus on appointing older members, whose time in the House is likely to be shorter (on this point, however, the trend seems to be if anything the reverse). But even if these forms of restraint are applied there will remain a problem, if a desire for political rebalancing makes it necessary at times to appoint more new members than can be expected to depart through ‘natural wastage’.

Necessary restrictions should retirement be introduced

It therefore seems desirable to look at the options for retirement from the House of Lords, and hence the work of the Leader’s Group is to be welcomed. But before turning to mechanisms by which this might be achieved, there are two essential prerequisites which I strongly believe must be built into ANY system of ‘retirement’ or permanent departure from the chamber.

Restrictions on standing for the House of Commons

The question of restricting departed peers’ ability to stand for House of Commons became controversial during the discussion of the Constitutional Reform and Governance Bill in the last parliament. That this matter became characterised in terms of desirability or otherwise of a ‘Mandelson clause’ is deeply unfortunate. The idea had been on the table for a long time (long before Lord Mandelson was appointed), and for very good reasons. The linking of this idea to a particular individual thus unhelpfully politicised debate on what is an extremely important point of principle.

The Royal Commission on the Reform of the House of Lords proposed in 2000 that ‘Members of the reformed second chamber should not be eligible for election to the House of Commons until ten years after their term of membership ends, whether or not they serve out their full term’.³ Their argument was that ‘Would-be career politicians should not be encouraged to see membership of the second chamber as a springboard to membership of the Commons’.⁴ The Constitution Unit strongly welcomed this conclusion, which chimed with (and may have been informed by) conclusions drawn from my own study of the Irish Senate. In Ireland it is common for TDs (MPs) who lose their seats to be immediately appointed senators, and for young politicians to serve an apprenticeship as senators before running for the Dáil. My research noted that in 1997, 23 of the 60 members of the Irish Senate had been candidates in the recent Dáil elections, while 16 members of the previous Senate had been elected to the Dáil.⁵ Although this is very far from present experience with the Lords, a rule change allowing

peers to run for the Commons soon after vacating their seats could encourage party leaders to appoint more younger members who sought to serve a short term before running for the Commons. Party leaders might even, as in Ireland, feel encouraged to appoint recently defeated MPs on a 'temporary' basis to the Lords until they could fight their Commons seats again. Introducing retirement without a limitation on subsequently standing for the Commons could therefore inadvertently completely change the culture of the current House, in very undesirable ways.

This danger has been seen by others as well as the Royal Commission. In 2002 the House of Commons Public Administration Committee likewise recommended a period of 10 years before a departing second chamber member could stand for the Commons.⁶ In 2005 a cross-party group of senior MPs led by Paul Tyler, in a report published by the Constitution Unit, recommended a similar period of five years.⁷ The government's 2007 White Paper accepted this recommendation, though it did not find its way into the Constitutional Reform and Governance Bill two years later.⁸ I believe that it is vital that such a provision - for at least five years, ideally ten - should be built in to any future arrangements for retirement from the House.

Requirements for party balance

Another issue which has been less widely canvassed with respect to the possibility of retirement from the present House (although clearly discussed with respect to the composition of a reformed House) is party balance. As indicated above, one of the difficulties with the present 'leave of absence' system is that if members depart on leave of absence this may leave the numbers in their party/group depleted. Similarly, I understand that one of the concerns amongst members with respect to the provisions in the Constitutional Reform and Governance Bill was that there was no guarantee that if they retired they would be replaced like-for-like by new members of their party/group. Whilst obviously there may be times when such like-for-like replacement might not be justified (i.e. if a given group was already greatly overrepresented in the House), it would be self-defeating if members felt unable to take advantage of new retirement provisions for fear of weakening their group. It is therefore important that any new system makes clear how decisions will be taken regarding new appointments, and the resultant party balance of the chamber.

In recent years there has been a growing expectation that appointments to the Lords will be made in a way which is broadly fair, if not exactly proportional, to the parties and their electoral strength. The Royal Commission proposed that appointments in a reformed House should be done in a way 'which matches the distribution of votes between the parties at the most recent general election'.⁹ This was within a context of a new second chamber, where members served fixed terms, and where one third of the members were appointed at a time while one third simultaneously retired. Even under this arrangement strict proportionality across the *entire* chamber would never be achieved. More recently, the coalition agreement went far further, suggesting that until such time as the Lords was fully reformed 'Lords appointments will be made with the objective of creating a second chamber reflective of the share of the vote secured by the political parties in the last general election'.¹⁰ This is, frankly, an unrealistic and politically unrealisable goal. As suggested at the time by Michael Crick of Newsnight, taken literally it would require appointment of around 200 new peers (and would now require more than this, following the many new Labour peers added subsequently).¹¹ Any attempt to pursue the coalition's stated goal would thus result in the size of the chamber ballooning in an exponential and unsustainable way. In contrast, a commitment along the lines that the Royal Commission proposed - to simply balance among *new appointments* - would be more manageable. Such a public commitment, which could only be made by the Prime

Minister, would probably be necessary for a retirement system to function effectively, for the reasons given above. It would also be desirable to keep a cap on Lords numbers, which is one of the main reasons that a retirement system is being considered.

Compulsory or voluntary retirement?

There are broadly two approaches that the Leader's Group may wish to take to introducing retirement: in terms of a voluntary and/or a compulsory scheme. Under a voluntary scheme, as proposed for example in Lord Steel's Bills, and the government's Constitutional Reform and Governance Bill, a provision would be introduced allowing members to retire if they wished, but with no obligation to do so. This approach, at a minimum, seems desirable for reasons already indicated. Should members of the House wish to permanently retire, they should be entitled to do so (so long as the aforementioned restrictions have been put in place). This would be adequate to address the first of the two reasons given above for which retirement is being considered.

In terms of the second reason, it has often been suggested that in order to encourage members to retire in sufficient numbers to make a worthwhile difference to the size of the House, some financial incentives must be provided. As an outsider it is difficult to judge this reliably, and the Leader's Group will no doubt want to take evidence on this point from members and their whips. But it is clearly the case that many members of the House have forfeited earnings, and/or pensions, in order to serve in the chamber. Consequently, some may be dependent on Lords allowances in order to comfortably survive, and thus feel unable to take retirement. This is a question which the Leader's Group will no doubt want to consider, but it in itself should not prevent the introduction of a voluntary retirement scheme for those who feel that they can use it.

Options for compulsory retirement

Should compulsory retirement be considered desirable, perhaps because voluntary retirement is not expected to yield enough volunteers, there are various options for building this into the system. The most obvious are age limits or term limits, both of which have been widely discussed in recent years. A third option is some kind of ballot system.

Age limits

Introducing an age limit for membership of the House of Lords would obviously bring it more closely into line with long-established practices for "retirement" in the world of work. It would also bring the Lords into line, for example, with the senior judiciary: where judges face automatic retirement at age 70. But based on the House at the present day, a compulsory retirement age of 70 would require 351 members of the chamber to depart: almost half of its total membership. A retirement age of 75 would affect 221 current members. Even a retirement age of 80 would affect 115 members.

A retirement age could therefore be seen as an effective means of significantly shrinking the size of the House of Lords. But it would also result in the loss of large numbers of members who still have much to contribute. The Lords, of course, is a place to which many people "retire" from previous roles: for example from the House of Commons or the civil service. A relatively low retirement age (of, say, 70) would leave less space for these members in future: amongst the current House at least 14 peers were appointed when already aged over 70, and at least 72 when aged over 65. Yet the contribution of peers recently 'retired' from public life is

widely appreciated and helps form the ethos of the current House. On the other hand if a retirement age was designed to remove more infirm or less productive members of the chamber there is no clear age at which it could be set. Some may fall into poor health in their 60s or early 70s, while others are still contributing vigorously in their 80s.

While a retirement age may be in line with established practice in the world of employment, it should of course also be noted that age discrimination legislation and pressure on pensions is gradually eroding this practice. For all of these reasons a retirement age for the House of Lords does not seem an obvious way to proceed, and if set it would need to be set relatively high. Notably, few have suggested this option to date.

Term limits

The suggestion of fixed terms has, in contrast, featured widely in debates on the longer term reform of the House of Lords. The Royal Commission suggested fixed 15 year terms for appointed members, with the possibility of a second term of appointment (at the discretion of the House of Lords Appointments Commission).¹² It also recommended that life peers appointed after its report was published should be ‘deemed to have been appointed to the reformed second chamber for a period totalling 15 years from the award of their life peerage’, as these peerages were accepted in the knowledge that reform was likely to follow.¹³ This recommendation was never explicitly taken up, however. The Public Administration Committee proposed ten-year terms for appointments, while the 2005 report by the Tyler group of MPs suggested terms equivalent (in normal circumstances) to three House of Commons terms, with the possibility of one reappointment. The government’s 2007 White Paper suggested 15 year non-renewable terms, while its 2008 White Paper suggested appointment (should appointments continue) for 12-15 year non-renewable terms.¹⁴ It is therefore widely agreed that appointments in a reformed chamber would cease being for life, but be for long terms, possibly with limited opportunities for renewal.

During the passage of the recent Constitutional Reform and Governance Bill there were moves by some members in the Commons to introduce a provision for ‘term peers’, as originally proposed by Andrew Tyrie and George Young in a Constitution Unit report in 2009.¹⁵ This provision, moved in an amendment by Andrew Tyrie and Keith Vaz, and supported by the Conservative and Liberal Democrat frontbench, would have allowed creation of peerages for the duration of (normally) three House of Commons terms.¹⁶ The measure was however opposed by the then government.

A move from life appointments to the House to fixed-term appointments would be an obvious way of containing its growing size. There would be a need to take care in designing such a system to ensure that continuity and expertise in the chamber was not lost, probably by allowing at least some provision for reappointment. However, as emphasised by the Royal Commission, the power to make such reappointments would best be given to the House of Lords Appointments Commission, to avoid the political party leaders increasing their hold over the chamber and its members. The introduction of fixed term appointments would be a significant change, but is probably desirable in the medium term, especially if moves towards an elected replacement for the House of Lords are further delayed.

Ballots

A final option for retirement was put by Paul Tyler’s group of MPs in 2005, and has also been suggested by the Public Administration Committee and others. This would introduce a requirement that a certain proportion of each group in the House retired on a given date, with

the decision on which members departed to be taken if necessary by a ballot within each group. This proposal was modelled on the arrangements for the departure of the hereditary peers in 1999. Under these proposals one third of each group was to be required to depart in the first instance, to be replaced by elected members. At the second stage, one half of the remaining life peers would similarly be required to retire.¹⁷ Some modification of these arrangements could be considered in order to reduce the size of the House, but might prove cumbersome in practice.

The role of the House of Lords Appointments Commission

Although the Leader's Group has not been explicitly asked to consider the role of the House of Lords Appointments Commission, some aspects of its work may touch on the Commission's role and responsibilities. Most notably, if (as I have suggested) a clearer principle for maintaining party balance in the chamber is set down, it would be sensible for this to be policed by the Commission. If reform went further, and fixed terms were introduced, with some option for renewal, this would again be best managed by the Commission. In both cases this would enhance transparency by removing patronage powers from the party leaders. It would therefore minimise the risk of accusations of gerrymandering, in the case of party balance. Similarly in the case of reappointment, it would avoid accusations of greater party control and patronage over members of the chamber. This seems highly desirable in order to maintain public trust in the appointments process.

Many have obviously suggested that the House of Lords Appointments Commission should be put on a statutory basis. This may be desirable, but it is not in itself essential in order for the Commission to be given additional powers. Such powers could be given to the Commission directly by the Prime Minister, as they were when it was first established in 2000.

The link between membership and the peerage

Allowing members to retire from the House of Lords might potentially raise questions about the life peerage, as members would no longer necessarily sit in the chamber for life. In the short term there is no reason why this necessarily should cause difficulty. Convention changed quickly in 1999 when the great majority of hereditary peers left the chamber, and it is now possible to be a hereditary peer who is a member of the House of Lords, but also a hereditary peer who used to be a member, or indeed who has never been a member. The same adjustment could equally easily be made with respect to life peers.

In the medium term, and particularly if there is a move to fixed term appointments to the chamber, the obvious next step would be to break the link between holding a peerage and being a member of the House of Lords. Such a change has been suggested by numerous bodies: including the Royal Commission, the Public Administration Committee, and the Tyler group of MPs. The principle was accepted by the government as early as 2001.¹⁸ Such a move would not be a threat to the peerage itself: peerages could continue to be given as honours. But it would help to clarify that membership of the House of Lords is not just an honour, it is also a job which requires at least some commitment of time. Of course members of the House of Lords could, like anyone else, be given peerages in recognition of past service. But breaking the necessary link between the peerage and second chamber membership would help clarify that the Lords is a working chamber, rather than a historic curiosity.

The challenge of achieving reform

It is finally worth making a few remarks about the nature of reform. The Leader's Group has been given the relatively limited task of considering how members may depart of House of Lords. This is, of course, greatly complicated by the surrounding context on 'wholesale' or 'long-term' House of Lords reform. The coalition is committed to 'bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation' by the end of the year.¹⁹ It is therefore unclear whether the Leader's Group is required to make recommendations which will function alongside, or in place of, such proposals. The questions of retirement in order to maintain the current House in a sustainable state, or in order to force departures to clear space for future elected members, are rather different. However, some of the same mechanisms may apply in both cases. The Leader's Group may want to offer alternate recommendations for both.

As I have indicated, even if the present House continues, the introduction of retirement provisions of some kind is desirable. However, it must be noted that the previous government attempted to introduce such provisions in its Constitutional Reform and Governance Bill, and that these provisions failed. Eventually they were blocked in the 'wash up' at the end of the last parliament, but they had earlier faced some resistance in both chambers. The provisions were resisted by some members who took them as an admission that 'wholesale' reform was not going to happen, and indeed some such members believed that minor 'tidying up' provisions to make the existing House more defensible would make larger-scale reform less likely. At the same time, some other members resisted the proposal on the basis that they were the beginning of a 'slippery slope' to larger-scale reform.

The Leader's Group must therefore recognise that any recommendations that it makes, however sensible, will face some opposition. Reforms which require primary legislation, in particular, may prove extremely difficult to agree and to implement. The current House of Lords continues to be seen as a 'transitional' and 'unreformed' chamber which is on the brink of large-scale reform. Yet this is not a new state of affairs: the chamber arguably spent the entire 20th century in a similar condition. The history of House of Lords reform demonstrates that reform happens rarely, and 'wholesale' reform has yet to occur - despite being promised for at least 99 years. The key reforms of the 20th century: in 1911, 1949, 1958, 1963 and 1999, were all 'partial' and 'temporary' measures, to change single elements of the chamber's power or membership, until a more settled or 'long-term' solution could be reached. Thus while House of Lords reform is rarely off the political agenda, the few successful reforms have been piecemeal responses to certain elements that the majority sees as no longer defensible. The inability to retire from the chamber may perhaps be the next indefensible element which is due for such a reform. Whether its time has yet come remains to be seen.

¹ In 2000 the next largest second chamber was the Italian Senate, at 326 members (Meg Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press (2000)). For latest figures see:

<http://www.ipu.org/parline-e/parlinesearch.asp>

² See Ben Seyd, *Rebalancing the Lords: The Numbers*, Constitution Unit briefing 18 (1998); Ben Seyd, *A Transitional House of Lords: The Numbers*, Constitution Unit briefing 45 (1999); Meg Russell and Robert Hazell, *Next Steps in Lords Reform: Response to the September 2003 White Paper*, Constitution Unit briefing 105 (2003).

³ *A House for the Future*, The Stationery Office (2000), Recommendation 76.

⁴ *Ibid*, paragraph 12.21.

⁵ Meg Russell, *Reforming the House of Lords*, op. cit., p. 91-2.

⁶ Public Administration Committee, *The Second Chamber: Continuing the Reform*, Fifth Report of Session 2001-02, House of Commons (2002).

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- ⁷ Paul Tyler, Ken Clarke, Robin Cook, Tony Wright and George Young, *Reforming the House of Lords: Breaking the Deadlock*, Constitution Unit briefing 119 (2005).
- ⁸ *The House of Lords: Reform*, The Stationery Office (2007).
- ⁹ Op. cit., recommendation 70(g).
- ¹⁰ *The Coalition: Our Programme for Government*, 20 May 2010.
- ¹¹ http://www.bbc.co.uk/blogs/newsnight/michaelcrick/2010/05/a_strange_situation_at_the_hou.html
- ¹² Op. cit., recommendation 74.
- ¹³ Ibid, recommendation 103.
- ¹⁴ 2007 op. cit.; *An Elected Second Chamber: Further Reform of the House of Lords*, The Stationery Office (2008).
- ¹⁵ *An Elected Second Chamber: A Conservative View*, Constitution Unit briefing 146 (2009).
- ¹⁶ See *House of Commons Hansard*, 26 January 2010, column 732.
- ¹⁷ *Breaking the Deadlock*, op. cit.
- ¹⁸ *The House of Lords: Completing the Reform*, The Stationery Office (2001).
- ¹⁹ Coalition agreement, op. cit.