

## Thoughts on the new second chamber

*Francis Bennion examines the Wakeham report on the future of the House of Lords.*

Many people (though not all) seem to feel this to be a time for huge constitutional change. That restless political sentiment is enhanced by a calendar quirk called the new millennium, though the sensible know that is a spurious reason for action. My own theory is that the cause of our current constitutional unrest and thirst for change is what can only be described as "one thing leads to another".

Looking back, I see this sort of progression throughout my lifetime. Bit by bit (slowly does it), one thing leads to another. One small change leads to the next small change, and so on and so on. Then comes a time when bigger and bigger change is desired (rather like the hectic "progress" of a drug addict). Now, at the opening of a new century (why should that be significant?), it is thought that the second chamber of our parliament must be entirely rejigged. The only reason given is Modernise! Every decade has felt the need to modernise, but they haven't always done much about it. Why does this generation have ants in its pants? That one I can't answer.

Already most hereditary peers have disconsolately slunk from our ancient second chamber, having done it much service. What other changes must we make under the impulsion of what is tiresomely called the *Zeitgeist*? A small, very worthy, group of people have just answered that question for us. I shall fairly present what they have to say.

The report of the Royal Commission on the Reform of the House of Lords, entitled "A House for the Future" (Cm 4534) was published on January 20. It contains, these worthy people say, recommendations which are not only persuasive and intellectually coherent but also workable, durable and politically realistic. We shall see.

A mere dozen people composed this momentous, even historic, Royal Commission. That may be thought not nearly enough. Missing among others from this crew scrutinising British constitutional history (and it shows) were any constitutional historians. However I am not here to knock the Royal Commission chaired by the worthy ex-Government whip Lord Wakeham, so I shall say no more on its membership. I pass to the main recommendations. After summarising them I shall venture a comment or two.

### **Proposed functions of the second chamber**

The Royal Commission's proposals are, they say, designed to make a clear break from the past. This they think is needed because the old House of Lords "lacked the political legitimacy and confidence to do its job properly". Oh yes?

The link between having a peerage and being a member of the second chamber will be broken. There will be no risk of conflict with the House of Commons, and the new members will not be able to challenge MPs' constituency representative role. "The Prime Minister should no longer have any control over the size, balance and individual membership of the second chamber and there should be no more party patronage." *Nous avons changé tout cela.*

“We acknowledged from the outset that it would be wrong - as well as futile - to try to make the second chamber a politician-free zone. Parliament is a place where political issues are debated and fought over, and the second chamber cannot and should not be disengaged from that process. It will need men and women of appropriate political experience to help it play a constructive role. But it should not simply be a creature of the political parties. The influence of the parties on individual members of the second chamber should be minimised.”

The commission say they want the new second chamber to be politically astute but not a home for yet another group of professional politicians. They wish to provide an appropriate role for the political parties but discourage sterile partisan confrontation. They want to include members of political parties but limit party influence and foster the exercise of independent judgement.

The report says that the new second chamber should have four main roles:

- It should bring a range of different perspectives to bear on the development of public policy.
- It should be broadly representative of British society, including aspects relating to professions and vocations, gender, ethnicity, culture and religion.
- It should form one of the main “checks and balances” within the unwritten British Constitution, requiring the Government of the day to reconsider or justify its policy intentions and the House of Commons to think again.
- It should provide a voice for the nations and regions of the United Kingdom at the centre of public affairs.

The principles underlying the Salisbury convention should be maintained, so the second chamber should respect a governing party’s general election manifesto. A Constitutional Committee should be set up by the second chamber to scrutinise the constitutional implications of all legislation and to keep the operation of the constitution under review. A Human Rights Committee should also be set up to scrutinise Bills and statutory instruments for human rights implications.

### **Composition of the new second chamber**

The Royal Commission recommend that the new second chamber should have around 550 members. All but one fifth should, they say, be party-political members taking the whip of one of the parties. The remaining fifth should be political neutrals or cross-benchers, marshalled under one of their number to be known as the Convenor of the Cross Benchers.

The only elected members of the new second chamber should be those representing the nations and regions of the United Kingdom (regional members). On the number of regional members the Royal Commission were split, the majority favouring a total of 87 (other figures on offer are 65 and 195). “These regional members should not be drawn from the devolved administrations, or from the Scottish Parliament or the other devolved Assemblies; but should be able to speak for each national or regional unit of the United Kingdom. They would share a regional perspective with MEPs, members of the devolved institutions, the English Regional Chambers and the existing local government groupings. As a result, they could encourage and facilitate greater contact across different levels of government and provide a stronger regional voice, in Europe as well as at Westminster.”

After the end of a transitional period, the non-regional members should, says the report, be chosen by an Appointments Commission. This means, since conferment of a peerage will no longer carry the right to membership of the second chamber, that at a stroke the Prime Minister of the day will lose the present exclusive right to determine who shall be a new member of that chamber, and will indeed have no such right at all. This is because the present immemorial right of appointment, exercised by recommendation to the Monarch, “puts too much power in the hands of the Prime Minister”. The question is whether the suggested alternative does not put too much power in the hands of the Appointments Commission.

The membership of the Appointments Commission is therefore vital. The report says it should consist of a mere eight people. Three should be nominees of the main political parties, and one a nominee of the Convenor of the Cross Benchers. The remaining four should be independents selected according to what are known as the Nolan principles. A minority of Appointments Commissioners should be existing members of the second chamber. None should be an MP. Their term of office should be up to ten years.

The report says the Appointments Commission should be required to maintain the proportion of independent members at around one-fifth and to make steady progress towards gender balance. Among the party-affiliated members (constituting four-fifths) the Appointments Commission would be required to secure and keep an overall balance matching the political opinion of the country as expressed in the preceding general election. However, inconsistently with this, “[i]t should not be possible for any one party to secure an overall majority in the new second chamber”. The Commission would be required to publish periodic statements specifying the broad characteristics it expects members of the second chamber to possess.

Religious representation in the new second chamber should, says the report, be open to all Christian denominations and non-Christian faiths. “The question of the name of the second chamber and the titles of its members should be left to evolve.”

### **Comments on the report**

Predictably, the Wakeham report has aroused controversy. Battle lines have been drawn between those who want a wholly elected second chamber and those content with one that is wholly or mainly appointed. The former say a non-elected chamber will lack the authority needed to stand up to the Commons. The latter say an elected chamber, possessing equal authority, will carry too much weight and compete with the Commons on equal terms, which is not the idea. The first lot then counter by arguing that the problem can be resolved by defining the functions of the second chamber restrictively.

I bring to this controversy some experience of how the House of Lords actually works. From 1953 to 1975, with a brief interval, I was a legislative draftsman participating in its revising function. I do not think one can resolve the problem of competition with the Commons by restrictively defining the second house’s functions. Its main function must be in relation to the enacting of legislation, and for this it must have at least the powers at present left to it by the Parliament Acts and the Salisbury convention. So I am bound to support the finding of the Wakeham Commission against a wholly elected second chamber.

With one major exception, I have no quarrel either with the other proposals in the report. They seem, if I may respectfully say so, to be sensible and practical given that major change is thought to be required. My one quarrel is over the Appointments Commission.

It seems to me that it would be outrageous to award such impressive constitutional powers to a small body of ordinary citizens. They are powers to appoint our law makers, who in themselves ought as such to possess enormous prestige. To make laws for a great nation is a mighty privilege. But what prestige can these eight people have when their origins as

legislators are so insignificant? Here I need to address the view, unhappily so prevalent, that it is now necessary to strip these vital powers from the office of Prime Minister.

First, we must in this connection forget Thatcher, Major, Blair and other individuals who have held this exalted office. Instead we need to remember that it *is* an exalted office, the loftiest in the land. In the Cabinet, the Prime Minister is *primus inter pares*, first among equals. He or she is the Sovereign's first minister. It is fashionable to dismiss the importance of the Sovereign, and wish to be citizens rather than subjects. This in my view is a mistake, because it throws away all that has been gained in constitutional advance over the past millennium.

Within the concept of the Crown is concentrated all the executive, legislative and judicial power of our nation. Within it, these constitutional aspects have been refined over the centuries. Supple and complex tools of control have been hammered out in court decisions, parliamentary usages - and even bloody battles. All that human progress is what lies behind the present role of a Prime Minister in effectively appointing members of the second chamber. If the Prime Minister overplays his or her hand, or otherwise abuses the power, massive controls come into play under the constitution. The ultimate powerful sanction is a Commons vote of no confidence, followed by a general election.

The Royal Commission suggest no such controls over their tinpot Appointments Commission. Nor could they, for the constitution does not allow for them. Our country is suffering from the fact that many elected politicians in recent years have degraded their high function by various abuses subsumed under the name sleaze. It would be the ultimate triumph of such undeserving renegades if their misconduct dragged down the good name of our institutions to such an extent that, with the best intentions, we threw the institutions overboard in the way the Wakeham report suggests. That would indeed be throwing out the baby with the bath water.

I believe the Royal Commission are simply wrong in saying that the present arrangements put too much power in the hands of the Prime Minister. Political power, which originates with the people, is now where it belongs - in the hands of the person who heads the political party chosen by the people. Let us keep it there.

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