



## Chapter 3 – The overall role of the second chamber

**3.1** Our terms of reference require us to proceed on the assumption that there will continue to be a second chamber of Parliament. We believe this to be right. We have therefore focused our efforts on considering what the second chamber should do and how it should be constituted.

**3.2** We began by stepping back to consider what the overall role of the second chamber should be, given the present nature of the constitutional settlement. The answer to the question ‘Why have a second chamber?’ provides a firm rationale for the various *functions* which we believe the reformed second chamber should perform. It also implies a number of things about the *powers* it should have, the *characteristics* its members should possess and how it should be *constituted*.

### The constitutional context

**3.3** Two central features of the present constitutional settlement in the United Kingdom are simple, at least in theory, and well-known. One is the sovereignty of Parliament. The other is the absence of a written constitution.

**3.4** Legislation in the United Kingdom can be passed only with the authority of the Crown in Parliament.<sup>1</sup> Moreover, although elements of the constitution have been progressively set out in legislation,<sup>2</sup> there remains no formal constitutional check on Parliament’s sovereign authority. The Human Rights Act 1998, for example, is carefully drafted to preserve Parliamentary sovereignty: judicial declarations of incompatibility do not strike down primary legislation and the fast-track procedure for passing remedial orders requires the authority of Parliament. There is therefore no judicial remedy against Parliament’s clearly expressed will. It follows that the will of Parliament must be the product of careful consideration and debate. Procedures need to be in place to ensure that when Parliament acts with a will it does not act wilfully.

**3.5** Several other features of the present constitutional settlement are also relevant. The House of Commons, because it is directly elected by the whole people, is the ultimate repository of democratic authority in the United Kingdom. It alone can make and unmake Governments and call the Prime Minister and the Government fully to account. It authorises taxation and supply and can, if it wishes, achieve its legislative objectives in the face of opposition from the House of Lords. In other words, whatever the theory, Parliamentary sovereignty in the United Kingdom ultimately resides, in practice, in the House of Commons. As things stand, the House of Commons could, if it insisted and subject to a delay of only about 13 months, achieve almost any result it desired, including the further amendment of the Parliament Acts. Here, we believe, is another reason for the existence of a second chamber sufficiently confident and authoritative to require the House of Commons, at the very least, to think again.

---

<sup>1</sup> Directly applicable European Union law is consistent with this doctrine of Parliamentary sovereignty because it is made possible by virtue of the European Communities Act 1972 which could be repealed or amended.

<sup>2</sup> For example, by the Scotland Act, the Government of Wales Act and the Northern Ireland Act 1998, and arguably by the Human Rights Act 1998.

**3.6** Moreover, within the House of Commons, the Government of the day is normally in a dominant position. It must of course retain the support of its Parliamentary followers and therefore has every incentive to be alert to their opinions. In practice, Governments are also constrained by the media, public opinion and the fear of defeat at the next general election. Nevertheless, Governments in the United Kingdom can usually get their way. Their Budgets are implemented. So is the great bulk of their legislative programme. In addition, the Government of the day exercises extensive executive powers by right of the Royal Prerogative, including the power to make appointments and enter into treaties. Given the Government's enormous power in our system, it seems to us important to have a second chamber able and willing to complement the House of Commons in its essential work of scrutinising the executive and holding the Government to account.

**3.7** This need is reinforced by the fact that Governments in the United Kingdom are normally one-party Governments, backed by absolute majorities in the House of Commons. There is no need for Governments in the United Kingdom, as there is for governments in many other countries, to negotiate with coalition partners over their Budgets and legislative programmes. Moreover, although Governments in this country must be alert to the views of their backbench supporters, the fact remains that, thanks to the high level of party discipline that obtains, the Government's will usually prevails.

**3.8** It was all these considerations that led The Rt Hon Lord Hailsham of Saint Marylebone a generation ago to describe the United Kingdom's system of government as amounting to an 'elective dictatorship'.<sup>3</sup>

**3.9** The further point is sometimes made that there is something inherently unsatisfactory about the fact that strong Governments in the United Kingdom, usually with secure Parliamentary majorities, are in fact typically elected on the basis of only a minority of the popular vote. Not since 1935 has any single party in the United Kingdom won more than 50 per cent of the vote. Our own concern, however, is somewhat different. Our concern is with creating a second chamber sufficiently robust to act, alongside the House of Commons, as a check on the Government of the day, whatever its basis of electoral support. If Governments were typically elected on the basis of majority support, the need for such a constitutional check might well be greater, not less.

**3.10** While we recognise the numerous informal constraints which restrict any Government's freedom of action (and which can frequently make life difficult for a Government), we are also concerned that the number of formal constraints on Governments is so limited under our constitution. In particular, we are concerned that the House of Commons often finds it difficult to balance its twin responsibilities of sustaining a Government in office and at the same time holding it effectively to account. Backbenchers on the Government side frequently speak out, and there are occasional Parliamentary revolts, some of them significant. But our view is that the country's new constitutional arrangements should provide for a second chamber which does not pose a threat to the House of Commons' pre-eminence but which is nevertheless able to augment and complement the Commons' work. It should enhance the ability of Parliament as a whole to scrutinise the executive and act as a check upon it.

<sup>3</sup> The Richard Dimbleby Lecture, broadcast 14 October 1976, published by the BBC.

## The nature of the second chamber

**3.11** In determining what the roles of the second chamber should be, we have taken a number of considerations into account. One has already been referred to and is implicit in our terms of reference: it should *not* be the role of the second chamber to substitute its own opinion for that of the House of Commons. The House of Commons should continue to be the pre-eminent chamber of Parliament and should remain the principal forum for the resolution of political differences. Nothing in what follows should be construed – or *could* reasonably be construed – as seeking to undermine the House of Commons as the final political authority under our constitution.

**3.12** That said, the new second chamber, whatever precise form it takes, will inevitably be a political chamber. Some of our witnesses and a number of those who wrote to us seemed to imagine that the new second chamber should be, and could be, a sort of

council of tribal elders: a body of wise men and women capable of determining, in a wholly detached manner and in the light of an entirely dispassionate examination of all the available evidence, what was in the nation's best interests. Such a vision is, in our view, pure fantasy. Politics exists because people disagree, often passionately. The new second chamber, like the old, will be and should be one of the principal forums in which these disagreements are expressed. Largely for that reason but also because the new second chamber, like any other legislative chamber, will require a degree of discipline and organisation, we take it for granted that the political parties will continue to have, as they have in the existing House of Lords, a central role to play.

**3.13** The new second chamber will be a political body, and practical politics requires political parties. Nevertheless, a central part of

the rationale for having a second chamber in a political system like the United Kingdom's is that the second chamber should to some extent counterbalance the dominance of the governing party in the House of Commons. We believe, therefore, that the new second chamber should be composed in a way which both ensures that no one party is ever in a position to control it and also limits the influence of political parties upon its individual members.



**3.14** By the same token, and for reasons spelled out below, we also believe that the new second chamber should differ from the House of Commons in not being composed primarily or largely of professional politicians. The general public would almost certainly resent the idea that the successor body to the existing House of Lords should provide a hunting ground for yet another ‘tribe of professional politicians’. We also believe that, in a body which is meant to complement rather than compete with the House of Commons, a different set of attributes and qualities is required.



**3.15** Given the dominant position of the House of Commons in the United Kingdom system, and given the normally dominant position of the Government within the House of Commons, we might have been tempted, in an earlier age, to recommend the creation of a more powerful second chamber than the one to be proposed here. We recognise, however, that the present Government’s programme of constitutional reform is already bringing about, as one of its inevitable effects, a reduction in the centralised power of Westminster and Whitehall. The number of formal as well as informal constraints on the executive is already increasing substantially. It is therefore a good deal harder today than it was a generation ago to argue the case for radically altering the existing balance of power between the Commons and the second chamber. The concentration of power in our system of government is already considerably less than it was.

**3.16** Membership of the European Union means that European legislation has the force of law in the United Kingdom. The creation of a new Scottish Parliament, a new National Assembly in Wales, a new Northern Ireland Assembly, and a new Mayor and Assembly for Greater London marks a significant transfer of power away from Westminster and Whitehall to sources of political authority closer to the people. The new Regional Chambers in England will soon be able to play a part in holding the new Regional Development Agencies to account and there may in time be elected assemblies in the English regions. In addition, the Human Rights Act 1998 will undoubtedly strengthen the position of the individual vis-à-vis the state. Strictly, none of these developments offends against the traditional principle of Parliamentary sovereignty. Each of them could, in theory, be abrogated by the Westminster Parliament but, in practice, this is unlikely. Each is now very firmly entrenched, politically if not legally.

**3.17** Against this background, one of our principal aims in recommending the creation of a new second chamber has been to devise a chamber that goes with the grain of the other constitutional changes currently taking place.

## The roles of the second chamber

**3.18** As well as considering the roles which a new second chamber *should* play, we need to consider the roles which it *might* play. Four separate strands of thinking have long dominated discussions about the possible roles of second chambers. We consider each in turn.

### Counsel from a range of sources

**3.19** The view of the classical world, as expressed by Aristotle and reflected in the constitution of republican Rome, was that good governance required those in power to take ‘counsel from a range of sources’. One potentially important role for a reformed second chamber might therefore be to provide a means whereby a range of different experiences and points of view – different, not least, from those of the House of Commons – could be brought to bear on proposed legislation and on public affairs more generally. The old House of Lords clearly played such a role, often successfully. We believe that the new second chamber should continue to play such a role. Its demonstrated ability to do so, and to do so effectively, would clearly add considerably to its overall authority.

### Estates of the realm

**3.20** The medieval view, not just in this country but throughout most of Europe, was that the principal ‘estates of the realm’ needed to be represented separately in any national assembly. Power in the state effectively resided in the estates; the structure of the national assemblies was organised to reflect that. The institution of Parliament in England and Wales and later in the whole United Kingdom originally embodied such a conception. The commoners were represented in the House of Commons; the lords, both temporal and spiritual, in the House of Lords. No commoner could sit in the House of Lords; no lord (except the bearer of a courtesy title) could sit in the House of Commons. The notion of strictly defined estates of the realm makes no sense in the context of today’s far more heterogeneous, far more fluid society. Nevertheless, we believe that the new second chamber does have a role to play in being broadly representative of United Kingdom society as it is now – ideally, considerably more representative than are the members of the present House of Commons – and in reflecting the diverse experiences and traditions of that society.

### Checks and balances

**3.21** A third strand of historical thinking about second chambers has been concerned with what the authors of the United States Constitution, the Founding Fathers, thought of as ‘checks and balances’. The Founding Fathers’ view, as expressed in *The Federalist Papers*, was that a second chamber was desirable in a legislative assembly to “double the security of the people by requiring the concurrence of two distinct bodies”. As the House of Representatives in the United States was to be popularly elected, a powerful Senate, chosen on a different basis, was essential to act as a brake on the tendency of popular assemblies, “stimulated by some irregular passion .., or misled by the artful representations of interested men, [to] call for measures which they themselves will afterwards be most ready to lament and condemn”.<sup>4</sup> We would not want to go that far but, as we have already indicated, we believe there is a role for the reformed second chamber to play as a check on the Government, with its majority in the House of Commons (the ‘popular assembly’).

**3.22** The American notion of checks and balances, carried over into the United Kingdom system of government, could express itself in three areas: scrutinising the actions of the executive and holding it to account; participating in the legislative process; and playing a role in connection with proposed constitutional change.

**3.23** For the reasons already given in paragraph 3.10 above, we believe the new second chamber should play an active role, complementary to that of the House of Commons, in scrutinising the executive and holding it to account. The House of Commons often finds it difficult *both* to sustain in power the Government of the day *and* to act as an effective check upon it. A revitalised second chamber could enhance the ability of Parliament as a whole to provide an effective check on the executive.

**3.24** This conclusion is reinforced by the findings of a study of unicameral (single chamber) parliaments around the world, commissioned by the Scottish Office in preparation for the establishment of the Scottish Parliament.<sup>5</sup> The study found that the few successful unicameral parliaments that exist in the world, far from being dominated by an untrammelled executive, incorporate alternative checking and balancing devices. These include proportional representation, usually leading to minority or coalition governments; significant rights for minority parties; powerful backbench and other external scrutiny arrangements; and constitutional and/or judicial controls on the power of the executive. Given the present nature of the constitutional settlement in the United Kingdom and in the absence of the kinds of constraints to be found in countries with unicameral systems, it falls to the second chamber in this country to assist Parliament as a whole to play its checking and balancing role.



**3.25** The House of Lords already plays an active part in the legislative process in the United Kingdom, and many second chambers overseas are referred to as being, like the House of Lords, ‘revising’ chambers. Having two legislative chambers facilitates the scrutiny of legislation and improves the quality of legislative drafting. It allows greater flexibility in the legislative timetable, more opportunity for interested parties to press for improvements to draft legislation and more time for second thoughts to develop and be reflected in the final form of legislation. The existence of a second chamber also facilitates the taking of ‘counsel from a range of sources’ in connection with legislation.

**3.26** It is not enough, however, for the second chamber merely to add its own voice to the other voices raised in legislative debates. It must, in addition, have the formal power to require those who initiate legislation to justify their proposals to the public and to both Houses of Parliament – if need be for a second time. Using this power, the second chamber can raise issues which the House of Commons has neglected and can bring considerable political pressure to bear on both the House of Commons and the Government. We discuss the powers which should be available to the reformed second chamber in Chapters 4 and 7. But we take the general view that even limited powers to

<sup>5</sup> *Checks and Balances in Single Chamber Parliaments* (Stage 1) (February 1998) and *Single Chamber Parliaments: A Comparative Study* (Stage 2) (September 1998). Constitution Unit.

refer issues back for consideration or to impose a delay could, if exercised with restraint and only when occasion clearly demanded it, have a substantial political impact. If a reformed second chamber were to express concern about a particular Government proposal and exercise whatever powers of delay or referral were available, that would lead to (renewed) public and media interest in the issue, with opportunities for the causes of concern to be set out. It would force the Government to reconsider the issues in the light of that interest, and it would give members of the House of Commons an opportunity to revisit the issues and make the final determination in the light of all the relevant information. The Government of the day would have to take such powers and their consequences into account in drafting its legislation in the first place as well as in seeking to put it on the statute book.



**3.27** As regards proposed constitutional changes, we merely note at this stage that many second chambers overseas have an explicit role to play in safeguarding their country's constitution. Many are accorded enhanced powers in connection with constitutional issues. However, because of the absence of a written constitution, the position in the United Kingdom is more complicated. On the one hand, a case can be made out that the new second chamber in this country should play a more clearly defined role with regard to constitutional matters and issues

relating to human rights. On the other, there are a number of substantial difficulties in the idea of assigning the second chamber a significant formal role as 'guardian of the constitution'. We discuss these questions further in Chapter 5.

**3.28** Our view is that the new second chamber should have the ability effectively to scrutinise the actions of the executive, including its legislative proposals; that it should have sufficient authority to ensure that it will be listened to when it draws attention to issues of concern; and that it should have sufficient power to require the Government of the day to consider its legitimate concerns. It should, in short, have the power to make the Government of the day think again, even against its will.

### The representation of regions

**3.29** The fourth strand in most thinking about the role of second chambers is the representation of regions, provinces, states and other territorial units. The United States Constitution, to take the obvious case, requires the United States Senate to provide equality of representation for each state, whatever its size. Not only in countries with federal systems but also in some countries with unitary systems, the second chamber is seen as a suitable vehicle for representing regions and other territorial units as distinct from simply representing population. As will emerge in Chapter 6, we do not under present circumstances believe that the representation of the nations and regions should constitute one of the primary roles of the new second chamber in this country. In

other words, we do not see the new second chamber playing the role of the United States Senate, the Australian Senate or the German Bundesrat. However, the reformed second chamber could have an important role in giving this country's nations and regions a direct voice at Westminster which they currently lack.

## Conclusion

**3.30** As we have indicated, we believe that the reformed second chamber can and should play many of the roles traditionally played by second chambers – and can and should play some of them better than the existing House of Lords has done.

**Recommendation 1:** The new second chamber should have the capacity to offer counsel from a range of sources. It should be broadly representative of society in the United Kingdom at the beginning of the 21st century. It should work with the House of Commons to provide an effective check upon the Government. It should give the United Kingdom's constituent nations and regions, for the first time, a formally constituted voice in the Westminster Parliament.

**3.31** It is against this background that in the remainder of this report we consider what the precise powers and functions of the new second chamber should be and how it should be constituted.