

House of Lords reform is once again on the political agenda. Assess the contribution of the chamber as currently constituted in improving the quality of legislation passed by Parliament. If the upper chamber becomes a wholly elected one, is its effectiveness in improving legislation likely to be increased or diminished?

1. Introduction

“House of Lords reform is once again on the political agenda.” As an unelected chamber at the heart of what is regarded as one of the world’s oldest functioning democracies, the House of Lords has long been a topic of debate. Such debate has on occasion given rise to momentum for reform, examples of which include curtailment of the Lords’ power to veto Bills through the two Parliament Acts and exclusion of the majority of hereditary peers in the House of Lords Act 1999. On these occasions, reform was met with resistance from both the Lords themselves and others. Such resistance has meant that reform has not always been forthcoming, as attested by the multiple failed attempts to remove the remaining 92 hereditary peers from the House.

As these reform attempts demonstrate, the make-up of the House of Lords is doubtless the source of the chamber’s greatest controversies. What is more, with a view to increasing democratic legitimacy, an impulse to make the UK’s upper chamber an elected one is understandable. And yet, as will be demonstrated below, the contribution of the House of Lords as currently constituted in improving the quality of legislation passed by Parliament is considerable. Moreover, making the upper chamber wholly elected may have a regrettable detrimental impact on its effectiveness in improving legislation. Below, it will be argued that this effectiveness would most likely diminish in the short term, and while there is potential for it to increase in the long term, this too is shrouded in uncertainty.

2. Assessing the contribution of the chamber as currently constituted in improving the quality of legislation passed by Parliament

a. The chamber as currently constituted

As of Monday 31st July 2023, the House of Lords is currently made up of 779 members – 754 Lords Temporal and 25 Lords Spiritual (Bishops of the Church of England). Among those Lords Temporal, there are 269 members representing His Majesty’s Government, 173 representing His Majesty’s Loyal Opposition, and others of various other parties. Of those Lords Temporal who are not affiliated to a political party, the majority are “crossbenchers” – peers who “are non-party political and by tradition sit on the benches that cross the chamber of the House of Lords.”¹

These crossbenchers, who number 179 (and therefore make up over a fifth of the upper chamber) consist of individuals with backgrounds in a broad range of sectors, including the military, civil service, business, health, academia, and the arts, giving them expertise garnered over often decades of experience. Among their cohort are also several accomplished lawyers, including, at present: nine former Law Lords; five other former members of the senior judiciary; and several practitioners.

¹ Parliament website definition, ‘Crossbench peers’, retrieved 31 July 2023: <https://www.parliament.uk/site-information/glossary/crossbench-peers/>.

The means by which the majority of crossbenchers, as well as the vast majority of members, join the House is through appointment in honours lists (New Years, King's Birthday, Dissolution and Resignation). Appointments can be for any number of reasons, including recognition of service – both political and non-political – as well as, in the case of active politicians with ministerial appointments, to enable them to begin (or even to continue) their ministerial responsibilities in circumstances where they are unwilling or unable to be returned as a member of the House of Commons. Life peers remain in the House of Lords until they die or retire. The Lords Spiritual are not peers but are members of the House by virtue of their position as Bishops of the Church of England. Finally, of the 92 hereditary peers allowed to continue to sit in the House post-1999, the Earl Marshal and Lord Great Chamberlain also sit ex officio, whereas the remainder are replaced upon death or retirement through by-elections among party groups of the hereditary peers or, exceptionally, by the whole House.

At this point, it should be noted in respect of crossbenchers that, owing to their backgrounds, and their mode of selection to the House, they (i) possess significant subject-matter expertise in a variety of areas, and (ii) are non-partisan and therefore not held to the position of any political party.

b. Improving the quality of legislation passed by Parliament

The “quality” of a piece of legislation can be conceived of in two ways: (i) substantive quality – that is, a measure of whether the legislation addresses an issue which requires Parliamentary attention and, if so, the extent to which the legislation goes far enough or too far in addressing that issue; and (ii) formal quality – assuming there is an issue to be addressed, and that the solution proposed in the legislation is adequate, a measure of whether the legislation as drafted will be effective in delivering that solution, in that it is capable of application as intended by the drafters.

In 1998, the then New Labour Government wrote in its White Paper on House of Lords reform that “[t]he most distinctive and important role of the present House of Lords is the specialist expertise and independent perspective it can bring to the scrutiny of legislation.”² This can be seen today in the contributions of the crossbenchers.

First, owing to their subject-matter expertise, crossbenchers are able to contribute significantly to the legislative process by improving draft legislation in both the substantive and formal senses. Furthermore, since are not accountable to constituents, they have more time to look into the substance of legislation in a way most MPs couldn't.

Second, crossbenchers are able to apply their expertise unencumbered by party ties. This is generally impossible in the Commons, where independent MPs are rare and even expert party-political MPs are nonetheless subject to their party's whip. However, in the Lords, the large proportion of crossbench peers means that they reduce the gridlocking effect of the party-political voting blocs.

i. Improving the substantive quality of legislation

² Cabinet Office, *Modernising Parliament: Reforming the House of Lords*, London: The Stationery Office, 1998, para.9.

The contribution of the crossbenchers to improving the substantive quality of legislation passed in Parliament can be seen in the amendments put forward by crossbench peers in 2023 alone.

For example, Baroness Kidron, an experienced filmmaker and advocate for the rights of children online,³ was successful at the Lords Report Stage in introducing amendments into the Online Safety Bill clarifying that new child protection duties apply to AI-generated sexual content.⁴ Furthermore, crossbencher Lord Carlile of Berriew, an experienced criminal barrister with experience reviewing terrorism legislation and national security arrangements in Northern Ireland,⁵ successfully negotiated the introduction into the National Security Bill of a clause requiring political parties to publish policy statements identifying donations from foreign powers.⁶

Notable also is the contribution of the significant number of Lords with legal backgrounds, in their commitment to upholding the principles of the British Constitution. For example, during the passage of the Illegal Migration Bill, law peers sought to include provisions which would ensure that the UK would not breach its obligations under the Refugee Convention.⁷

ii. Improving the formal quality of legislation

Furthermore, the significant number of Lords with accomplished legal backgrounds means that the upper house is particularly well placed to improve the formal quality of bills.

One way they do this by improving the clarity and precision of legislation. Furthermore, the Lords also remove sources of potential legal unworkability of legislation. An example is the successful amendment of Lord Anderson of Ipswich (sponsored by fellow legal crossbench peers Lords Etherton and Pannick) to the Judicial Review and Courts Bill 2022, removing the presumption in favour of prospective-only quashing orders.⁸

3. If the upper chamber becomes a wholly elected one, is its effectiveness in improving legislation likely to be increased or diminished?

³ House of Lords Profile, Baroness Kidron, retrieved 31 July 2023:

<https://members.parliament.uk/member/4258/experience>.

⁴ Amendment 27, Lords Report Stage (1st Day), Online Safety Bill, Hansard, Volume 831; debated on Thursday 6 July 2023, retrieved 31 July 2023: Hansard, Thursday 6 July 2023: <https://hansard.parliament.uk/lords/2023-07-06/debates/A3CD7080-9B88-4F19-A7A7-D81E1739B887/OnlineSafetyBill>.

⁵ House of Lords Profile, Lord Carlile of Berriew, retrieved 31 July 2023:

<https://members.parliament.uk/member/1138/career>.

⁶ Amendment 22B, Consideration of Commons Amendments and Reasons, National Security Bill, Hansard, Volume 831; debated on Wednesday 21 June 2023, retrieved 31 July 2023:

<https://hansard.parliament.uk/lords/2023-06-21/debates/F63A33A2-E7D6-44A0-96D1-911209FED895/NationalSecurityBill>.

⁷ Second Marshalled List of Lords Amendments to be move on report, retrieved 31 July 2023:

<https://bills.parliament.uk/publications/51989/documents/3735>.

⁸ 'Lord Anderson of Ipswich's amendment, Clause 1, Judicial Review and Courts Act 2022, Report stage, Amendment number: 4', retrieved 31 July 2023:

<https://bills.parliament.uk/bills/3035/stages/16198/amendments/91887>.

a. Short term

In the short term – i.e. at the point at which all current members are removed from the House and replaced by members chosen by an electorate – the Lords' effectiveness in improving legislation is likely to be diminished.

i. Effect of likely partisanship

It is most likely that election of House of Lords members would be conducted along party lines, particularly if members are elected directly by the general public.

Political parties are already familiar to the electorate, who overwhelmingly vote for candidates of political parties in General Elections.⁹ Thus, candidates representing those already-familiar political parties would have an advantage over their non-affiliated competitors, and so political parties would be incentivised to field candidates to the Lords. This is assuming a first-past-the-post ('FPTP'), regional-representation electoral system, but under the other widely-used voting system – proportional representation ('PR') – partisanisation would be unavoidable, as voters vote for a party itself, from whose lists members are taken in proportion to the party's vote share.

As a result, House of Lords elections would most likely be conducted as competitions between the well-known political parties and therefore resemble General Elections. Furthermore, the consequence of this is a reduction in the Lords' effectiveness in improving legislation on both best- and worst-case scenarios.

At best, partisanship in the Lords will mean that the passage of legislation through the Lords is likely to add nothing to its development in the Commons. This is where political debate reflects that in the Commons, such that the same issues are fought over and decided in the same way. It is already rare for a party-political peer to vote against their party's position,¹⁰ and introducing the prospect of their being replaced as their party's candidate at the next election would doubtless make this even more of a rarity.

At worst, the quality of legislation might even deteriorate for passage through the House of Lords. Where compromise was made in the House of Commons on a particular provision, the Lords might choose to row back from that, leading to the extreme position of the side with the greater number of members winning out.

ii. Loss of expertise

In the short term, the upper house would immediately lose considerable expertise as those current crossbenchers not seeking or obtaining election to the House would be forced to leave it. Moreover, the likely partisanisation of election to the House of Lords would make it unlikely that this lost expertise would be replaced with that of incoming members. This is submitted for two reasons.

First, apolitical experts who would otherwise apply for appointment as crossbenchers are perhaps less likely to wish to seek election, and serve as a politician, under a party banner.

⁹ House of Commons Library, 'UK Election Statistics: 1918-2022: A century of elections', 17 March 2023, retrieved 31 July 2023: <https://commonslibrary.parliament.uk/research-briefings/cbp-7529/>.

¹⁰ D Hughes, 'Voting patterns in the House of Lords rubbish claims of its independence', Electoral Reform Society, 11 January 2018, retrieved 31 July 2023: <https://www.electoral-reform.org.uk/voting-patterns-in-the-house-of-lords-rubbish-claims-of-its-independence/>.

Furthermore, the great financial cost of running as an independent would foreclose that alternative to many.¹¹

Second, where voters are given a choice of candidates to choose from, they are more likely to vote for the candidate representing the political party whose political position more closely reflect their own, rather than the candidate which they believe to have the greatest expertise on matters relevant to the legislative process. This is for a number of reasons, including that they will seek to choose a candidate that will act in their interests over a range of issues, rather than a candidate with expertise in a particular subject. Furthermore, on voting methods such as PR, voters will not even be able to vote for a candidate, but only a political party. Finally, and in any event, the average voter is probably not well placed to assess a candidate's expertise in a particular subject matter, let alone weigh it up against that of another candidate.

As such, members voted into the upper house by the public would be unlikely to have the same in-depth, subject-specific expertise as possessed by those crossbenchers that would be forced out of it.

b. Long term

What the long-term effect of making the House of Lords wholly elected would be is far from clear, and much will depend on external factors. Below are discussed two ways in which making the House wholly elected might in fact lead to an increase in its effectiveness in improving legislative in the long term: (i) procedurally, increasing its legislative competence relative to the Commons; and (ii) substantively, increasing the reflection of the interests of the regions and/or devolved nations in the substance of Acts of Parliament.

i. Procedural: increase in relative legislative competence

As the unelected upper house to the elected House of Commons, the House of Lords suffers from a democratic deficit. As such, the Commons has been accorded legislative supremacy over the Lords. Under the Salisbury Convention, as a matter of practice, the Lords do not vote down a Government Bill mentioned in an election manifesto. Furthermore, the Parliament Acts 1911 and 1949 removed the Lords' power to veto the vast majority of Bills and restricted the length of time the Lords could delay a Bill to one year.

However, a wholly elected House of Lords would have a political mandate on par with the House of Commons, and so the rationale for legislative superiority of the Commons over the Lords would be greatly diminished. As such, it is conceivable that elections to the Lords could lead to an increase in the Lords' legislative powers relative to that of the Commons.

For example, with their own mandate from the people, the Lords might begin to see themselves as more empowered and therefore more comfortable with opposing and amending the Government's legislative proposals. For example, Viscount Hailsham's amendment to the EU Withdrawal Bill 2018, requiring a meaningful Parliamentary vote in the event that no

¹¹ H Bochel & A Defty, 'A Question of Expertise? The House of Lords and welfare policy', retrieved 31 July 2023: http://eprints.lincoln.ac.uk/id/eprint/2245/2/A_question_of_expertise_-_the_House_of_Lords_and_welfare_policy.pdf, p.6

withdrawal agreement was agreed with the EU, attracted criticism for being undemocratic.¹² With a democratic mandate through election, this criticism would not have been possible.

Furthermore, while repeal of the Parliament Acts is a remote possibility, it is a good deal more likely with a wholly elected House of Lords. With its newfound democratic legitimacy, the electorate might welcome a fail-safe role for an elected House of Lords, blocking extreme legislation that makes it through the Commons.

That said, given that elections to the House of Lords are likely to result in partisanship, any increased legislative confidence/competence of the House might well either make no difference or be used to abusively frustrate the legislative process.

If, on the one hand, Lords are elected at the same time as MPs during General Elections, the makeups of members in both Houses are likely to largely reflect each other. In such circumstances, a majority in the Lords would not use their increased legislative power to go against a majority in the Commons (i.e. because they would almost certainly be of the same Party).

If, on the other hand, Lords are elected at some other point during a five-year Parliament (say, midway through), the political makeup of the Lords might be very different to that of MPs in the Commons, given changes in polling throughout a government's duration. This might result in opposing Commons/Lords majorities of different parties hampering the legislative efforts of their counterparts. This is reflected in the practice of the US Senate, in which Republican/Democratic majorities have on numerous occasions hampered the legislative initiatives of their Democratic/Republican majority counterparts in the House of Representatives, through the infamous 'filibuster'.¹³

ii. Substantive: better reflection of the interests of the regions and/or devolved nations

The recent proposal for reform of the Labour Party's Commission on the UK's Future (chaired by Gordon Brown) is to transform the House of Lords into an elected 'Assembly of the Nations and Regions',¹⁴ which would provide "constructive scrutiny of legislation", like the current House of Lords, but "look[ing] at issues from the perspective of the nations and regions of the UK."¹⁵

In theory, this could improve the substantive quality of legislation in that the interests of the regions/home nations might be better reflected in the centralised *Westminster* legislative process.

¹² C Howarth, 'How Viscount Hailsham's amendment to the EU Withdrawal Bill could let peers block Brexit', Brexit Central, 29 April 2018: <https://brexitcentral.com/viscount-hailshams-amendment-eu-withdrawal-bill-let-peers-block-brexit/>; B Cash, 'Failure to reverse the Wrexiteers' changes to the EU Withdrawal Bill would undermine trust in democracy itself', Brexit Central, 18 May 2018: <https://brexitcentral.com/failure-reverse-wrexiteers-changes-eu-withdrawal-bill-undermine-trust-democracy/>.

¹³ T. Lau, 'The Filibuster Explained', Brennan Center for Justice, 26 April 2021: <https://www.brennancenter.org/our-work/research-reports/filibuster-explained>.

¹⁴ Brown Commission, 'A New Britain: Renewing our democracy and rebuilding our economy', Report: <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>, p.137, Recommendation 37.

¹⁵ Brown Commission, 'A New Britain: Renewing our democracy and rebuilding our economy', Report: <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>, p.139.

However, there are practical challenges to Labour’s proposal. For example, how the Assembly should be composed is fraught with difficulty. Given the asymmetrical devolution of the home nations and the regions, indirect election by these devolved bodies (insofar as they even exist – e.g. some English cities have mayors, others do not) would be questionable, if not deemed impossible. If elected directly by the public, deciding on the division of seats between areas would be difficult, as a fine balance would have to be struck between the tyranny of the more over the less populous areas (in the Commons, almost 10 times as many English constituencies (533) are represented as are Scottish (59)), and allowing the less populous nations to dictate the Assembly’s agenda through equal representation. Practical difficulties aside, the proposal would also be met with significant resistance from the SNP, who would eschew any reform having the effect of increasing the devolved nations’ integration into the Union.¹⁶

For these and other difficulties, Labour’s proposal has been labelled “ambitious”,¹⁷ and therefore perhaps not one which might even materialise in its current, regionalised form.

4. Conclusion

In conclusion, the House of Lords as currently constituted contributes significantly to improving the quality of legislation passed by Parliament. This is seen most prominently in the apolitical crossbenchers, whose combined in-depth expertise in a range of areas society and non-partisan nature allow them to effectively improve bills before them both substantively and formally unencumbered by the position of any political party. As such, if the upper chamber becomes a wholly elected one (and the crossbenchers most likely cease to exist as a significant grouping), its effectiveness in improving legislation will most likely be diminished – at the very least in the short term. The long-term picture is not certain, and it is conceivable that effectiveness in improving legislation could be increased, both procedurally and substantively. However, on closer inspection, this has shown to be unlikely, and what is clear in any event is that making the Lords wholly elected will remove the current legislative advantage that it has in the crossbenchers.

That notwithstanding, to some who push for reform this will not matter. For them, the real motivation for reform is revulsion at having an unelected upper chamber, whose members’ titles originate in the feudalistic conception of “Lordship”, some members holding them by virtue of their birth. No doubt for them, the increased democratic legitimacy of an elected upper chamber will be worth it in itself, even if it does mean an initial (and perhaps even permanent) reduction in the effectiveness of that upper chamber in the legislative process.

Word Count: 2,998 (not including footnotes)

¹⁶ M. Russell, ‘The Brown commission’s proposals on reform of the House of Lords’, The Constitution Unit Blog, 1 March 2023: <https://constitution-unit.com/2023/03/01/the-brown-commissions-proposals-on-reform-of-the-house-of-lords/>

¹⁷ M. Russell, ‘The Brown commission’s proposals on reform of the House of Lords’, The Constitution Unit Blog, 1 March 2023: <https://constitution-unit.com/2023/03/01/the-brown-commissions-proposals-on-reform-of-the-house-of-lords/>