

~~An independent Scrutiny Commission could take over the constitutionally valuable roles that the House of Lords presently performs, and at lower cost – whether we move to create an elected second chamber; or reform the unacceptable features of the current House of Lords; or just scrap a second chamber altogether~~

A key responsibility of the current Lords is its scrutiny function, which might not continue in the same way with the Coalition's draft bill for a wholly or mainly elected upper chamber. [Dawn Oliver](#) looks at how the scrutiny role would be affected by the reforms proposed in the Coalition's draft White Paper. A Scrutiny Commission of experts would provide a better alternative, however we proceed in electing, reforming or getting rid of the upper chamber



The House of Lords performs vital constitutional safeguard functions, including the revision and scrutiny of bills and draft bills, and the scrutiny of draft statutory instruments. These are particularly important in the UK because we lack an entrenched written constitution along with a Constitutional Court jurisdiction to strike down 'unconstitutional' provisions in Acts of Parliament, a role that our current Supreme Court does not fulfil.

Under the system at present these functions are intra-parliamentary: they are performed within Parliament, particularly, and particularly well, by the second chamber and its committees. In addition, the current House of Lords conducts inquiries into issues affecting the public interest and public policy.

What if the second chamber is wholly or mainly elected?

Let us jump ahead in time and imagine that the UK's second chamber consists of 300 elected, or 240 elected and 60 appointed, independent, members, as is proposed by the government [White Paper and draft bill](#) of May 2011. But will those members be able to perform the functions of a number of important and highly regarded House of Lords Select Committee well? Members of these Committees must have expertise in constitutional law including human rights, regulation and judicial review, and knowledge and understanding of European law and policy. They must also have the ability to read, understand, and interpret complex bills and statutory instruments.

My concern is that a largely or wholly elected second chamber would not contain sufficient people with the qualities required to carry out these functions. It is obvious that the House of Commons MPs cannot do so, for three reasons. They already have high workloads, with responsibilities for their constituencies. They also lack expertise – for instance there are not many lawyers in the House of Commons. And the Commons is – rightly and inevitably – highly politicised.

The scrutiny roles of the House of Lords and its committees require political nous and experience, which is what elected members would be expected to possess. But they also require expertise, wisdom and independence of approach, which not all elected members would necessarily have.

The case for an independent Scrutiny Commission

Let us imagine that after a few years of an elected second chamber it is found and agreed that the quality of legislation passed by Parliament is no longer as good as before, because the second chamber has not been able to perform its revision and scrutiny roles as well as the present House of Lords. And let us assume that because it is known in government that the second chamber will not perform these roles well, the preparation of bills 'upstream' is less well done. Let us also assume that the UK has not by then acquired an entrenched written Constitution with a Supreme Court with the power to set aside statutory provisions that are incompatible with the Constitution. It seems to me to be likely and highly desirable that a high status extra-parliamentary body should be established to perform these revision, scrutiny and inquiry roles. Let us call it the Scrutiny Commission. What would such a body be like?

The status and functions of the Scrutiny Commission. This Commission would be completely

independent of government and of Parliament. Its function would be to complement and support the House of Commons in holding the government to account in the course of the scrutiny and revision of bills and in its inquiries into matters of public policy. Its special responsibilities would include the constitution, delegated powers, European law and policy, human rights and the drafting and merits of statutory instruments. Its functions could be extended into international law and scrutiny of treaties. It would be entitled to scrutinise and revise bills, to conduct inquiries into matters of public interest, and to debate such matters and report.

Role in the legislative process. The Commission's role in the legislative process would be provided for in its enabling Act: to regulate the role of the government in the legislative process, imposing delay on that process unless the Commission is satisfied about the quality of each bill. The Commission would examine, amend and report on bills at each stage of the intra-parliamentary legislative process. The government would be required by statute to provide a reasoned response to each Commission report. The point of this is that government would be expected to take care to secure that its bills did not transgress the standards the enabling statute and the Commission would elucidate, so that its existence would have an effect upstream when bills were being prepared.

Appointment and terms of office. All members of the Scrutiny Commission should be appointed by an independent Appointments Commission. The Scrutiny Commission Act which established the Commission would specify the overall numbers of members; require a gender, ethnic and party balance; and insist on an independent, non-party element of say 25 per cent. There should be no mandating or whipping of members. The Appointments Commission would consult on and lay down the needs of the Scrutiny Commission members for expertise in matters such as commerce, constitutionality, culture, defence, economics, education, European law, finance, foreign affairs, health, human rights, industry, international affairs, law, sport, welfare, and so on, and it would be required to take these into account when making appointments. Members of either of the two Houses of Parliament would be disqualified from membership. Scrutiny Commissioners should serve for a single term of, say, fifteen years, followed by a period of quarantine before they could stand for elected office. They should not be required to be full time. They should receive a per diem allowance for the work that they do.

Standards. In carrying out their scrutiny and revision roles the Scrutiny Commission would apply standards, many of which would be set out in the enabling legislation. This could require the Scrutiny Commission to report on whether, for instance, the government had published the evidence base for the proposed legislation, and carried out efficient risk, regulation, environmental and other impact assessments. It could also set out standards such as access to a court or tribunal for the resolution of disputes, preservation of the independence of the judiciary and of the integrity of the electoral system and civil service impartiality.

Such a commission would be legitimate because of its statutory basis and remit and because of the quality of its work. It would not be a legislative body and so would not be expected to be elected. And its work and its existence would make up for what I expect to be the inability of an elected or largely elected second chamber to carry out these functions of revision, scrutiny and inquiry. Such a new institution would secure that there were effective safeguards against the passing of defective laws and ensure that matters of public policy could, where necessary in the public interest, be independently and openly scrutinised by those with political nous, experience, wisdom expertise and independence, and make it possible for the country to continue without post-legislative scrutiny by the courts.

Implications of a Scrutiny Commission for the Second Chamber

What would be the implications of the existence of such a body for a largely or wholly elected second chamber – if one emerges from the current proposals and draft bill? We need to note that the assumption in current and all past proposals for a reformed second chamber is that it would perform the same roles and functions and have the same powers as the House of Lords. If that were all that the elected or largely elected chamber were supposed to do, and if it turned out that it could not do them so that a Scrutiny Commission had to be established, it would follow that the elected or largely elected second chamber was unnecessary. It could be abolished: the cost of a Scrutiny Commission would be very much less than the cost of an elected second chamber.

What If the House of Lords is not wholly or partly elected?

My second 'what if?' question is, what if the present proposals for reform of the second chamber are not implemented? It seems to me that the current situation is not sustainable, because the House of Lords has over 800 members, each entitled to claim £300 per day tax-free for attendance, plus some expenses. Even if there are sufficient members in this enormous House to carry out the revision, scrutiny and inquiry functions, there are bound to be many who are not needed for those purposes and yet who attend in order to draw their allowances or contribute in other ways.

If the current reform proposals are not put into effect there may then of course be progress in relation to such matters as

- putting the appointment process to the current House on a statutory basis and removing the Prime Minister's patronage;
- removing the last of the hereditary peers;
- making appointments for a single fixed term of say 15 years; and
- permitting or encouraging peers to retire so as to reduce the numbers in the House (while allowing those who retire to retain their titles).

But if progress on these fronts proves not to be possible, another – and perhaps more easily achievable from a political point of view – approach would be:

1. to abolish the House of Lords, thus saving the increasing annual cost of this huge institution. (Provision could be made to pay compensation or severance to current members based, for instance, on the length of their membership and their contributions in Committees); and
2. to establish in its place a Scrutiny Commission on the lines outlined above. That Commission might well contain some of the members of the House of Lords, those who contribute most and best to its current functions. But there should be no expectation of such appointment.

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On Monday, 18 July, the Constitution Society, CentreForum and British Government @ LSE hosted the debate, **The future of the House of Lords**. The debate brought together MPs, peers and academics to discuss the proposals set out in the Draft Bill and the prospects for reform of the House.

The speakers were:

- [Mark Harper MP](#), Minister for Political and Constitutional Reform, who was in favour of the proposed reforms;
- [Professor Patrick Dunleavy](#), London School of Economics, who was also in favour, but urged the reforms to go further;
- [Professor the Rt Revd Lord Harries](#), who was skeptical of the proposals and advocated a hybrid system;
- [Professor Tim Bale](#), University of Sussex, who was against the proposals.

[Click here for more details and to download "The End of the Peer Show?"](#)