RESEARCH PAPER 99/5
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The *House of Lords Bill*: 'Stage One' Issues

Bill 34 of 1998-99

The *House of Lords Bill* is due to have its second reading debate on 1-2 February. This Paper is one of a series which provides Members with briefing on the Bill, and on the wider issues surrounding Lords reform.

This Paper deals directly with the Bill itself and the proposals for the 'transitional' House of Lords ('stage one'). Research Paper 99/6 focuses on options for longer-term Lords reform, including the proposed Royal Commission ('stage two'), and Research Paper 99/7 concentrates on the place of Lords reform within the present Government's extensive programme of constitutional change. Developments in the run-up to, and since the 1997 general election are summarised in Research Papers 97/28, 98/85 and 98/105, and, generally, are not reproduced in the present series of Papers. Research Paper 98/104 and the Appendix to this Paper provide relevant statistics on the House of Lords and its membership, and Research Paper 98/103 examines the legislative role of the House. The House of Lords Information Office and Library both provide a range of relevant information (including the history of previous attempts at reform) in the form of Papers and on the Parliament website. See also the Bill's Explanatory Notes, *Bill 34-EN*.

Barry K Winetrobe

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Summary of main points

***Note**: Issues highlighted in bold type are discussed in detail in this Paper. Other issues are considered in the companion Research Papers 99/6 and 99/7.*

- **The Government is committed, as stated in the 1997 election manifesto and in this session's Queen's Speech, to reform of the House of Lords as presently constituted. This reform programme is intended to be a staged process, rather than a single, 'big bang'.**

- **The *House of Lords Bill* seeks to implement 'stage one', the removal of hereditary peers from membership of the Upper House, and their consequential 'enfranchisement' in House of Commons elections. The Bill is very short, but as a 'constitutional measure', it is intended to have 2 days for second reading, and its committee stage wholly on the floor of the House. As it has been introduced in the Commons, it is eligible for enactment through the *Parliament Acts* procedure if necessary.**

- **To counter accusations that the resulting House will be composed wholly of nominated peers, the Government has set out certain principles for party balance, and will establish an *Appointments Commission*, as an non-statutory advisory NDPB ('quango'). It will conform to the 'Nolan appointments principles', will nominate non-party peers and take over the scrutiny of possible party-nominated life peers from the Political Honours Scrutiny Committee. There are no plans to alter the powers or functions of this 'transitional House.'**

- **The Government are minded to accept a Lords amendment, proposed by the Cross-bench Convenor, Lord Weatherill, which would retain 91 hereditary peers in the transitional House (75 in proportion to party balance elected by the parties; 14 'office-holders' selected by the House, and the Lord Great Chamberlain and Earl Marshal), but only if the Bill and its sessional legislative programme are not unreasonably obstructed.**

- As part of the 'stage two' process for further reform of the second chamber, a Royal Commission has been appointed, to be chaired by Lord Wakeham. Its terms of reference require it to retain the primacy of the Commons and to take account of other constitutional changes, such as devolution and the *Human Rights Act 1998*. It is to examine the role and function of a second chamber, and the method(s) of composition to fulfil them, and is to report by 31 December 1999.

- The Lords Spiritual and the Law Lords are to remain unaffected by the 'stage one' process. The Government are keen to maintain an independent, non-party element, as provided by the Cross-benchers and others. The Royal Commission may examine issues such as the name of the reformed second chamber, and retention or otherwise of the link between the honour of a peerage and membership of the House.

- Lords reform is a key element of the Government's constitutional reform programme, not only for its intrinsic importance but also as a way of underpinning and binding the other elements of that programme. This could be achieved by some form of territorial representation, perhaps through the devolved (and regional bodies) themselves. Any second chamber, especially one building on the practices and expertise of the present House, could have an important role in constitutional matters generally, and human rights in particular. The Opposition has strongly attacked what it sees as the dangers inherent in the Government's piecemeal approach to constitutional reform.

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"If the House of Peers ever goes, it will go in a storm, and the storm will not leave all else as it is" -- *Walter Bagehot* [1]

"Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:
And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately be brought into operation:
And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:" -- *preamble to Parliament Act 1911*

"Since the theme of this Gracious Speech and those which have preceded it is the modernising of our country, we cannot ourselves, as a Parliament, lay ourselves open to the charge that we are failing to modernise Parliament itself – and not only the elected Chamber …. We have made it clear that we intend to introduce legislation this Session to deal with powers and also with the composition of their Lordships' House. We intend that this legislation shall be introduced in good time for it to become law this Session." -- *Prime Minister, Harold Wilson , 1967*[2]

"This is a modernising Parliament, in a modernising age … I submit that in a reforming age .. when the temper of the people is not to restrain the process of modernisation but rather to express impatience with any slackening of the pace of change – it would be unthinkable that, in our Legislature and in the relations between the two Houses of that Legislature, we should decide, for whatever reason, to withhold this instrument of modernisation. So far as the House of Lords is concerned, so far as the relations of our two Houses are concerned, so far as the possibility of a co-ordinated and, indeed, of an integrated Parliamentary structure is concerned, and, therefore, so far as Parliament itself is concerned, the Bill which I have commended to the House is a desirable, necessary, step in the long overdue modernisation of the institutions of our democracy." -- *The Prime Minister, Harold Wilson, 1969* [3]

"A modern House of Lords
The House of Lords must be reformed. As an initial, self-contained reform, not dependent on further reform in the future, the right of hereditary peers to sit and vote in the House of Lords will be ended by statute. This will be the first stage in a process of reform to make the House of Lords more democratic and representative. The legislative powers of the House of Lords will remain unaltered.

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1 *The English constitution*, introduction to 2nd ed., 1872, (Fontana ed., 1993, p 284)
2 Queen's Speech debate at start of 1967-68 session, HC Deb vol 753 cc 27-9, 31.10.67
3 opening the second reading debate on the *Parliament (No.2) Bill*, HC Deb vol 777 cc 57-9, 3.2.69

> The system of appointment of life peers to the House of Lords will be reviewed. Our objective will be to ensure that over time party appointees as life peers more accurately reflect the proportion of votes cast at the previous general election. We are committed to maintaining an independent crossbench presence of life peers. No one political party should seek a majority in the House of Lords.
> A committee of both Houses of Parliament will be appointed to undertake a wide-ranging review of possible further change and then to bring forward proposals for reform.
> We have no plans to replace the monarchy." -- *1997 Labour manifesto*[4]

> "A Bill will be introduced to remove the right of hereditary peers to sit and vote in the House of Lords. It will be the first stage in a process of reform to make the House of Lords more democratic and representative. My Government will publish a White Paper setting out arrangements for a new system of appointments of life peers and establish a Royal Commission to review further changes and speedily to bring forward proposals for reform." -- *1998-99 Queen's Speech*[5]

I Lords reform: some general considerations

The issue of Lords reform[6] is, in many ways, an extremely complex one, not least because it comprises two (at least) distinct if inter-related questions:

- change, if any, to the present House of Lords, and
- the need for a 'second chamber' of whatever form

Not only are these two questions often mixed together in debate on this issue, but difficulty is compounded when they are regarded simply as a single issue. This is often revealed in the ambiguity of the terminology adopted. For example, it is not always apparent whether those who argue for 'abolition' of the Upper House are advocating outright removal of a second chamber and the consequent creation of a unicameral Parliament, or are simply suggesting replacement of the existing House of Lords by a new second chamber. Again discussion of the Lords' powers is often in fact an examination of their exercise, rather than their extent.[7]

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4 *New Labour: because Britain deserves better*, April 1997, pp 32-3

5 24 November 1998

6 In this Paper, and its companion Research Papers on the *House of Lords Bill*, 'reform' denotes, as in the commonly-used terms 'constitutional reform' or 'Lords reform', change generally, not necessarily change for the better

7 This is considered, in relation to the Upper House's legislative activities in Research Paper 98/103, *The legislative role of the House of Lords*, December 1998

There is, in practice, no obvious starting-point for examination of this issue, especially in circumstances where a fundamental constitutional 'revolution' is not contemplated. In the absence of such a 'first principles' approach, much discussion of Lords reform tends to revolve around changes to the existing House of Lords, its composition, functions and powers, although that change can cover the whole spectrum from minor refinements to wholesale amendments.

The issue of a second chamber of Parliament is beset with a number of paradoxes which make this question a very complex and difficult one to discuss.[8] These relate, in particular, to the relationship between the two Houses, and involve the interrelationship between such considerations as composition, powers and functions, and concepts such as legitimacy, representation and democracy. Because of the current variety of membership of the House, issues such as the establishment of the Church of England, the place of a supreme court, and even the basis of the monarchy itself can be drawn into debates on Lords reform. In the contemporary context, an additional dimension is provided by the present Government's major programme of constitutional reform, some of which may have direct or indirect impacts on the House of Lords.[9]

II Bicameralism v. unicameralism

A. Why a second chamber?

At the heart of any consideration of Lords, or second chamber, reform is the logically prior question of the very existence of a second chamber within Parliament. The present Government's policy, as set out in the white paper and in ministerial statements, assumes that the Westminster Parliament will remain as a bicameral body:[10]

> **6.** The Government believes that Britain, like other large mature democracies, needs a two-chamber legislature. While other major democracies show a wide range of variation in how they form their second chambers, a second chamber is a feature of almost all of them. But the second chamber must have a distinctive role and must neither usurp, nor threaten, the supremacy of the first chamber.

This approach is evident in the exchanges following the 20 January statements to the two Houses. The Leader of the Commons, Margaret Beckett said that unicameralism "is not the Government's view,"[11] and the terms of reference of the royal commission appear to

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8 For a neat analysis see R Brazier, *Constitutional reform*, 2nd ed., 1998, pp 87-8

9 This is considered more fully in the companion Research Paper 99/7

10 *Modernising Parliament: reforming the House of Lords*, Cm 4183, para 2.6, p 6. The white paper amplifies this approach in chapter 4

11 HC Deb vol 323 c 920

presume a bicameral arrangement under any reform plan. In the Commons, Liam Fox, for the Opposition, described the Government's intention as being "tilted towards de facto single-chamber Government."[12]

Bicameralism historically occurred in either federal or unitary systems. In both, one house tended to represent 'the people' as a whole, but, whereas in the latter, the second house would represent a different, elite class of society, in federal systems it would represent the geographical components of the federation. A recent study of bicameral and unicameral parliaments set out five common justifications for two-chamber bodies:[13]

- *"to reflect class or other deep cleavages evident in the society of the day."*
- *"simultaneous representation of aggregate national views as well as the special outlook of geographical components such as regions or states"*
- *"two legislative bodies will provide a check on each other's actions and avoid legislative excess and ill-conceived or hasty decisions"*
- *"two different legislative bodies can provide valuable diversity of outlook on matters"*
- *"political inertia and legislative adaptability"*

The 'checks and balances' argument for bicameralism is part of the wider debate about controls on untrammelled majoritarian government, long a major theme in western liberal political thought. In recent times, concern has been expressed in the UK about what Lord Hailsham described as 'elective dictatorship', that is, the supreme power in the hands of a government of the day through its majority in the House of Commons, where it can usually obtain the enactment of whatever legislation it desires because of the 'sovereignty of Parliament'. Because of the nature of voting systems, this majority may often actually reflect a minority of the people at large. Bicameralism (especially where both houses are in some sense representative, in different ways) is said in such circumstances to broaden the democratic base as it requires the approval of two distinct manifestations of popular support for government legislation or action to be effected.

The relationship between the two chambers can sometimes be settled fairly straightforwardly, if "the weaker body eventually, albeit sometimes painfully, adjusts to the determined position of the stronger."[14] Alternatively, accommodation may result from the existence of a "dominant external entity", such as, in a democracy like the UK, the government of the day operating through its party machinery, or through formal coordinating machinery such as joint conferences (as in the US Congress).

A summary of some of the main criticisms of bicameralism is provide by the Longley & Olson study already cited:[15]

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12 c 912

13 L Longley & D Olson, *Two into one: the politics and processes of national legislative cameral change*, 1991, p1-3. The authors themselves concede that the last is more of an explanation than a justification.

14 Longley & Olson, *op cit*, p5. Bicameral bodies rarely have two houses co-equal in theory or in practice

15 p 6

> Among the charges frequently levelled are that legislative bicameralism fosters duplication and inefficiency by having two chambers do what one body could do more easily and quickly; that it blurs the democratic accountability of political leadership - especially when the two chambers are under the control of differing political parties or factions; and that it is ultimately incompatible with the underlying philosophy of modern parliamentary government, based on the principle of executive responsibility to the legislature. The locus of such responsibility is clear when there is one legislative chamber. With two separate chambers, even when relatively unequal in powers, such necessary responsibility is diffuse and unclear

These criticisms stem, they argue, from three basic sources:[16]

- *Democratic values*: The older or upper house in bicameral systems is often described as 'undemocratic' because its composition will have evolved in pre-democratic times. "The very origin of bicameralism - the desire to incorporate different social classes into government - is in the democratic era a powerful argument against continuation of the original or aristocratic chamber." This can lead to loss of functions/powers (such as those relating to legislation) or even to abolition. Alternatively, as with the US Senate, it can be 'democratised' so that it can retain legitimately its wide powers.
- *The requirements of contemporary parliamentary government*: Functions of government formation and related issues (such as accountability) will generally reside wholly or mainly in the 'democratic' chamber, and therefore it is that chamber where the political battles (with the consequent need for party discipline and so on) take place, and to where the politically ambitious will gravitate. Federal systems, where bicameralism tends to be strong, are often not wholly compatible with traditional forms of parliamentary government.
- *Concerns about efficiency and delay*: Inefficiencies, delay and uncertainty can occur with legislation having to pass through two separate processes (and often a further process of reconciliation of any disputes over the final text). If the 'less democratic' chamber is seen to be holding up legislation desired by the will of the majority, as expressed through the 'more democratic' chamber, that will create tension. If the chambers are substantially co-equal (especially if they represent the same electorates), dual legislative scrutiny may appear redundant.

Much of the constitutional reforms generally proposed in the last 20-30 years appeared to derive from a desire to seek ways of diffusing power within the state, in the absence of a written constitution. The key legal concept - some reformers would regard it as an obstacle to be overcome or, at least, bypassed - in this context is the 'sovereignty of Parliament'. In the political arena, this is seen as concentrating real power at the centre (or apex) of our political system, through the de facto control by the Prime Minister and government of the day of the legislature, in addition to their practical exercise of the

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[16] *op cit*, pp 6-8

prerogative powers of the Crown. Thus the various standard reform proposals tend to seek to provide effective checks and balances to that power-centre, which is identified as the exercise of 'supreme' legislative power through a government's control, with its Commons majority (maintained by the party system) of Parliament. Examples of this are:

- *devolution*: the creation of alternative and additional sources of legislative power
- *open government*: making the exercise of central power more transparent and, thereby, more accountable
- *human rights*: the imposition of 'external' legal restraints on the exercise of central legislation and executive power
- *electoral reform*: the use of PR to provide the potential for more 'coalitionist' government.

As part of this agenda, reform of the House of Lords can be seen as another example of a 'check' on central power, by providing an alternative, legitimate and effective legislative power-centre. While the House of Lords has that power in theory, it rarely exercises it fully in practice because of the perceived lack of legitimacy inherent in its composition when compared with the elected House of Commons.

The very breadth of the present government's constitutional agenda may be thought by some to be achieving that very diffusion of power sought by reformers. Indeed ministers frequently justify their constitutional proposals on the grounds of decentralisation and dispersal of power. However different conclusions could be drawn from such an analysis. Abolitionists could suggest that the need for any second chamber, as an alternative power-centre, is now no longer required. Supporters of the present House could take the opposite view, that the need for radical reform of the House has been rendered unnecessary.

Many of the other unicameralist arguments tend to be the same as those deployed in previous periods of debate about Lords reform. One reason perhaps why these are not so prominent nowadays is that unicameralism is rarely proposed on the 'centre-left' because (like unilaterialism nationalisation or withdrawal from the EU) it is seen as one of the most recognisable items of what might be termed by some as the 'Old Labour' agenda (such as was set out in the 1983 election manifesto, for example[17]).

B. Different approaches to bicameralism and unicameralism

Many of the arguments for Lords reform, and for bicameralism generally, can be described as 'negative', in the sense that they support an enhanced second chamber as a way of dealing with failings and inefficiencies elsewhere in the political system, and

[17] "…we shall… take action to abolish the undemocratic House of Lords as quickly as possible…"

especially in the House of Commons. To some extent this is part of the argument already discussed at the start of this note. On a more practical level, an obvious response which could, at least in theory, be made is that these flaws themselves could and should be rectified, and that the solution of a second chamber has merit only in so far as that process of 'internal improvement' cannot be fulfilled.

For example, it is often argued that the House of Lords performs useful, even necessary, work in the making and scrutiny of legislation, in the 'tidying-up' of drafting and other flaws in bills, and in scrutinising delegated and EU legislation. The Lords is seen, in this context, as making up for the perceived inadequacies of existing Commons legislative procedures and practices in the face of the growing volume and complexity of public legislation. The question arises, therefore, whether these perceived inadequacies in the Commons and its procedures need necessarily persist in the future.

It may be that devolution will lead to a significant decrease in the current volume of Commons business, especially relating to legislation. The Procedure Committee is currently investigating the consequences of devolution for the House, and its report may have relevant things to say in the wider context. The Government's 'modernisation' agenda for the House, through the Modernisation Committee, is intended to lead to a more efficient and effective chamber, and reform of the legislative process is a major plank of that strategy.[18] Developments such as enhanced pre-legislative scrutiny, the use of draft bills, better examination of bills at committee stage, programming of legislation, more explanatory material and so on may produce a genuine improvement in the House's legislative function.

More generally, it could be argued that it is theoretically possible for a Parliamentary structure to be constructed that is formally unicameral but which can accommodate scope for 'independent' revision of the activities of the 'main' legislative body. The House of Lords itself uses a Grand Committee procedure (which used to be known informally as the "Moses Room procedure") which allows the whole House, in effect, to meet simultaneously in two different places, and transact two agendas of business. Such a proposal may emerge in the Commons through the Modernisation Committee or otherwise, as a capacity for the House to sit in two guises at once has been suggested over the years. This 'one House but with several rooms' approach, if it were adopted and procedurally feasible, could bring the benefits of independent revision[19] which the House of Lords is said to bring but within a notionally unicameral framework.

There are various distinct precedents or proposals for 'non-Chamber' bodies in British parliamentary assemblies. At one end of the spectrum are bodies composed of non-parliamentarians, that is bodies which are not part of the legislature as such but whose functions and activities are integrated or incorporated in some way with the legislative, scrutiny or other ‘parliamentary’ process. An example of this could be the ‘Civic Forum’

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[18] See Research Paper 97/107

[19] perhaps with additional non-Parliamentary members, through co-option or otherwise

concept proposed by some for the Scottish Parliament.[20] At the other end of the spectrum would be a body which was part of the parliamentary body as such, composed wholly or partly of its members, and subject to its rules and practices, as appropriately modified. Two examples of this are the House of Lords' Grand Committee, and the 'main committee' (on the model of the Australian House of Representatives), which was considered by the Modernisation Committee in its recent report on the parliamentary calendar.[21]

The report of the Conservative Review Committee on House of Lords reform in 1978 warned about a drift to unicameralism:[22]

> 7. **The natural consequence for our institutions of the crude equation of parliamentary government with the right of a party majority in the House of Commons to authorise a Government to do anything for which it claims a mandate must eventually be a unicameral Parliament**. There would be no room for sharing powers within Parliament between the Commons and a Second Chamber, nor indeed would there be any place for the residual rights of the Crown. It may still take some time to reach just this situation, but it can hardly be doubted that this is the inevitable destination, given the continuance of the trend of constitutional development just described and the reluctance of the House of Commons to contemplate changes, whether in its internal procedures or in electoral law, which might impose constraints on the manner in which a majority there can currently use that House. Thus we face the prospect of a steady drift towards what Lord Hailsham has called 'elective dictatorship' and a further undermining of these practices of limited government to which we believe the vast majority of the people of this country are still fundamentally committed……
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> 9. …. Unicameral government in democratic countries is limited to a few small and homogeneous states whose experience is not directly applicable to the United Kingdom. Furthermore, there is *always* potentially a danger in the concentration of power. Free and limited government depends in contrast on the dispersion of powers and on the maintenance of a complex and flexible balance between institutions in the political system. As to the future of the Labour Party, it has to be accepted that there is a strong minority in it which openly advocates single chamber government. Its supporters look forward to the time when they may form the Executive, and if and when they do so, they do not want to tolerate any restraints upon what they may do.

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[20] See *Shaping Scotland's Parliament*, the report of the Consultative Steering Group, January 1999, p 7

[21] *The Parliamentary calendar: initial proposals*, First report of 1998-99, HC 60, December 1998, part II. The Committee is now taking evidence on this proposal: Press Notice 2, 1998-99, 21.1.99. If adopted, it could have a significant impact on the present structure of House committees and on the balance between Chamber and Committee Corridor. Interestingly, when considering the name of such a body for the House of Commons, the Committee recognised that there would be difficulties in calling it something like 'the Second Chamber': para 98

[22] *The House of Lords*, March 1978, p8. It is often called the 'Home Report, as the committee was chaired by Lord Home of the Hirsel

> 10. Thus, summarising this section, we argue that both an account of certain trends in contemporary British politics and a general theory about the dangers of concentrating power suggest that the basic question underlying the reform of the House of Lords is whether we wish to halt and indeed reverse the drift towards a unicameral form of parliamentary government, resting on a crude and often implausible application of the majority principle. Our view is that this trend ought to be halted. There are serious dangers for our traditional understanding of freedom and individual rights as well as for the prospect of maintaining tolerance in society and responsiveness on the part of government if we move any closer to a single chamber system. We believe too that this opinion will be shared by the majority of electors if the issue is put to them clearly. It follows, therefore, that reform proposals need to be judged in relation to the probability that they will contribute to the achievement of a better balance in our institutions. In the various possibilities discussed below we have tried to bear this principle in mind.

It concluded:

> **66.** Throughout our deliberations we have remained convinced of the desirability of maintaining a bicameral legislature and this preference has been endorsed in practically all the evidence and opinions submitted to us. But it has to be recognised that the bicameral arrangements which we now have are exposed to serious dangers: at best the present House of Lords faces gradual but relentless atrophy; at worst it may be swept away by a Government impatient of the modest checks it imposes on the passage of legislation.

III Relationships between the two Houses[23]

> "One of the difficulties in identifying the 'ideal second chamber' is that there is no agreed role for a second chamber within the British parliamentary system nor any clear idea of the intended relationship between the two Houses of Parliament to use as a starting point."[24]

A. Generally

Any scheme for a bicameral legislature has to deal with the fundamental issue of the relationship between the two Houses. Some aspects can be dealt with expressly in a constitution or legislation, stating which, if either, is to be the superior body; how disputes are to be resolved (e.g. by joint conferences or committees); how workload is shared and so on. Other matters may be dealt with by Parliamentary procedures and practice, or by more general conventions.

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[23] Lord Weatherill, convenor of the cross-bench peers, has argued that reform of the House of Commons should be as much, if not more of a priority as reform of the House of Lords, perhaps by the Royal Commission. See, for example, his interview in the 11.1.99 issue of the *House Magazine*.

[24] Constitution Unit, *Reform of the House of Lords*, April 1996, p4

The relationship between the two houses of a bicameral parliament is at the heart of the paradoxes outlined in the introduction. To quote the Abbe Sieyes, "If the second Chamber agrees with the first it is unnecessary: if it disagrees it is pernicious". Or in Bagehot's words, "With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House of Commons .... it is certain we should not need a higher chamber."[25]

The relationship determines not only the functions of a second chamber but, to a large degree, its composition and form of election/appointment. It is a question of where political legitimacy and, thereby, power resides; whether it is predominantly with one house or more equally shared between the two. Legitimacy is not simply a result of function. It can also derive from the manner in which members of the house attain their membership, and, perhaps, even from the relative size of both houses. US Senators speak, generally, for a larger constituency than members of the House of Representatives, and this relative exclusivity may contribute to the Senate's superior position.[26]

The relationship between the two Houses at Westminster is a product of (at least):

- *express legislative intent*, such as the *Parliament Acts*, *Life Peerages Act 1958* and the *Peerage Act 1963*), and
- *conventions and practices* which derive from, and are a response to, organic constitutional development[27], and from particular political realities[28].

The essential inter-connection between composition and function/power is, as has already been noted, at the heart of the difficulties which have in the past bedevilled Lords reform. Deliberate constitutional (and especially Parliamentary) change, by statute or otherwise, can often lead to other, sometimes unforeseen or unintended, consequences. This makes the management (even containment) of change by no means straightforward. For example, the maintenance of the primacy of the House of Commons can be declared by ministers, as in the current white paper,[29] and confirmed by legislation, but it will be any change in Parliamentary and public perception of the relative legitimacy between the two Houses following any reforms which could be the ultimate determinant in this equation.

Confusion between *description* and *prescription* can complicate the policy context. Descriptions of the present composition, role and function, and even evaluation of the effectiveness of the Houses need not necessarily mean that the present situation should *or*

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25 *The English Constitution*, 1964 edition, pp 133-4

26 The same, however, is not true (yet?) of MEPs vis-a-vis MPs

27 such as the growth of democratic representation through universal election, and the transfer of effective executive power from the Sovereign personally to a politically responsible government

28 such as legislative self-restraint in times of different party majorities in the two Houses

29 The 1968 white paper, for example, began by listing the various propositions by which any scheme of Lords reform should be considered, the first of which was: "in the framework of a modern parliamentary system the second chamber has an essential role to play, complementary to but not rivalling that of the Commons.": Cmnd 3799, para 4

even could continue. It may not be possible for Parliament to change one or more key factors in the Parliamentary power relationship (such as the composition of one House) while expecting all other factors to remain unaffected. Thus, for example, consideration of the present value of the hereditary peers in the present Upper House need not be significantly relevant to a decision whether to retain some or any of them in a reformed second chamber. The apparent relative specialisation of the present House of Lords in, say, European policy or the wider aspects of science and technology, may be a result, in part, of perceived failings in the House of Commons in these areas.[30] Similarly, to return to the issue of the relative power of the two Houses, to describe the patent political fact of the present primacy of the House of Commons is not necessarily to decide that such a situation should continue.

It is, of course, possible for policy to recognise this situation by making complementary changes in factors other than composition. This could be done, for example, by countering any increase in the *exercise* of the Lords' powers due to the enhanced legitimacy deriving from composition changes, by statutory dilution of the Lords formal powers, such as the period of delay over bills or the absolute veto on delegated legislation. The 1968 white paper adopted this more comprehensive approach, believing that "there is no sensible alternative to a comprehensive reform of both the composition and of the powers of the House of Lords."[31] The *Parliament (No. 2) Bill*, which followed but was later dropped, proposed a significant diminution of the Lords' legislative powers.

Most commentators agree that there is no logic in the second chamber duplicating or mimicking the first, either in function or in composition. As such the two chambers would in reality be two diets of the one chamber. Therefore the general aim is, in Lord Hailsham's term, "complementation"[32], which he described in 1982:[33]

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30 It may also be a way of filling any perceived gap in the Upper House's role caused by the absence of formal legislative power over public money (confirmed by the provisions of the *Parliament Act 1911*, following the battle over Lloyd George's 1909 budget)

31 Cmnd 3799, para 21. Earlier the agreed statement in 1948 following the conference of party leaders on the *Parliament Bill 1947* noted that "these two subjects, though capable of separate consideration, were to be regarded as interdependent, and it was recognised that failure to agree either on Composition or on Powers might result in general agreement on the future of the House of Lords not being reached": Cmd 7380, para 4, May 1948. See also the Home Report: "The future of the Second Chamber has for long enough been bedevilled by the difficulty of separating the issues of composition and powers": para 67. Interestingly, Harold Wilson wrote in his memoir of his 1964-70 government: "We had considered whether to proceed with the introduction of a short, sharp Bill dealing with powers only, leaving changes in the composition for the indefinite future. But the Lord Chancellor and the Leader of the Lords, who were deeply steeped in the negotiations, both felt strongly that it would not be meaningful to change the powers while leaving the composition to continue to be based on the indefensible hereditary principle": *The Labour Government 1964-1970*, 1971, p 608

32 The 1968 White Paper made a similar point, in the context of the continued supremacy of the House of Commons: "in the framework of a modern Parliamentary system the second chamber has an essential role to play, complementary to but not rivalling that of the Commons" (Cmnd 3799, para 4)

33 *The Parliamentarian*, vol LXIII, 1982, p 293

> It is necessary for an Upper Chamber to possess real powers in order to make its views felt and to impress on the Lower House the need to take into account the views and interests of precisely those elements in the community who are insufficiently reflected in its composition. This function requires both a negative and a positive side. Negatively, the role of an Upper Chamber must remain subordinate to the role of the Lower. Just as it must not simply exist as a mirror image of the first, it must not challenge the primary position of the first in the field of policy. It must exercise self-abnegation. Its powers need, no doubt, to be limited by law. it must not be in a position to destroy the ultimate sovereignty in the first. Nevertheless, it must be in a position to impress its views, particularly in the field of legislation designed to be permanent, in such a way that the Lower House cannot rush through legislation which flouts the genuine rights of minorities, the permanent sense of the inarticulate majority as to what is appropriate or right, the fundamental rights and freedoms of the individual or of minority groups, or the changing opinions of the electors.

B. Government formation

One crucial difference between the two chambers of the Westminster Parliament at present is in relation to the formation of a government.[34] It is accepted in the modern era that only the House of Commons can make and unmake governments through the granting or withdrawal of its confidence in the administration generally or one of its ministers, and the white paper is clear that this should continue to be the case.[35] This was demonstrated in December 1993 when the then Labour Opposition in the House of Lords put down a motion of no confidence, and the general tenor of reaction within the House and beyond was that, even if it had been carried, it would not have obliged the Government to resign or to seek a dissolution.[36]

An example of the orthodox view, which is striking given the political background of the speaker and the time, was given by Balfour, when Leader of the Opposition in 1907:[37]

> "The Government of the day, the House of Commons of the day would treat with derision any vote passed by the House of Lords condemning a particular Ministry or a particular member of the Ministry. They would not suggest for a moment that such a vote carried with it either the resignation of the Government or the Minister, or a dissolution or any consequence whatever except a mere statement of opinion on the part of their lordships that they disapproved of a Ministry to whom this House gave its confidence. That, after all is the greatest of the powers which this House possesses. We can put an end to a Government; we can bring a Government into being; we can destroy the career of a Minister; and we can pass a vote of censure which carries with it an immediate resignation."

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34 See Research Paper 95/19, *Confidence motions*, 7.2.95

35 See, for example, para 7.6, p 36

36 "That this House has no confidence in the policies of Her Majesty's Government", HL Deb vol 550 cc 544-554, 571-635, 1.12.93, defeated 95-282

37 HC Deb vol 176 c 928, 24.6.07

In a recent television interview Jack Straw said:[38]

> We are clear and we shall be saying so in the White Paper, that any recommendations for a change that they will come forward with in the composition of the House of Lords, cannot and must not challenge the supremacy of the House of Commons and that's for a very, very good reason that it is the elections, direct elections through constituencies to the House of Commons which determines who forms a government.

However, there have been suggestions that these political conventions have evolved not simply because the Commons derives its authority from popular election, but also because of the fact of the continuing potential Conservative majority in the Lords. See for example the analysis of Sir Ivor Jennings:[39]

> "Since 1886 ... the support of a Liberal or Labour Government in the House of Lords has been so small that, on the one hand, it has never thought of resigning or even asking for a vote of confidence from the House of Commons; and, on the other hand, the House of Lords has rarely resorted to a vote of censure."

This could possibly suggest that if the nature of the House of Lords' composition were to change significantly in the future, not only in terms of the injection of an elective element, but also in the removal of any inherent party imbalance, the Upper House *could* well come to play some role in government formation. Its censure motions, either against governments as a whole or against particular ministers, could, in such situations, have some political impact (whether or nor they led to resignation or dissolution). This cultural change could in turn lead to the imposition of greater party discipline, akin to that in the present House of Commons, as oppositions seek to topple ministers and ministries, and governments seek to minimise the risk of such outcomes.

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38 *On the record*, BBC1, 17.1.98, website transcript,

39 *Parliament*, 2nd ed, 1970 reprint, pp393-4. He noted that when a vote of censure was passed in the Lords in August 1911 over the Liberal Government's determination to secure passage of the Parliament Bill in the Upper House by the creation by the King of a sufficient number of new peers "a similar motion was rejected in the House of Commons; and nobody paid any attention to the peers," op cit, p.394. The censure debate is at HL Deb vol 9 cc815ff, 8 August 1911

IV Timescale for the reform process

A. Possible timetable

The Government's proposals appear to envisage a possible timescale something like the following:

- *Enactment of the present Bill this session*: This should allow its provisions to take effect from the 1999-2000 session. *Clause 4(1)* of the Bill states that the main provisions come into force at the end of the session in which it is passed.[40] If resort to the *Parliament Acts* is required for enactment, this could mean delay until the following session.
- *Establishment of the Appointments Commission*: Baroness Jay said that this "will depend on the passage of the stage one Bill through both Houses of Parliament. If it were to proceed smoothly, there is no reason why the appointments commission should not be set up in the course of this year."[41] This period may see a number of life peerage appointments, such as those of hereditary peers no longer eligible to sit in the House by right, or party-aligned peers to alter the present House's party balance.
- *(S)election of residual hereditary peers*: If something like the Cross-bench proposal is agreed and enacted, the process of election or selection of the hereditary peers to remain in the transitional House will presumably have to be undertaken before the end of the session in which the Bill is enacted, so that the full body of hereditary peers forming the relevant (s)electorates is still in place. This may not apply if arrangements were to be made, say, to 'freeze' the list of eligible peers at a particular time before the start of the new session, to provide a notional (s)electorate.
- *Establishment of the Royal Commission*: The Prime Minister announced that the Royal Commission would be chaired by the Conservative peer, Lord Wakeham.[42] Other members would be announced "shortly"[43]. The white paper stated that it was being set up "immediately"[44] and, as it would be an extra-Parliamentary body (unlike the proposed joint committee), "it can, therefore, begin work while the Bill concerned with the hereditary peers is still going through Parliament..."[45] The Commission's terms of reference require it to report by 31 December 1999.

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40 See further paras 14-16 of the *Explanatory Notes.*

41 *op cit*, c 597

42 At the same time, it was also announced that Gerald Kaufman would also be a member

43 This is the term used in Baroness Jay's statement and in the relevant No. 10 press notice. Mrs Beckett used the phrase "in due course."

44 p 4, executive summary

45 para 2.22, p 10. Ministers have also suggested that there would be no need for the Commission to undertake extensive primary research before beginning the process of evaluation

- *Establishment of the Parliamentary joint committee*: This would "examine the Parliamentary implications of the [Royal] Commission's work" and "will be asked to work speedily."[46]
- *Legislation on further reform*: If this stage should be achieved in this Parliament, its provisions, once enacted, could be implemented either before or after the next general election.[47] It has sometimes been suggested that there should be a referendum on this matter, which could take place before or after enactment or implementation of the substantive legislation. Baroness Jay was quoted in a recent press interview as signalling opposition to such a referendum: "The manifesto was in a sense the referendum on this -- the very, very clear and precise terms of reference as it were for this parliament. And they were very clearly and precisely fulfilled - a stage one process and a stage two process."[48]

B. One stage or more?

> "As an initial, self-contained reform, not dependent on further reform in the future, the right of hereditary peers to sit and vote in the House of Lords will be ended by statute. This will be the first stage in a process of reform to make the House of Lords more democratic and representative….. A committee of both Houses of Parliament will be appointed to undertake a wide-ranging review of possible further change and then to bring forward proposals for reform."[49]

A key aspect of the current controversy is the process by which the Labour Party seeks to implement its policy of Lords reform, by way of a staged process rather than a single stage 'big bang' approach. Much of this argument has been considered in earlier Research Papers and is therefore not reproduced here.[50] There is sometimes confusion as to the naming of the particular stages proposed. Government and Opposition speakers and others often talk of a two-stage process, comprising the statutory removal of the hereditary peers from the Lords ('Stage One') and the more comprehensive reform of the Upper House thereafter ('Stage Two'). Labour frontbenchers have, however, sometimes talked in terms of three stages, as for example did Lord McIntosh of Haringey in 1996:[51]

> We end up with a three-stage approach. The first is to deal with the hereditary peerage, the second is extensive and fundamental consultation and the third is

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46 white paper, para 7.4, p 35

47 Post-election legislation or implementation would, of course, depend on factors such as the outcome of that election, and the degree of cross-party agreement over any proposals for 'stage two' reform.

48 "Jay signals opposition to Lords referendum" *Financial Times* 22.1.99. References by Labour frontbenchers before the election to resort to the 'mandate of the people' could also imply the intervention of a general election before 'stage two' enactment or implementation. See, for example the quote from Lord McIntosh of Haringey below

49 Extract from 1997 Labour manifesto

50 See Research Papers 97/28, 98/85 and 98/103

51 HL Deb vol 573, 4.7.96, cc 1682-3

> with the mandate of the people, and only with the mandate of the people, to proceed to the final composition of this House.

Ministers have explained the staged approach in terms of a response to potential opposition amounting to obstruction, based on the fate of previous attempts.[52] The former Leader of the Lords, Lord Richard, told a conference last June:[53]

> In our manifesto, we envisaged a two-stage reform of the Lords. We have always been aware of the enormity of the task of reforming it, especially in the face of opposition from within Parliament itself. It would be a brave but foolish Government which ignored the lessons of past failures to reform the second chamber.
>
> It is well known that the Liberal Democrats broadly share our views on reform of the Lords. As I have said, the Government sought consensus with all the major political parties. Consensus would clearly be desirable on such an important issue. We have, however, clear manifesto commitments, and the staged approach we have set out is a perfectly rational and sensible way of carrying them out.

The Home Secretary made similar points in a television interview recently:[54]

> We were never trying to kick it all into touch, but what we recognised when we discussed this in detail in opposition, was that given all the abortive attempts to reform the House of Lords over this last century, each of which has effectively been sabotaged by the Conservatives because they've got this built in three to one majority in the House of Lords, so it's not been in their interests, that you can't go for a single stage reform, and it was always my judgement that the only way you'd actually force the Conservative Party to address the reality of a wholly reformed chamber was to take it stage by stage and remove the right of hereditary vote to begin with.

The white paper explained the staged policy as follows:[55]

> 12. The Government is committed to ending the anachronisms of the composition of the House of Lords. The Government made its position clear in its election manifesto, when it proposed a step-by-step reform of the House of Lords.
>
> 13. We will now take the first steps towards the fulfilment of that commitment.
>
> - *Hereditary peers* The Government will legislate to remove the right of hereditary peers to sit and vote in the House of Lords.

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52 The white paper makes similar points at paras 2.20-21, p 9

53 *Labour and the House of Lords*, ICR/Daily Telegraph conference, 8.6.98, report, pp 6-7.

54 *On the record*, BBC1, 17.1.98, website transcript

55 paras 2.12-13, p 7

- *A transitional House* The Government is putting forward new proposals for a transitional House of Lords following the passage of the legislation.
- *Longer-term reform* The Government will appoint a Royal Commission to make recommendations for wide-ranging reform of the House of Lords.

> The Government believes that a step-by-step process is the best way to proceed. It is consistent with the incremental approach which has characterised much constitutional development in this country. But at the same time, it is a radical approach -one which, taken as a whole, will mark a fundamental transformation of a key part of the central democratic institution of Parliament.

A main argument put forward by the Opposition is that there will in fact be no further stage of reform, because the Government has always intended only to remove the hereditaries from the Upper House. They argue that promises of further consultation or examination, by joint committees, royal commissions or otherwise cannot in themselves be a pledge or guarantee of any further additional change. Emphasis is put on, for example, the terms of the 1997 Labour manifesto pledge which described the removal of the hereditary element as "an initial, self-contained reform, not dependent on further reform." Further action was in terms of ways of *bringing forward proposals*, rather than expressly of *implementing* further change.

The white paper's text contains passages which can be interpreted in such a way as to support these different contentions. For example, the Prime Minister, in his foreword, states that "reforming the House of Lords is a key element of the Government's legislative plans, and proposals for further reform beyond that." Yet he continues by stating that "New Labour in government will, as we promised, carry out a careful and considered reform of the House of Lords: the immediate removal of the hereditary peerage, and longer-term reform of the House of Lords as a whole."[56] The white paper promises that if the present Bill is enacted with consensus, "the Government will make every effort to ensure that the second stage of the reform has been approved by Parliament before the next election."[57] The Parliamentary statements on publication of the reform proposals claimed that the Royal Commission's timetable was "evidence of the Government's wish to maintain the momentum of reform of the second Chamber", and that the Government's proposals deal not only with the immediate issue of the hereditary element, but also identify the path to longer-term reform.

The Conservative Opposition was not convinced that the published policy, including even the Royal Commission's timetable, was proof of the Government's determination to implement further reform. Lord Strathclyde, the Conservatives' leader in the Lords, noted that ministers appeared to accept the need for movement towards a genuine second

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[56] p iii. The conclusion to chapter 2 states unequivocally that the removal of the hereditary peers "will be followed by further reform": para 2.26, p 11. See also paras 7.1 and 7.3, p 35, and the white paper's conclusion, para 8.38, p 51

[57] para 5.11, p 29

stage, "although I regret the fact that there is still no guarantee that it will take place, and no timetable."[58] In the Commons, Liam Fox said:[59]

> The Government tell us that this is a matter of urgency, and they have set a deadline of December 1999. Why, then, was a royal commission not set up 20 months ago, when the Government took office? We could now be discussing the results of a royal commission and moving to single stage reform by consensus. We also hear today that, beyond the royal commission, there is to be yet another stage--a Joint Committee of both Houses. Perhaps the right hon. Lady can tell us how long the Government propose that that will last. It was bad enough when we had to say, "No stage one without stage two." We were not counting on stages three and four, and whatever else may follow.
> The Government's clear intention seems to be to kick the whole subject into the long grass. We will go into the next general election without knowing what Parliament will look like on the other side of that election. I must congratulate Ministers on protecting themselves from the spectacle of being unable to agree among themselves on the subject, as happened on proportional representation.

The Liberal Democrats predicated their welcome of the Government's plans on a belief that ministers intended to proceed to implement further reform. Lord Rodgers of Quarry Bank concluded his response to the statement as follows:[60]

> Finally, we should welcome the prospect that there will be a final settlement. Inevitably, that will be for the time being, but that time being may be a long period. We should all welcome the prospect that there will be a settlement within the next five years. That is the assumption I make on the basis of the Statement and the White Paper. Will the noble Baroness the Leader of the House confirm that she and the Government anticipate that the interim stage will be over, and the legislation to establish the new House will be through, within a period of five years? May we look that far ahead but no further for the new life which the second Chamber will eventually have?

Responding to a later question, Baroness Jay said:[61]

> The noble Baroness draws attention to the need to proceed rapidly to stage two. I believe we would be in disagreement about the relevance of the hereditary peerage in a second Chamber of the 21st century. It is precisely because we on these Benches are unwilling to foresee that as a long term prospect that we will wish, particularly in light of the theoretical amendment to retain transitionary rights of hereditary Peers to sit in your Lordships' House, to move rapidly to a

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58 HL Deb vol 596 c 587, 20.1.99

59 HC Deb vol 323 c 912, 20.1.99

60 *op cit* c 590. See also Robert Maclennan's welcome for "the Government's indications of speed in moving towards the second stage of reform to establish the House of Lords on a democratic basis", *op cit*, c 914

61 *op cit,* c 596

> point at which that becomes unnecessary. The fact that we have given the noble Lord, Lord Wakeham, a very tight timetable in which to report to the Government on his findings under the Royal Commission must suggest to your Lordships that we would hope to move to a second stage as rapidly as possible. I am sure that noble Lords are more able than I of working out the parliamentary and annual arithmetic of the number of months between that and the next general election.

She also reassured another questioner that, with the device of a royal commission to assist with further reform, "there is absolutely no suggestion that any change would be made before the Royal Commission reported."[62] Margaret Beckett responded in similar terms to questions about the nature of the Government's commitment to further reform, for example:[63]

> The Conservative party does not seem to be able to make up its mind whether the Government are going too fast, or too slowly on the matter. When it did not know that we were going to set a term date of a year for the royal commission, it accused us of dragging out that procedure. Incidentally, what a ridiculous accusation Conservative Members made that we were kicking the matter into the long grass. In fact, we are proceeding much more quickly in terms of studying how we proceed towards stage two than most hon. Members had anticipated. It is evident that that was not anticipated by Conservative Members and it makes most of their contributions more than a little irrelevant.

Criticism of the Government's staged approach may continue to form a significant part of the Opposition's attack on the present Bill, especially as recent remarks by ministers suggest that they could envisage further reform before the end of this Parliament, if the proposed royal commission reported by the end of the year. The Opposition have argued that if this timescale is feasible for 'second stage' reform, possibly for enactment in this present Parliament, there is no compelling need for a separate 'stage one' bill this session.

C. Possible implications of staged reform

One significant result of a staged process is the nature of the 'interim' or 'transitional' House, between the implementation of the provisions of the current Bill, if enacted with or without amendment, and implementation of any broader reform scheme a later date. The length of that interim phase is crucial for various tactical and practical reasons. For example, the shorter the interim period, the more ministers can justify any perceived 'flaws' or undesired aspects of the stage one arrangement. If something resembling the recent Cross-bench proposal for retention of a number of hereditary peers during that transitional phase is enacted, then its practical application (such as the maintenance of the original numbers and party balance) becomes more problematic the longer it is required

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62 *op cit*, c 598
63 *op cit*, c 917

to be operational. If it has to last into, and even well beyond, the next Parliament, the detailed mechanisms for the (s)election of the 'residual hereditary peers', especially the way in which they reflect party balance, will have to be more robust than if they only need to work for a couple of years.

A further aspect of the 'transitional House' is the question of the need for any further appointments by award of life peerages so as to alter the party balance which will result from enactment of the present bill, amended or not. This involves issues of principle, such as the operation of such patronage by the Prime Minister,[64] and of practice, such as the arithmetic and methodology of such 'rebalancing'.[65] Also, if the interim House perceives itself as a more legitimate body, because of the removal of the hereditary peers, albeit for a limited though unstated period pending further change, then it may feel justified in acting differently from the present House in terms of the exercise of its existing powers. The white paper itself recognised that "the complexion and composition of the Lords will be different in a transitional chamber."[66]

V Changes to the franchise et for hereditary peers[67]

A. History and background

Peers do not have the right to vote in elections to the Commons, but may vote in local elections and elections to the European Parliament, as well as elections to devolved bodies such as the Scottish Parliament. Their right to vote is set out expressly in the relevant legislation and they appear on the electoral register for those elections. This exclusion encompasses both life and hereditary peers, but see below for the position of Lords Spiritual.

Peers are disqualified from voting for members of the Commons at common law on the grounds that they have the right to sit in the House of Lords and therefore are already represented in Parliament. Hugh Rawlings in *Law and the Electoral Process* (1988) points to the existence of a Commons resolution of 1699 declaring peers incapable of voting in parliamentary elections.[68] This resolution was passed in consequence of the Earl of Manchester having voted in an election in Malden. In *Earl Beauchamp v Madresfield Overseers* [69] the Court of Common Pleas held that peers were disqualified from voting at an election for members of the House of Commons, and were not entitled to be placed on

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64 This is discussed further in section VII of this Paper

65 Work has been done on this by the Constitution Unit; see section IIIA of Research Paper 98/85

66 Cm 4183, para 6.4, p 31

67 This section written by Oonagh Gay, Home Affairs Section

68 p 98 13 *Commons Journal* 64

69 (1872-3) 8 L.R.C.P 245 see also *Re Parliamentary Election for Bristol South East* [1964] 2QB 257

an electoral register. They held that the 1699 resolution reaffirmed the common law exclusion.

The *Peerage Act 1963* 'tidied up' peers voting rights, in allowing all peers and peeresses either to sit in the Lords or if they did not, to vote in parliamentary elections, provided the necessary qualifications were met. The Act had been preceded by a joint committee of both Houses which had examined the possibility of allowing peers to surrender their peerages in order to stand for election to the Commons, and had reviewed the unsatisfactory position of the law in relation to voting in parliamentary elections.[70] The Act ended anomalous situations such as the position of those Scottish peers, who were not one of the 16 representative peers provided for in the *Act of Union 1706,* who could neither vote in parliamentary elections, nor sit in the Lords. All Scottish peers were given the right to sit in the Lords. It prevented peeresses in their own right (who were eligible for the Lords) from voting in parliamentary elections and clarified the position of Irish peers.

Following Article 4 of the *Act of Union 1800,* Irish peers not forming one of the 28 representative peers in the Lords could stand for any constituency in Great Britain (but not in Ireland). On election to the Commons, an Irish peer became entitled to vote in a parliamentary election which took place while he was a sitting member. In practice, since at a general election there are no sitting members, this restricted the right to vote to by-elections.[71] After the creation of the Irish Free State in 1922, Irish peers could vote for elections to the Stormont Parliament, but were still unable to stand for Westminster seats in Northern Ireland and had no general right to vote.[72] Following the 1963 Act Irish peers (who do not sit in the Lords unless they have an alternative British peerage which confers membership) may both vote in and stand for parliamentary elections throughout the United Kingdom.[73]

Halsbury's Laws notes that in the case of conferment of a peerage by letters patent or of succession to the peerage the disqualification arises on creation of or succession to the peerage and does not depend on issue of a writ of summons to the Lords, although it is likely that disqualification does not apply under the writ in acceleration procedure until the writ has been issued.[74] Peers are also disqualified from membership of the Commons, unless they have disclaimed their peerage under the *Peerage Act 1963.*

The position of the Lords Spiritual peers has been considered as more ambiguous by commentators. The twenty six bishops hold their seats in the Lords during the tenure of

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70 HC 38/ HL 23 1962-63

71 *Rendlesham v Haward* 1873) L.R.9 C.P 252 For further detail see Appendix 5 of the Joint Committee on House of Lords Reform HC 38/HL 23 1962-63

72 for background to the creation of the Irish Free State and to the voting rights of Irish citizens see Research Paper 98/57 *Northern Ireland: Political Developments since 1972*

73 *Peerage Act 1963* s 5

74 *Halsbury's Laws of England* vol 15 para 315

their see and so do not remain in the Lords after their retirement. This is in contrast to the law lords who retain seats as life peers. In the 1983 general election the then Archbishop of Canterbury cast his vote, having reportedly received legal advice that he was entitled to vote. Subsequently the Bishop of Derby announced in the Lords that neither the Archbishop nor any of the Lords Spiritual would vote in parliamentary elections in future.[75] The question has never been expressly considered by the courts, but a *Public Law* article suggests that a general historical perspective would indicate that since Lords Spiritual are full members of the Lords a similar exclusion should apply to them, as to Lords Temporal.[76]

The 1968 White Paper *House of Lords Reform*[77] proposed that all peers should be able to vote in parliamentary elections.

> *Rights of peers to vote in parliamentary elections*
> 68. Peers have in the past been disqualified from voting in parliamentary elections on the ground that the peerage is a separate Estate of the Realm, distinct from the Commons Estate, and a member of the first has no right to influence the composition of the second. This doctrine evolved at a time when the powers and influence of the two Houses were more nearly equal than they are today. A consequence of the doctrine was the anomalous situation in which some members of the peerage were entitled neither to sit in the House of Lords nor to vote in parliamentary elections: for example, Scottish peers other than those elected as representative peers. These anomalies were removed by the Peerage Act 1963, which allowed all peers and peeresses either to sit in the House of Lords or, if not, to vote in parliamentary elections (provided that they were qualified as regards age and residence). The Government does not consider that, in the context of the reformed House, it would any longer be appropriate to maintain a peer's disqualification from voting in parliamentary elections. whether or not he is entitled to sit in the House of Lords. Such a disqualification is an anachronism in a modern democracy where the right to take part in the process of choosing the members of the elected chamber should be fundamental and universal, and no such bar applies to members of the second chamber in other democratic countries such as Australia, Canada and the United States of America. All peers, therefore, whether or not they are members of the reformed House, would in future be qualified to vote in parliamentary elections.

The Government did not, however, consider that peers who were members of the reformed House of Lords should be able to stand as candidates for the Commons, on the principle that it would be inappropriate for any person to be eligible for membership of both Houses. (para 69).

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75 HL Deb vol 443 c 243 29.6.83
76 P Hughes & S Palmer, 'Voting Bishops' 1983 *Public Law* 393-7
77 Cmnd 3799 November 1968

The *Parliament (No 2) Bill*[78] subsequently abandoned, contained clauses on parliamentary franchise and qualification which would have allowed the Lords Spiritual to vote:

Parliamentary franchise and qualification

Parliamentary franchise.

16. A person shall not be disqualified for voting at elections to the House of Commons –

(a) as being the holder of a peerage, whether or not he is entitled to receive writs of summons to attend the House of Lords as such; or
(b) as being One of the Lords Spiritual.

Parliamentary qualification

17. The holder of a Peerage who is not entitled to receive writs of summons to attend the House of Lords shall not be disqualified as such for being elected as, a member of the House of Commons.

B. The White Paper Proposals and the Bill

A Cabinet Office press briefing issued at the time of this session's Queen's Speech stated: 'The Bill would provide for hereditary peers to vote in elections for, and stand for election to, the House of Commons.' This was confirmed by the junior Cabinet Office minister, Peter Kilfoyle, in a speech to a *House Magazine* conference on 3 December.[79] There was no mention of proposals to enfranchise all categories of peers, but this issue may well be raised during the passage of the bill. The Conservatives indicated that they will table amendments to allow hereditary peers the right to stand for election to the Commons, if they are now no longer able to sit in the Lords.[80] If hereditary peers become qualified to stand for and sit in the House of Commons, this could raise the possibility of a hereditary peer as Prime Minister for the first time since the Marquess of Salisbury in 1902.[81] Hereditary peers can already stand for the new devolved assemblies, for local authorities and for the European Parliament[82], and will be able to stand for the London Assembly and the Mayor for London.[83] If the Commons is open to them, they will have the capacity to act as a representative in almost all political arenas, except the House of Lords itself. The White Paper confirmed that only hereditary peers will be given the right to vote and stand. Life peers would not be enfranchised, and so the 1968 precedent will not be followed. It is common in bicameral legislatures for there to be no bar on members of one house voting for the members of another house, even if there are prohibitions against dual membership.

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78 Bill 62 of 1968-9

79 for further details see Research Paper 98/105 *Lords Reform: Recent Developments*

80 *Daily Telegraph* 14.1.99 'Tories want deadline on Lords reform bill'

81 with the exception of the brief period in 1963 between the Earl of Home's appointment as Prime Minister on 19 October 1963 and the disclaimer of his peerage four days later on the 23rd

82 one example is the former MEP Lord Bethell

83 see Research Paper 98/113 *Voting Systems: the Government Proposals* for details

Clause 2 of the Bill removes the common law disqualification of hereditary peers and enables them to vote and stand for the House of Commons. The Bill's *Explanatory Notes*[84] refers 'simply to 'peers' being given these rights, but life peers, or spiritual peers are not mentioned in the Bill, and will not be covered by Clause 2. The White Paper makes clear that it is only hereditary peers who will be affected.[85] **Clause 4(3)** allows for the Secretary of State to make transitional provisions to ensure that if the session ends after 10 October 1999 hereditary peers will be able to appear on the electoral register and so vote from February 2000.[86] Any order which is made will be subject to negative resolution and may include transitional provisions to cover the existing right of hereditary peers to vote in European Parliament elections. The special machinery for candidates for the Commons to disclaim peerages set out in s2 of the *Peerage Act 1963* will no longer be necessary and would therefore be repealed under the Schedule. Parts of s3 and ss4-6 of the 1963 are also repealed in the Schedule as the provisions applicable to Scottish and Irish hereditary peers, and to hereditary peeresses would not longer be relevant.

Should the Cross-bench amendment be accepted, it is likely that the Bill would need to be amended to ensure that those hereditary peers remaining in the Lords for a transitional period could not vote or stand in the Commons. No further detail on this is publicly available at present.

VI Removal of the hereditary peers

A. The hereditary principle

There has been a variety of different methods (election[87], by right of office[88], selection[89]) by which people are or have been able to sit in the Lords, and there have been many changes in the composition of the House over the centuries for all sorts of reasons. The situation at present is that, while most members of the House of Lords have derived, and continue to derive, their membership by succession, the hereditary principle is not a necessary or core component of a second Westminster chamber. Nevertheless the hereditary principle has been so firmly embedded in the constitutional history and culture of the Upper House that its removal may well be perceived as one of the biggest changes in the House of Lords for a very long time, a change of kind rather than of degree.[90]

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84 Bill 34-EN 1998-9

85 Cm 4183 para 2.16

86 to be eligible to appear on the electoral register a person must be resident at a qualifying address on October 10 (September 15 in Northern Ireland) and meet the qualifications to vote

87 as with the former Scottish and Irish representative peers

88 as with the Lords Spiritual or 'Law Lords'

89 as with life peers or hereditary peers of first creation

90 In a press article on 20 January, the Opposition leader in the Lords, Lord Strathclyde, wrote: "Heredity may seem outdated to modernisers. But it is part of our national tradition and every family's instinct ("Oliver's army is here today", *Times*, 20.1.99)

Thus arguments about the statutory removal of all or most of the hereditary element from the House revolve not only around the hereditary principle itself, but also around preservation of, or interference with the traditional basis of the Westminster system itself. This approach allows arguments to be made which do not necessarily defend the hereditary basis as a valid or desired principle for membership of a House of Parliament, but shift the focus to the effectiveness of the House itself, of which the hereditary element is an integral element. In other words this argument stresses the perceived threat to the House itself rather than to the hereditary peers.

The terminology of the arguments about the hereditary basis of membership is interesting because it reflects the fundamental inter-relationship between the peerage and membership of the Upper House. Under present constitutional law, peers not otherwise disqualified have what may be described loosely as a 'right to sit' in the House of Lords.[91] Historically 'membership' of Parliament was an obligation rather than a right as such, derived from feudal obligations of service to the monarch, exacted by military or financial means. Pike described the status of peerage once the feudal concept was finally abolished during the Restoration in the 17th century: "The summons to Parliament, too, had long been regarded as an indication of his dignity rather than as a disagreeable incident of his position … but the feudal as well as other titles of honour, and the 'right to sit' in the House of Lords were saved to the Peers by special enactment, without any mention of attendance in Parliament as a necessary duty."[92]

B. Defences of the hereditary principle

While the main argument between the parties over the Bill is said not to be over the hereditary principle and its place in Parliament, some do seek to justify it as such. For example, in the recent two-day debate on Lords reform, Lord Beloff defended the hereditary role as follows:[93]

> The noble Lord, Lord Gordon, said he did not think anyone would defend the hereditary principle. I find the hereditary principle a common factor in most advanced society in many branches of life. In my religion the priesthood is hereditary; in many other countries there are hereditary occupations; and there are hereditary links between families and people. The whole idea that everyone starts anew at birth may be the result of modern technology but it is not in line with human experience.
>
> I do not say that in an ideal world a parliamentary chamber should consist only of persons who are there for hereditary reasons. Obviously there are other assets that

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[91] Questions of the nature of this 'right' in a property sense are not directly relevant to the current debate, and are not pursued here.

[92] L Pike, *A constitutional history of the House of Lords*, 1894, p357

[93] HC Deb vol 593 cc 966-7, 14.10.98

> I should like them to bring to bear apart from their families' experience in ruling. But simply to toss the concept out of the window as though it was out of date and was last year's fashion does not strike me as worthy of debate in your Lordships' House.

A 1990 Lords debate provided some further examples of this. Lord Simon of Glaisdale, introducing the debate, said that "we need not be afraid of the hereditary element. It has real advantages, particularly by way of continuity and tradition", although he did suggest that it could be organised on some form of representative basis.[94] Lord Somers was even more forthright:[95]

> However, the hereditary system should be preserved. I wish to say a few words about it because a great deal of abuse has been thrown at it. It is not so extraordinary that the hereditary system should work; it works in other walks of life. For instance, Bach would not have been such a superb musician had it not been for the fact that his father, brothers, uncles and practically his whole family were professional musicians. Therefore, the hereditary system has an influence. I am the first to admit that sometimes the system makes mistakes; but so does the electoral system. There cannot be many noble Lords who are unable to name members of one elected body or another who are by no means suitable for the work that they are supposed to carry out.

Others have suggested that the hereditary principle provides these peers with an independent autonomy, "who are able to render an opinion free of external pressures, since they are beholden to no party or patron."[96] Mrs Thatcher revived the hereditary principle in the 1980s to a very limited degree.[97]

In his 1996 *Politieia* speech[98] Viscount Cranborne examined the case for and against the hereditary principle. He admitted that "the spirit of the age is not instinctively sympathetic to hereditary constitutional rights" but thought that there were "pragmatic arguments on the other side." Active hereditary peers were "not obviously less virtuous ... neither are they obviously less able" than MPs. Further in an age of the professional politician, which has led to the increased power of the front benches, and to the public's increasing contempt for politicians, there was a place for the amateur, who, while never wholly disinterested, "is less interested in climbing the greasy pole than the professional. It is helpful to the body politic for Parliament to contain a body of amateur politicians. The only such body we now have is the hereditary peerage and it is a body chosen by lot."

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94 HL Deb vol 518 c 608, 25.4.90

95 cc 616-7

96 quoted by Norton, *The British polity*, 3rd ed, 1994, p300. A sustained defence of the historic role and composition of the Lords was contained in Lord Sudeley's 1991 Monday Club pamphlet, *The preservation of the House of Lords* (summarised in Research Paper 97/28)

97 Viscounts Whitelaw and Tonypandy in 1983 and the Earl of Stockton in 1984. Only the Earl of Stockton had an heir.

98 Conservative Party PN 762/96, 4.12.96.

This body of peers, he claimed, did not conform to the public stereotype of the "collection of chinless wonders who live on their broad acres shooting and hunting anything that moves, weak in the arm and weak in the head: people like me in fact." The proportion of traditional landowners among the hereditary peerage, while high, was falling rapidly. He continued:

> Increasingly the amateur politicians who make up the hereditary peerage are coming to represent the common man in Parliament. As I say the process is not yet complete, but it is accelerating. They owe no favours to patronage. They are not paid. They do it for its own sake, dare I say it, from a sense of duty and of privilege. They are not a group to be despised in an otherwise specialist House of Lords and in a bicameral legislature dominated by an elected chamber composed of professional politicians.

C. The monarchy

Other than membership of the House of Lords, the most visible example of the hereditary principle in action in the British constitutional system is the monarchy itself. For this reason, proposals for the dilution or removal of the hereditary element in the House of Lords are sometimes criticised as opening the way, intentionally or otherwise, to criticisms of the foundations of the current constitutional monarchy.[99] In its 1997 election manifesto, the Labour party concluded its pledge on Lords reform with the following brief sentence: "We have no plans to replace the monarchy," and ministers have confirmed this since.

The Bill's *Explanatory Notes* states that the exclusion would include "members of the Royal Family who have the right to sit and vote in the House (the Prince of Wales[100], the Duke of Edinburgh, the Duke of York, the Duke of Gloucester and the Duke of Kent)."[101] However, " The Bill does not affect the position of The Queen, who is not a member of the House of Lords by virtue of a hereditary peerage."[102] In a written answer last month, the Prime Minister had said that, in the Bill and white paper, "the Government would not intend to propose special arrangements for Royal Members of the House of Lords."[103]

It has been made clear from Buckingham Palace that the Queen would, in accordance with constitutional practice, accept her government's advice that its plans for Lords reform would remove the five royal peers[104] – the Prince of Wales, and the Dukes of Edinburgh, York, Gloucester and Kent - from the Upper House. The BBC News website

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99 Lord Somers' 1990 speech, cited above, contained a spirited defence of a hereditary monarchy.

100 ***Clause 5(1)*** makes it clear that "hereditary peerage" includes the principality of Wales and the earldom of Chester

101 *Bill 34-EN*, para 6

102 para 11

103 HC Deb vol 322 c 15w, 7.12.98

104 For a discussion of this term, see D Shell, *The House of Lords*, 2nd ed., 1992, pp31-2. See also, "Hamlet without the princes?", *House Magazine*, 16.3.98, p 25

on 29 November quoted a Palace spokesman as follows: "Formal advice has been received from the government on reforms in line with established constitutional practice and the Queen has accepted that advice. The peers of first creation - the Prince of Wales, the Duke of Edinburgh and the Duke of York - would lose their seats. There would be no separate arrangements for the Duke of Gloucester and the Duke of Kent. They would not be able to remain in the House of Lords." This was confirmed in the white paper:[105]

> **16.** Following consultation with the Royal Family, the Government proposes that the Royal Peers should, like other hereditary peers, relinquish their rights to sit and vote in the House of Lords.

Liam Fox, for the Conservatives, was quoted in the *Independent on Sunday* of 29 November as criticising this development: "This has the symbolic effect of reducing the role for the monarchy in Parliament. There is undoubtedly a very large republican element in the Labour Party which would take comfort from such a step."[106]

During the debate on the Queen's Speech on 30 November, the following exchange took place:[107]

> **Mr. Laurence Robertson (Tewkesbury):** ….. Does his dislike of the hereditary principle extend to the monarch?
>
> **Mr. Straw:** No.
>
> **Maria Eagle:** The Queen does not legislate.
>
> **Mr. Straw:** My hon. Friend is right. There are overwhelming arguments for constitutional monarchy. Every other country with a constitutional monarchy does not have hereditary peers with legislative power.
>
> **Mr. Gerald Howarth (Aldershot):** The Home Secretary has not answered the point raised by my hon. Friend the Member for Tewkesbury(Mr. Robertson). If the Home Secretary is adamant that the principle of hereditary succession is, in his words,"risible", he will have to defend the position of the monarch rather better as many of his right hon. and hon. Friends will make their next target the removal of the hereditary principle as applied to the monarch and he will be caught out by them.
>
> **Mr. Straw**: With great respect to the hon. Gentleman, I think that we can speak rather better for what we believe than he can, and what he says is untrue.

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[105] para 5.16
[106] "Labour throws Royals out of Lords" *Independent on Sunday*, 29.11.98
[107] HC Deb vol 321 cc 572-3, 30.11.98

Bogdanor has argued that the application of the argument to the monarchy is not appropriate:[108]

> It is sometimes suggested that the disenfranchisement of the hereditary peers would be a threat to the monarchy, since if the hereditary principle were to be discredited for one of the branches of the legislature, it could not survive as a means of choosing the head of state, the third branch of the legislature. But this argument cannot be sustained. For, although in theory the Queen is part of the legislature, in practice her power of refusing Royal Assent to bills is purely formal, last having been used in 1707. The Queen's role is quite different. It has been summed up, in Bagehot's famous phrase, as that of being consulted and encouraging and warning her ministers. But she can also act as an umpire or constitutional long-stop during times of serious conflict. The functions of the head of state, further discussed in Chapter 7 below, are best undertaken by someone without any party history and so uncontaminated by political controversy. Moreover, constitutional monarchies on the continent function perfectly well without the backing of a hereditary upper house.

Earl Russell has made a similar point: "The monarchy is a political referee, not a political player, and there is a lot of sense in choosing the referee by a different principle from the players. It lessens the danger that the referee might try to start playing."[109]

D. The Bill

The key policy of the bill is achieved in brief legislative terms (***clause 1***):

> **1. No-one shall be a member of the House of Lords by virtue of a hereditary peerage.**

This provision would apply to the House in the session immediately following the bill's passage (***clause 4***):

> **4** - (1) This Act (apart from subsections (3) and (4) below) shall come into force at the end of the Session of Parliament in which it is passed.
>
> (2) Accordingly, any writ of summons issued for the present Parliament in right of a hereditary peerage shall not have effect after that Session.

The *Explanatory Notes* explain the effect of, and consequences which flow from, this clause:

> 5. The main provision of the Bill ends membership of the House of Lords by virtue of a hereditary peerage. Once the Bill is enacted, no present holders of a

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[108] V Bogdanor, *Power and the people*, 1997, p 113

[109] "Dead mistresses, not live ministers", *Spectator*, 11.1.97

hereditary peerage in the peerage of England, Scotland, Ireland, Great Britain or the United Kingdom, or their heirs, will have the right to sit and vote in the House of Lords by virtue of that peerage, or to sit and vote in committees of the House, or to speak in the House, or to receive a writ of summons.

6. The exclusion from membership applies to all those who are members of the House by virtue of a hereditary peerage, including -

- •members of the Royal Family who have the right to sit and vote in the House (the Prince of Wales 1, the Duke of Edinburgh, the Duke of York, the Duke of Gloucester and the Duke of Kent);

- first holders of a hereditary peerage (of whom there are currently nine);

- any holder of a peerage by virtue of acceleration, being the eldest son of a hereditary peer who is sitting by virtue of one of his father's peerages while the father is still alive (of whom there is currently only one in the House of Lords, Lord Cranborne); and

- any holder of a hereditary peerage by virtue of the termination of a peerage in abeyance (where only female co-heirs survive to inherit the peerage and one is preferred by the Crown against another for the peerage).

7. The Bill deprives hereditary peers of all the privileges of membership of the House of Lords, including the privileges they enjoy as members of Parliament. Parliamentary privileges cover various matters, many of which relate to the House of Lords as a whole (such as punishing improper conduct within the House itself), but include some that are personal to individual peers. One of the most important personal privileges is that no action can be taken against a peer for what he or she may say in Parliament. Hereditary peers will also lose the right to be paid allowances and to use the facilities of the House that are available to members, such as its library, research and restaurant facilities. The removal of these rights does not prevent the House from deciding to grant some rights to use the facilities of the House to a hereditary peer under the exercise of its own authority.

8. Holders of a hereditary peerage will cease to be excusable as of right from jury service on implementation of the Bill. (They will no longer fall within Part III of Schedule 1 to the Juries Act 1974, or Part III of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, or Schedule 3 to the Juries (Northern Ireland) Order 1996.)

9. The Bill does not affect the rights of holders of a hereditary peerage to keep all the other titles, rights, offices, privileges and precedents attaching to the peerage which are unconnected with membership of the House of Lords.

10. At 4 January 1999, the House of Lords was composed of 759 hereditary peers, 510 life peers and 26 Archbishops and Bishops. The Bill does not affect the position of members of the House of Lords who do not sit by virtue of a hereditary peerage: the Archbishops and Bishops of the Church of England;

retired and existing Law Lords (who are created life peers under the Appellate Jurisdiction Act 1876) and life peers created under the Life Peerages Act 1958.

11. The Bill does not affect the position of The Queen, who is not a member of the House of Lords by virtue of a hereditary peerage.

E. The Cross-bench proposal for the retention of some hereditary peers[110]

While the policy of the Bill is clear as to the complete removal of hereditary peers, a group of Cross-bench peers made a significant proposal last December which would ensure the retention of a number of such peers, at least in the 'transitional House', pending any further reform. Ministers have said that they are minded to accept the proposal on certain conditions. If it does form part of any resulting statute, the composition of the interim House of Lords will be significantly different from that implied by the bill in its current form.

The proposal was made in the following terms by Lord Weatherill, the Convenor of the Cross-bench peers, and others at a press conference on 3 December[111]

> The debate surrounding House of Lords reform has clearly shown signs of being far more bitter than it needs to be. The Government has a manifesto commitment and has indicated a desire to move forward in a more consensual way than currently seems possible.
>
> As three Cross-benchers we wish to put forward a specific proposal which, in our view, will allow this consensus to be built. Equally, it will allow the Government to fulfil the commitment, while reassuring the Opposition of the Government's seriousness of intent in proceeding to Stage 2 of House of Lords reform.
>
> Our proposal, which we would table as an amendment to the Bill outlined in the Queen's Speech, is as follows:
>
> *Both Government and Opposition accept the Government intends to end the right of hereditary peers to sit and vote in the House of Lords.*
>
> *During the transition to a reformed Upper House, a block of hereditary peers - one tenth of the total - will be elected among its number, and will remain until the transition to Stage 2 is complete.*

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[110] Lord Weatherill's account of the genesis of the proposal is given in a recent *House Magazine* interview, 11.1.99

[111] The key passages for the purposes of this discussion are italicised here for emphasis. Initial political reaction to the proposal was considered in Research Paper 98/105. The internal ramifications in the Conservative Party and elsewhere are beyond the scope of this Paper

> *A group of 14 hereditary peers, elected by the whole House, will sit during the transitional phase being available to serve as deputy chairmen and in other capacities in the scrutiny of legislation and the workings of the House.*
>
> *The Lord Great Chamberlain, as The Queen's representative, and the Earl Marshal, who is responsible for ceremony, would retain their seats until Stage 2 was implemented.*
>
> *This means that 659 hereditary peers will immediately lose their right to sit and vote as part of Stage 1, while 91 hereditary peers would remain as part of the transitional House.*
>
> *It would be understood that the Prime Minister could appoint sufficient Labour peers to achieve parity with the number of peers taking the Tory whip.*
>
> We would assume that the normal conventions of the House would apply during the transitional period.

Whether this is regarded as a limited and temporary exception to the policy of complete removal of the hereditary element, or a breach of that policy, is, of course, a matter for political debate. The potential impact of the proposal on the legislative progress of the Bill is considered in section VIII of this Paper. No details have been disclosed officially by ministers or those peers promoting this potential amendment as to the practical aspects of the proposal, but it is understood that discussions may be taking place with relevant officials as to the wording of the amendment and the systems of election/selection which may be appropriate. Consideration will have to be given to a number of issues, such as:

- how much of the proposal is to be given express statutory effect
- whether, if the bloc of 75 peers is to be allocated according to 'party' (ie including Cross-benchers and other independents) balance among the hereditary peers, each of the 'party' groups decide their own form of (s)election, or whether a common system is adopted
- the extent to which these elections (especially those for the bloc of 14 'office-holders') are part of the operation of the House and its officials, eg by way of some form of Committee of Selection, or formal nomination by Resolution.
- the application of the *clause 2* 'enfranchisement' provisions on hereditary peers remaining as members of the Upper House for the period
- whether, and if so, how, vacancies arising among the group of 75 or the group of 14 retained hereditary peers are to be filled
- whether, and if so, how the system would operate if the transitional period continues in future Parliaments. [112]

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[112] Lord Weatherill has indicated that if the proposal is seen to work in the transitional period, "it's within the bounds of possibility that the Royal Commission may say this has been working well – let's leave it alone. That would preserve continuity and leave in the Lords a number of very able hereditary peers to continue to serve the nation. Surely a consummation devoutly to be wished": *House Magazine,* 11.1.99

F. The 'precedent' of the representative peers[113]

A possible 'precedent' for the residual hereditary peers in a transitional House, if the cross-bench proposal was implemented, may be the representative peers of Scotland and of Ireland who sat from 1707 and 1801 respectively. The concept of representative peers is relevant to the current debate for two main reasons:

- **election:** the idea that certain members of the Lords owed their place in that House of the legislature to a form of election rather than by hereditary right;
- **representation:** whom (or what) did such peers 'represent', in the sense of speaking and acting for, and in, their interest?[114]

Relatively little has been written on this subject, especially on the 'representation' aspect, but a brief outline of the salient points may be of interest. The elections, especially for the Scottish peers, illustrate many of the practical and legal issues which can arise, including the franchise,[115] (dis)qualifications for candidature/membership, costs and conduct of the relevant campaign,[116] filling of vacancies, and challenges to the result.

The proposal that only some Scottish peers should sit in the House of Lords following the Union was assisted by the belief among the senior Scots peers that the peerage had become too numerous (154 in 1707) and thereby diluted in status.[117] The eventual settlement was contained in Articles XXII and XXIII and in an Act of the Scottish Parliament which was attached to, and declared valid as if part of, the Treaty of Union.[118] Later legislation in 1708 to regulate the elections themselves instructed the peers assembled for the election not to "act, propose, debate, or treat of any other matter or thing whatsoever, except only the election of the said sixteen Peers." Mitchell has suggested that "the provisions were aimed at preventing a re-emergence of a Parliament of Scotland."[119]

Some disquiet was expressed in the House of Lords over the precedent of representative peers, especially by way of election, able to sit alongside peers by birth. A Protest of 27 February 1707 argued that 16 Scottish peers was too large a number as rarely more than

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[113] See generally, *Membership of the House of Lords*, House of Lords Library Note 99/001, January 1999

[114] "… there are two groups of members who owe their seats to a combination of inheritance and election: the sixteen Scottish representative peers and the few remaining Irish representative peers have inherited their peerages but not their seats in the House of Lords": P Bromhead, *The House of Lords and contemporary politics*, 1958, p 18.

[115] not always straightforward when peerages of different countries (Scotland, England and Great Britain) were involved, and there were claims from time to time to particular titles. For the first hundred years, the monarch's eldest son participated as Duke of Rothesay.

[116] including, directly or otherwise, political or executive involvement such as canvassing in some form

[117] AS Turberville, *The House of Lords in the 18th century*, 1927, p 136

[118] APS, XI, 425 (1707). This Act also dealt with the election of the 45 MPs from Scotland

[119] Mitchell, *Constitutional law*, 1st ed., 1964, p89, fn 53. Until the arrival of the Scottish Parliament under the *Scotland Act 1998*, the General Assembly of the Church of Scotland has generally been regarded as the main 'national' Scottish representative body

100 English peers attended in any one sessions, and "that by agreeing to sit by right of election the Scottish peers diminished their own dignity; that the introduction of the elective principle might prove prejudicial to the English peers also." Disputes over the rights of Scottish peers led to some reconsideration of the elective scheme, within the context of the Union legislation itself. This had a political edge, as the sixteen peers were a crucial bloc (if they chose to act together as such) in the party battle between Tories and Whigs at the time. There were even tactical motions introduced in the House of Lords for the dissolution of the Union. The unsuccessful *Peerage Bill* of 1719 had contained a provision for 25 hereditary peers instead of sixteen representative peers, and the senior Scottish peerage was split between fear of being permanently excluded from the House and desire to be among the select twenty-five.

The system of election was set out in one of the Scottish parliament's final statutes, as later amended by the Westminster Parliament,[120] but there were disputes almost immediately about the relevant franchise, especially whether Scottish peers who were also peers of Great Britain were allowed to vote in the election of the representative peers.[121] The Scottish Parliament had not wanted such peers to be able to vote, and this was upheld by a resolution of the House of Lords on 21 January 1709.[122] This was restated in 1787, but overturned in 1793. Again there was the problem of a Scottish representative peer who received a British peerage, which was decided in February 1787 when the House resolved that such peers vacated their membership by virtue of their election as a representative peer, and sat as British peers.

Turberville was scathing of the practical operation of the election process: "The record of the peerage elections in the eighteenth century is not edifying … Governments manipulated elections almost from the start. Already in 1708 it is regarded as a great advantage if a candidate can say that he has the Queen's support for his candidature."[123] In that election, the compilation of a list of 'candidates' was, in practice, further circumscribed by the need to include a number of peers by virtue of their status or influence. Those who failed to be selected for a slate would seek selection to an opposing list. Selection was by throwing the dice, described by one contemporary as 'which tho equall yett nott very politicall.' From 1710, the practice of a Queen's/King's List took hold, which survived in some form or other throughout that century at least.

On the other hand, according to JDB Mitchell, "few peers in the peerage of Scotland who wished for a political career were in fact excluded. Factors such as minorities and the possession of additional peerages of Great Britain reduced the apparent gap between the total number of peers in the peerage of Scotland and the number of representatives.

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[120] eg. *Representative Peers (Scotland) Acts* 1847 and 1851

[121] There was also the question whether Scottish peers who were granted a British peerage thereby were entitled to sit in the Lords. The House resolved in December 1711 that they were not, but this was reversed in 1782, and in any case did not apply to Scots who were not already Scottish peers.

[122] LJ vol. xvii, p 609

[123] op cit, p 158

Some, indeed, who had the right to vote had little or no real connection with Scotland …. In the years immediately after the Union, the restriction of the meeting of peers exclusively to elections was probably significant in preventing the emergence of a parliament in a different guise."[124]

The report of the joint committee on House of Lords reform in 1962[125] noted that their predecessor committee in the previous session had found that the historical reasons for the Union restrictions on the Scottish peerage's membership in the Upper House no longer applied.[126] Following further consideration the committee recommended that the election procedure should be repealed, and all Scottish peers should be able to sit in the House on the same basis as other peers.[127] This was given effect to by s4 of the *Peerage Act 1963*.

The representative scheme was adopted for Irish membership of the House of Lords following the Union of 1800. The senior Irish peerage were, like their Scottish counterparts a century before, tempted with the prospect of seats at Westminster for some of their number. It should be recalled that before the Union the Irish Parliament was bicameral, with its own House of Lords.[128] Twenty eight peers and four bishops were granted seats under the provisions of the Union legislation (Article IV)[129], but, unlike the Scottish arrangement, the lay peers were to be elected for life, rather than for a single parliament. It was feared at the time that the frequent election of almost 50 members of the House (from Scotland and Ireland) would threaten the constitutional basis of the House of Lords as a house of hereditary peers.

A by-product of this variant of the representative system was the provision allowing Irish peers to sit in the Commons (with, during such membership, no right to become a representative peer, or enjoy the privileges of peerage) in acknowledgement of the much reduced opportunity for an Irish peer to gain membership of the Upper House. Holders of British peerages could become Irish (but not Scottish) representative peers, and, unlike the Scottish position, could remain as representative peers.[130] Whereas the Scottish peerage was, in effect, closed by the 1707 Union settlement, the 1800 Union maintained the Irish peerage, by allowing new creations to prevent the total following below 100. The different system of election meant that representative elections for Irish peers were much less frequent than those for Scottish peers, only arising to fill vacancies, at a rate of

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124 *Constitutional law*, 2nd ed., 1968, p112. Two Prime Ministers were Scottish representative peers, the Earl of Bute (1762) and the Earl of Aberdeen (1852-55), although the latter sat in his own right as a viscount in the British peerage from 1814

125 HC 38/ HL 23, 1962-63, December 1963

126 At that time in the early 1960s only 15 peers of Scotland were not representative peers

127 paras 7-9. It also recommended that no further Scottish peerages be created (none had been created since the Union), and that Scottish peers would be able, like other peers, be enabled to surrender their peerages

128 The pre-1707 Scottish parliament was unicameral, though there were the various 'Estates'

129 Proposals for the separate representation of the small Catholic peerage were rejected by ministers

130 Seven of the 28 sat in such a dual capacity in 1837, for example

nearly one per year (27 between 1801 and 1837). Ministerial intervention in such elections, including the first 'general' election following the Union, was as covert but as real as for Scottish elections.[131]

The election system lapsed following the partition of Ireland in the early 1920s (the last election having taken place in 1919, and the last representative Irish Peer having died in 1961). This was supported by a Lords committee in 1962[132] and upheld by the Lords Committee for Privileges in 1966.[133] The joint committee on Lords reform in the early 1960s considered the position of the Irish peerage, and, having noted that their predecessor committee in the previous session had rejected the resumption of a system of election of representative peers, recommended that Irish peers should be eligible for election to the Commons for all constituencies,[134] and be able to vote in such elections in the usual way.[135] These proposals were enacted in s5 of the *Peerage Act 1963*.

In the pre-democratic era the notion of representation was significantly different from current ideas, being concerned more with the representation of distinct segments of, or interests in society. At the time of the two Unions in the early eighteenth and nineteenth centuries, the elected peers, if they did not feel that they represented 'Scotland' or 'Ireland' in the broadest sense, would probably regard themselves as representatives of the aristocratic stratum or 'estate' of society in these parts of the United Kingdom, rather than of 'the people' of these territories.

Such concerns may not have mattered much in theory or in practice throughout much of the two and a half centuries when the election system operated. However it became an issue when in the 1960s the House of Lords were required to consider the position of the Irish representative peerage, in the Earl of Antrim's case, already mentioned. There was much discussion, based on interpretation of the relevant Union legislation, about whether the peers 'represented' the Irish peerage or 'Ireland' as such. Lord Reid and Viscount Dilhorne, who delivered two of the three substantive opinions, believed that the elected Irish peers represented Ireland rather than their electors, the Irish peerage.

Lord Reid said: "Lords spiritual and temporal and commoners were to sit 'on the part of Ireland' …It was argued that 'on the part of' meant as representing the several estates of the Kingdoms and of Ireland. In my view that is not so. All who were to sit in the first Parliament of the United Kingdom of Great Britain and Ireland were to sit as

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131 For details, see Turberville (1958), pp 122ff

132 HL 23, 1962-63, para 10

133 *Earl of Antrim's petition* [1967] AC 691. See also Lord Dunboyne, "Irish representative peers: counsel's opinion 1924" 1967 *Public Law* 314-322 and C Lysaght "The Irish peers and the House of Lords" (1967) 18 *Northern Ireland Legal Quarterly* 277-281 (reproduced in condensed form in *Burke's Peerage*, 105th ed., pp xxv-xxviii)

134 they were not able to be elected for seats in Northern Ireland

135 only those who were sitting Members of the Commons could, at that time, vote in Parliamentary elections

representatives of the two former Kingdoms to be united."[136] Viscount Dilhorne agreed: "In one sense the 28 elected peers were representatives of the Irish peers who elected them just as the four lords spiritual who sat by rotation represented the other lords spiritual but it is to my mind clear that they were only elected to sit and vote on the part of Ireland."[137]

In so far as the era of Scottish and Welsh representative peers provides any precedent or analogy for an electoral system for 'residual' hereditary peers in a transitional House of Lords, these legal opinions may be relevant. They may suggest that any members of the Upper House who owe their seat to an election amongst all or some of the relevant hereditary peerage would not represent the 'estate' of the hereditary peerage as such, or their party's hereditary peers, but would be as much members 'at large' as any other peers. Unless the contrary is expressly stated in legislation, they would be members of the House of Lords by virtue of being elected by a particular group of hereditary peers, but would not be there to act in their interest or on their behalf. In other words, they would be *representative* of, but not the *representatives* of, the hereditary peerage.

However, the white paper, when discussing the view that some in a reformed House could be representatives of particular functional interests, was concerned that "those nominated might see themselves as delegates rather than representatives. They might feel obliged to serve the narrow interests of the body which sent them rather than the greater good, thus diminishing the central purpose of the House as presently conceived. Or they would feel unable to contribute on a personal basis to debates in which there is no functional interest and therefore on which they had not been mandated."[138]

VII The membership of the interim House

A. Prime Ministerial patronage[139]

> "It seems to me that the distinction of the peerage has been degraded by the profuse and incautious use that has been made of it" -- *Peel to Wellington* [140]
>
> "I rather enjoy patronage. At least it makes all those years of reading Trollope worthwhile."-- *Harold Macmillan*[141]

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[136] op cit, at 717

[137] at 719. Lysaght, op cit, has argued that such arguments erroneously assumed that the Irish peerage was synonymous with the Irish nobility, and that the Lords' decision, being unsafe in law, was unjust to the Irish peers if taken on a more pragmatic basis, such as any antipathy to the hereditary principle

[138] Cm 4183, para 8.11, p 44

[139] This section does not deal with the role of the Prime Minister in the appointment of bishops

[140] J Walker, *The Queen has been pleased*, p 40

The result of a staged process is a period where the membership of the House will reflect the implementation of the present bill, if and when enacted, and the effect of related measures, such as changes in the present method of appointment based on Prime Ministerial patronage. This means that the government of the day could determine the membership of the House and its political composition, even more (because of the removal of most or all of the hereditary peers) than at present. This has been criticised by the Opposition and others through descriptions of the resulting House as 'the greatest quango in the land' or a House of 'Tony's cronies'. At least two themes are involved in this strand of argument: the fact that the membership will be based almost entirely on appointment (rather than, say, succession or election), and that the Prime Minister may have the ultimate power of patronage in these appointments.

A major reason for such antipathy as exists to the idea of an appointed membership of a reformed House of Lords is that current constitutional practice dictates that such appointments are in practice made by the Prime Minister of the day, through his or her advice to the sovereign as to the exercise of the prerogative. This is compounded by the fact that, as already noted, the award of the honour of a life or hereditary peerage brings with it membership of the Upper House of Parliament.

In addition to the ad hoc creation of peers, under the regular honours lists or otherwise, there have been occasions when the creation of large numbers of peers at once (or the threat to do so) has been made to overcome resistance to government policy. Clearly, as this involves the exercise of the prerogative, the agreement (or at least, the acquiescence of) the monarch is required. On the future use of the prerogative in this way, Bradley and Ewing's standard work on constitutional law suggests that "it seems improbable that this prerogative will again be invoked; the Parliament Act 1911 was intended to provide a more effective way of overcoming opposition in the Lords to new legislation."[142] The last unequivocal example of this was in 1712 when Anne created 12 Tory peers to ensure support for the Treaty of Utrecht. This was regarded as revolutionary and highly controversial at the time[143]. It was cited in the impeachment of Robert Harley, Earl of Oxford (the de facto 'premier' at the time), clause 16 of which alleged that he

> "being most wickedly determined, at one fatal blow, so far as in him lay, to destroy the freedom and independency of the House of Lords, the great ornament and nearest support of the imperial Crown of these realms … did advise Her Majesty to make and create twelve peers of the realm and lords of parliament … and prevailed on her to exercise in the most unprecedented and dangerous manner that valuable and undoubted prerogative, which the wisdom of the laws and constitution of this Kingdom hath entrusted with the Crown for the rewarding signal virtue and distinguished merit."

The clearest fallout of the 1712 creations was the plan introduced in 1719 by the Duke of Somerset, later embodied in a *Peerage Bill* to prevent such creations for party purposes and to preserve the dignity of the peerage. This created much controversy amongst the

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[141] Quoted in A Horne, *Macmillan*, vol 2, p 272

[142] *Constitutional and administrative law*, 12th ed., 1997, p 165

[143] See AS Turberville, *The House of Lords in the XVIII century*, 1927, chap 6

press and the political classes. The Commons (led by Walpole), fearing that the Upper House would simply become more exclusive, powerful and politically irresponsible in relation to the Crown and its ministers, rejected the bill.

The examples of the Great Reform Bill in 1831-2 and the Parliament Bill in 1910-11 are well-known, where the threat of multiple creations, with the backing of the monarch of the day, overcame the resistance of the House of Lords to fundamental constitutional measures. On the former occasion the Prime Minister, Grey, and the King, William IV, initially opposed the idea, especially if it involved a large number of creations at once,[144] but pressure grew as the Lords' resistance to the Reform Bill persisted. The King agreed to some measure of creation, and eventually this promise was put in writing. In the latter case of the *Parliament Bill* in 1910, the new King, George V, reluctantly agreed a secret undertaking that if the Liberals won the forthcoming election, he would create sufficient peers.[145] Asquith was able to deploy this threat when the Lords were considering the Parliament Bill, though there was much debate as to whether the number should be simply sufficient to thwart resistance to the Bill, or, more drastically, to install a permanent Liberal majority.

B. Restrictions on patronage

Ministers have sought to counter the criticisms about Prime Ministerial patronage in a number of ways. The white paper amplifies the manifesto pledges on this:[146]

> 1. The Government's intention to remove the right of hereditary peers to sit and vote in the House of Lords will radically alter the complexion and composition of the House. Proposals for further reform of the Lords will flow from the Royal Commission the Government will shortly establish. In the interim, the House of Lords will be in a transitional stage. Even so, we are determined to ensure that even in transitional form, the House of Lords is a more modern and a fairer chamber.
>
> 2. The Government said in its election manifesto that in addition to taking action over the unrepresentative anomaly of hereditary peers, it would reform the way life peers are nominated. We believe that no political party should have a majority in the House of Lords. We will make the process of appointment transparent and fair. There is no truth to the assertion that we wish to create a 'house of patronage' as an abuse of the appointments system.

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[144] There was the related fear that the creation of a number which proved to be insufficient to ensure a majority for the Bill would be the worst of all worlds politically

[145] It was estimated by some that around 500 would be required for success

[146] paras 6.1-4, p 31. Note also that in his speech at the Charter Mark awards on 26 January, the Prime Minister said that one of the 'non-financial rewards' for public servants was "esteem - from ceremonies like today's to nominations to the House of Lords…": *Modernising public services* 26.1.99

> 3. For the transitional House:
> - we presently plan to seek only broad parity of numbers with the main Opposition party; and
>
> - we shall maintain a significant independent, cross-bench element. We will establish an independent Appointments Commission to make nominations to the cross benches and to oversee the propriety of all recommendations of political peers, so that all peers are vetted to the highest standard.
>
> 4. The complexion and composition of the Lords will be different in a transitional chamber, but the Government is not proposing any changes in the House's functions in the transitional stage. The House of Lords is, and will remain, the second chamber of the legislature. Its functions, in the transitional House, will continue to be to question Ministers and to give its consent to and, where appropriate, revise the proposals for legislation.

As to party balance, the white paper stated:[147]

> 7. If some hereditary peers remain the majority of them will inevitably be Conservatives. This will have the effect of tilting the imbalance in the House which will still exist among life peers further away from the results of the last general election. We do not seek to replace the current enormous political imbalance with a mirror image which favours the Labour Party, but with a fair balance between the parties. We set out in our manifesto the broad principle which we believe should govern the appointment of life peers but our present intention is to move towards broad parity between Labour and the Conservatives. The principle of broad parity and proportionate creations from the Liberal Democrat and other parties would be maintained throughout the transitional period.

The effect of the detailed proposals as intended by the Government was set out in the concluding paragraph of chapter 6:[148]

> 14. Taking all the Government's proposals together the Prime Minister will in future have less influence than any of his predecessors over appointments and the composition of the House of Lords. The Government is not only removing the hereditary peers. It is accompanying this with a modernisation of the way the Lords are appointed and putting in place firm measures to ensure that this is done in a balanced way with no unfair party advantage and with a clear commitment to the independence of at least a significant proportion of the members.

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147 para 6.7, p 32
148 para 6.14, p 34

C. The Appointments Commission

The key mechanism for the control of patronage in the membership of the interim House is to be a non-statutory Appointments Commission:[149]

> 8. It is entirely reasonable that the parties should have the major say in the selection of those who represent them in the House of Lords. After all, they also decide who to put forward as candidates for election to the House of Commons. There must be proper safeguards to ensure that corruption or undue influence are not involved, but beyond that, this must be a matter for the parties, especially as the award of a peerage continues to shift from being an honorific award to being an appointment to undertake specific duties and the concept of the 'working peer' develops.
>
> 9. We recognise and value the tremendous contribution made to the work of the House of Lords by the independent cross-bench peers. The Government proposes to set up an Appointments Commission to take over from the Prime Minister the function of nominating cross-bench peers. There is no reason why the Prime Minister of the day should control the nominations to the cross benches. Cross Benchers will become more important with the removal of the Conservative in-built majority. The Commission will be an advisory non-departmental public body. It will consist of representatives of the three main political parties, and independent figures who will comprise a majority, one of whom will become the Chairman. It will operate an open and transparent nominations system for cross-bench peers, both actively inviting public nominations and encouraging suitable bodies to make nominations. The general qualities being sought and the type of information required to support a nomination will be made public. It will seek to cast its net wider than the present system to achieve successful nominations.
>
> 10. The Appointments Commission will also take on and reinforce the present function of the Political Honours Scrutiny Committee in vetting the suitability of all nominations to life peerages. It will continue to include scrutiny on the grounds of propriety in relation to political donations, as endorsed by Lord Neill in his report on the funding of political parties. (The Political Honours Scrutiny Committee will retain its role in respect of other political honours.) The Prime Minister will have no right to refuse a nomination the Commission had passed.

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[149] paras 8-13, p 33. For a recent description of the role and function of the Political Honours Scrutiny Committee see the Neill Report on the funding of political parties, Cm 4057, October 1998, esp chapter 14 and related evidence. Around the time of the publication of the white paper and Bill, the media gave prominence to the policy of encouraging public nomination, leading to what they called 'people's peers'. It remains to be seen how significant a component of the transitional membership this form of appointment will be

> 11. The Appointments Commission itself will be appointed in accordance with the rules of the Commissioner for Public Appointments. It will also seek his advice about best practice in the area of attracting and assessing potential nominees.
>
> 12. Awards of peerages will continue to be made by The Queen. In accordance with the normal conventions for the exercise of the prerogative, the names of those recommended will have to be submitted by the Prime Minister. The Prime Minister will decide the overall number of nominations to be made to The Queen and the Commission will be asked to forward to the Prime Minister the same number of recommendations. The Prime Minister will pass these on to Her Majesty in the same way as he will pass on the recommendations of other party leaders to fill the vacancies on their benches. Therefore, except in the most exceptional of circumstances, such as those endangering the security of the realm, the only nominations which the Prime Minister will be able to influence are those from his own party.
>
> 13. As at present, creations would take place in batches once or twice a year. The Government believes it would be better to allow more scope for considerations of balance and representativeness by enabling all parties and the Appointments Commission to consider a number of nominations at a time.

The first Nolan report[150] recommended that although responsibility for appointments to public bodies should remain with ministers, appointments should be made on the basis of merit. A Public Appointments Commissioner would regulate and monitor the public appointments process and produce a Code of Practice for public appointment procedures. The main weakness was in the system of public appointments was seen as a lack of external scrutiny and the remedy recommended was the use of advisory committees for departments to include some element of independence.

Sir Leonard Peach was appointed Commissioner for Public Appointments under an Order in Council in November 1995.[151] 274 executive Non Departmental Public Bodies were put under his remit together with 641 NHS bodies. His guidance on appointments was published in April 1996.[152] It incorporated a Code of Practice for Public Appointments which set out seven principles. A further edition was published in July 1998, and in October 1998 the Commissioner's remit was extended to public corporations, nationalised industries, utility regulators and advisory NDPBs. The 1995 Order in Council was amended in October 1998 to take account of the extension. However, since many advisory NDPBs have little funding and no administrative staff, the Guidance is applied in only a limited way to these bodies.

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150 *Standards in Public Life First Report* Cm 2850 May 1995

151 *Public Appointments Order in Council 1995*

152 *The Commissioner for Public Appointments' Guidance on Appointments to Executive Non Departmental Public Bodies and NHS Bodies* April 1996

The Code of Practice has seven principles which govern the appointments process:

2.2 All appointments to executive non-departmental public bodies (ENDPBS) and NHS bodies must be based on the following seven principles.

1. Ministerial Responsibility

The ultimate responsibility for appointments is with Ministers.

2. Merit

All public appointments should be governed by the overriding principle of selection based on merit, by the well informed choice of individuals who through their abilities, experience and qualities match the needs of the public bodies in question.

3. Independent Scrutiny

No appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

4. Equal Opportunities

Departments should sustain programmes to promote and deliver equal opportunities principles.

5. Probity

Board members of ENDPBs and NHS bodies must be committed to the principles and values of public service and perform their duties with integrity.

6. Openness and Transparency

The principles of open government must be applied to the appointments process, its workings must be transparent and information must be provided about appointments made.

7. Proportionality

The appointments procedures need to be subject to the principle of "proportionality", that is they should be appropriate for the nature of the post and the size and weight of its responsibilities.

The recording of political activity is emphasised in the Guidance. Candidates are asked whether they have held office in a political party or have spoken publicly in its favour or have stood as a local, Parliamentary or European Parliament election. No appointment should be made without at least one independent assessor being involved; the assessor is expected to act as the 'guardian' of the seven principles. Departments should build up a list of assessors. A Certificate of Satisfaction should be completed by each independent assessor to confirm that the Code has been applied in an appointment. All stages of the appointments process should be fully documented and information about the procedures followed and the candidates should be readily available.

The White Paper notes that the Appointments Commission will be 'appointed in accordance with the rules of the Commissioner for Public Appointments. It will also seek his advice in the area of attracting and assessing potential nominees' (para 11). The Commission will be specifically constituted as an advisory NDPB and so would automatically fall under the remit of the Commissioner. The Appointments Commission is likely to be expected to follow the seven principles set out above in seeking nominations to the Lords, but will not be bound by the Commissioner's detailed guidance which is applicable only when appointments are made *to* NDPBs, not when appointments are made by NDPBs themselves.

The Appointments Commission will therefore take on most of the current role of the Political Honours Scrutiny Committee in vetting the suitability of nominations to life peerages, but it will not necessarily take on the membership of the current Scrutiny Committee, since appointments to the Commission will be made subject to the Guidance of the Commissioner for Public Appointments.

Mrs Beckett made specific reference to the status of the Appointments Commission':[153]

> The Appointments Commission will be what one might call a "Nolanised" body, which will go through the proper process governing public appointments that is now in train for non-departmental public bodies, following what was thought necessary in the previous Parliament.

Baroness Jay of Paddington said in exchanges following her statement in the Lords:[154]

> The appointments commission will have total control, if that is the appropriate word, over the nomination of the Cross-Bench Peers, which is a very substantial and important part of our arrangements. It is suggested in the White Paper that that may be a way of looking in the long-term at the appointment of other life Peers.

The Opposition has criticised the claim that the Commission will be truly free of governmental influence and patronage. For example in its 'Battle for Britain' campaign, launched on 26 January, it said: "The Prime Minister will give up his right to appoint cross-benchers - but there are no prizes for guessing who will appoint the appointments commission."[155]

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[153] HC Deb vol 323 c 913, 20.1.99
[154] HL Deb vol 596 c 592
[155] *Battle for Britain*, January 1999, p 7

VIII The Bill and its legislative process

The Bill itself is extremely short, being five clauses and a schedule. The key policy of the bill is set out in the first two clauses, a total of six lines. Nevertheless, like, say, the *European Communities Bill 1971-72*, brevity is not an indication of the importance of its content, and it is very likely that the coming debate will range as much over matters not included in the bill as on those which are in the bill. Among the matters not, for various reasons in the bill as printed, (but which are mentioned in the white paper and in related ministerial statements and departmental press notices) are:

- Proposals for any further change to the Upper House, including the establishment of the Royal Commission,
- The establishment of the proposed Appointments Commission,
- The proposal presented by the Convenor of the Cross-bench peers, Lord Weatherill, for the retention of a limited number of hereditary peers in the 'interim' House[156]

The present bill has been introduced initially in the House of Commons rather than the Lords, notwithstanding that its provisions deal with the very nature and constitution of the Upper House. One consequence of (and, perhaps, reason for) this order of Parliamentary consideration is that the Bill would be eligible ultimately to be enacted by way of the *Parliament Acts* procedure if no agreement between the two Houses over the bill's progress could be reached, as happened with the *European Parliamentary Elections Act 1999.*[157] The *Parliament Acts* procedure does not apply to Bills first introduced into the Lords.

Parliament Acts' considerations may also have been relevant to the non-inclusion of any clauses giving effect to the Cross-bench proposal, even though the government has indicated its willingness to accept it under certain circumstances, if it is moved in the Bill's Lords' proceedings. Ministers have made it clear that they regard the proposal, not as a concession but as a two-way deal, where some hereditaries are retained in the transitional House in return for no 'abnormal' obstruction of its legislative programme in the Lords. Therefore the implication is that if the Government feels it necessary to resort to the *Parliament Acts*, because of what it has regarded as parliamentary obstruction to the bill (or the rest of its programme for the session), that would mean enactment of the bill in its original form, without provision for retention of any hereditary peers:[158]

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[156] The Cross-bench proposal is considered further, below

[157] On the *Parliament Acts* procedure and how it applied to that recent legislation, see Research Papers 98/102 and 103.

[158] HC Deb vol 323 c 909, 20.1.99. Opposition to the bill may well not solely be by legislative means. For example, the *Independent on Sunday* reported recently that some hereditary peers are planning a legal challenge to any use of the Parliament Acts to enact the bill, on the grounds that the *Parliament Act 1949* itself was not validly enacted: "Lords to fight reform in courts", 24.1.99

> The White Paper also confirms the undertaking that the Government have given that if, when the Bill reaches the House of Lords, there is a consensus in favour of an amendment to allow continued transitional membership of that House to some hereditary peers, the Government are minded to support such an amendment. I must make it clear that whether the Government are able to support such an amendment depends a great deal on the extent to which normal conventions relating to the Government's legislative programme are being observed.
>
> The Government have always made it clear that we prefer to proceed by consensus. In that spirit we are prepared to accept the proposal if, indeed, it enables reform to proceed in that way. It is not a concession to be extracted by pitched battle; indeed, pitched battle will jeopardise the proposal.

Following the equivalent Lords statement, Lord Strathclyde for the Opposition, asked:[159]

> Why the threats? What are the normal conventions that the Government are so afraid might be broken? The Government say that they wish to see consensus. Do they feel that the Bill commands any form of consensus? If not--and I think there is none--why do they say that that is what they want? As for "pitched battles", how will we know when we have fallen into a pitched battle? Will the noble Baroness let us know?

Lord Rodgers of Quarry Bank, for the Liberal Democrats, thought that "the Government were a little heavy-handed in their threat -- and I would call it that although the noble baroness will have to deny that it was any such thing -- that the Weatherill proposals would succeed only if peers behaved themselves."[160] Baroness Jay responded:[161]

> Both noble Lords suggested that I had been "threatening". I hope that my tone of voice was not threatening. I normally try to be conciliatory and proceed by consensus. But my noble friend the Chief Whip and other business managers--and I am sure that the noble Lord, Lord Strathclyde, will have drawn from his experience in that role both in government and in opposition--will understand only too clearly what we mean by the passage of legislation through the "normal conventions of this House". I am sure that the noble Lord will be able to detect when we reach a state of "pitched battle", as I put it rather colloquially, or the usual friendly and very constructive relationships in the usual channels which normally exist in this House.
>
> As to the passage of the Bill and whether or not the amendment suggested by the noble Lord, Lord Weatherill, or some arrangement of that kind, should have been on the face of the Bill, and the reason that it is not, that can be precisely derived from what I have just said. If this Bill--and we have an example of this in the recent past--has to be subject to the enactment of the Parliament Acts, it would be

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[159] HL Deb vol 596 c 588, 20.1.99
[160] c 589
[161] c 592

> fruitless for the Government initially to produce a Bill in the House of Commons which contained that specific provision.

If the bill goes through all its Commons stages without debate on an amendment on the lines of the Cross-bench proposal, but such an amendment is inserted in the Lords, then the Commons would be able to consider such a relatively major change to the current policy of the bill at a subsequent Lords Amendment stage, rather than as part of Committee of the Whole House proceedings.

The Bill will have two days on second reading, a fairly common practice for constitutional bills of this significance, and ministers have indicated that their intention is that the whole of the Commons committee stage will be taken on the floor of the House. It is often said that constitutional bills are not subjected to guillotines in the Commons, but practice does not bear out such a sweeping statement. In addition gradual adoption of the changes to legislative procedure in the Commons, through the modernisation programme,[162] may make some of these practices and 'precedents' less relevant to contemporary situations. A good example of this is the widespread adoption of the more consensual 'programme motion' as a means of timetabling rather than the more draconian (at least in perception) guillotine motion.

There has been some comment about the direct involvement or otherwise of the Prime Minister in the Parliamentary proceedings related to this Bill. The then Prime Minister, Harold Wilson, opened the debate on the second reading of the *Parliament (No. 2) Bill* in 1969, the last significant government attempt at legislating for Lords reform. Harold Wilson explained why he was introducing the bill personally:[163]

> It is in accordance with precedent, Mr Speaker, that any major legislative proposals involving major constitutional change, reform of our Parliamentary system, the constitution and powers of another place, should be presented to the House by the Prime Minister of the day. That this is a major constitutional measure cannot be gainsaid. In terms of the powers of another place, it continues the reforms of the Parliament Acts of 1911 and 1949, with the major new provision designed to end the Lords' power to veto absolutely subordinate legislation. But it also, unlike those two Measures, provides for very major changes in the composition of the House of Lords.

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[162] See generally, Research Paper 97/107

[163] HC Deb vol 777 c 45, 3.2.69. Asquith opened the 4th and final day of the second reading debate on the *Parliament Bill 1911* on 2 March 1911 (HC Deb vol 22 cc 581ff). Attlee closed the 2nd and final day of the second reading debate on the *Parliament Bill 1947-48* (HC Deb vol 444 cc 309-18, 11.11.47), but did not appear to participate substantively in the second reading debates of its successors in the 1948 and 1948-49 sessions. As each of these bills was but one aspect of a protracted political and Parliamentary battle over Lords reform, each of which in the Asquith, Attlee and Wilson eras was quite distinct, simple application of 'precedent' is not always applicable. Macmillan, for example, did not participate substantively in the second reading debates on the *Life Peerages Bill 1957-58* or the *Peerage Bill 1962-63*. Generally, the Leader of the House and/or Home Secretary are closely involved in Commons proceedings of Lords reform bills.

The Opposition have acknowledged that it is legitimate for the Government to seek enactment of their manifesto pledges, and have stated that they will abide by the terms of the Salisbury Convention, and so will not oppose the principle of the Bill at second or third reading in the Lords. However they have made it clear that they will oppose the Bill, and do not discount the possibility that that the Government may be in a position where they would have to consider resort to the *Parliament Acts* in order to ensure the measure's passage.[164]

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Appendix: The composition of the House of Lords (by Richard Cracknell, Social and General Statistics Section)

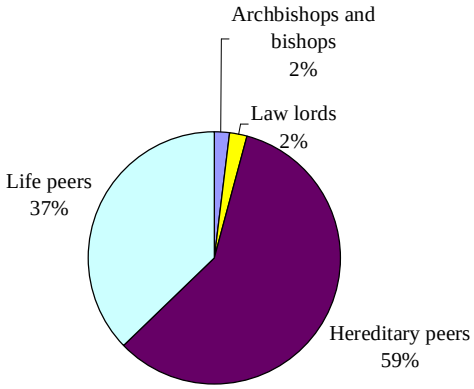
The following tables and charts provide an analysis of the current membership of the House of Lords.[165] They update the main tables and charts in *Research Paper 98/104* and are largely consistent with those in the Government's White Paper *Modernising Parliament: Reforming the House of Lords*.[166] Throughout this Appendix the categorisation of peers is consistent with that used by the House of Lords Information Office.

Table 1: Composition of the House of Lords by peerage type
4 January 1999

	All	of which: Women
Hereditary peers	759	16
Life peers	482	87
Archbishops and bishops	26	-
Law lords	28	-
Total[(a)]	1,295	103

(a) All potential members of the House of Lords. Includes peers without Writs of Summons (67) or on leave of absence (63)

Chart 1: Composition of House of Lords by peerage type
4 January 1999



[165] Source: House of Lords Information Office Internet pages – http:\\www.parliament.the-stationery-office.co.uk/pa/ld/ldinfo.htm

Table 2: Composition of the House of Lords by party strength and peerage type

4 January 1999

	Life peers	Hereditary peers		Lords Spiritual	Total
		Of first creation	By succession		
Conservative	172	4	300	-	476
Labour	157	1	17	-	175
Liberal Dem	45	-	24	-	69
Cross Bench	119	4[(a)]	198	-	321
Other	10	-	88	26	124
Total[(b)]	503	9	627	26	1,165

(a) Duke of Edinburgh, Prince of Wales, Duke of York, Earl Snowdon
(b) All currently eligible to attend the House of Lords (excludes those without Writs of Summons or on leave of absence)

Chart 2: Party Strengths in House of Lords
4 January 1999

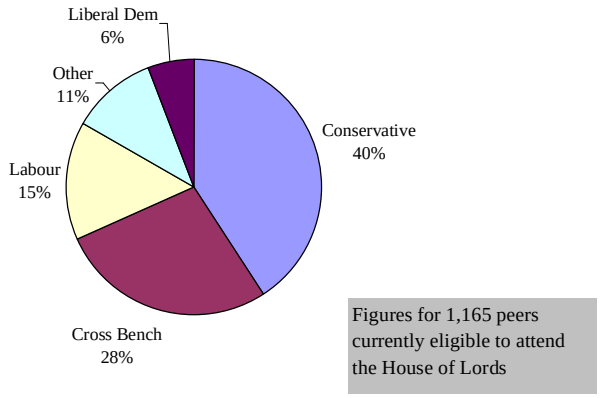
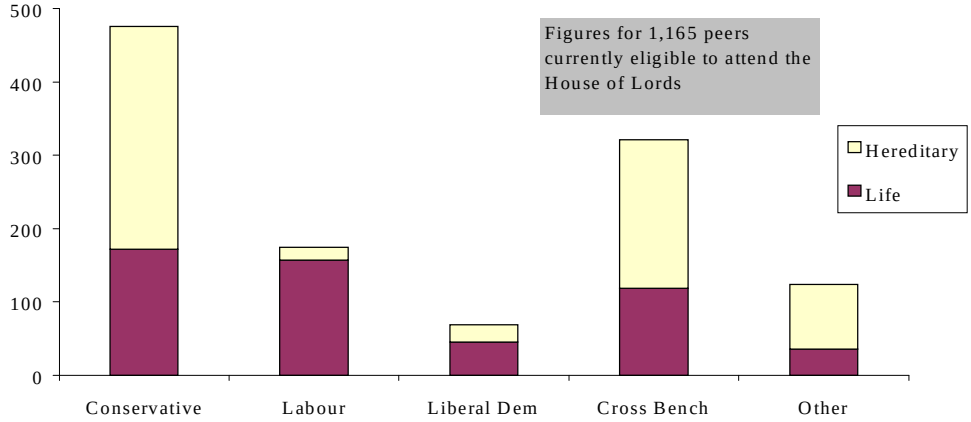


Chart 3: Party strengths by hereditary/life status
4 January 1999



Note: In Chart 3 Bishops are included in the "Other Life" category.

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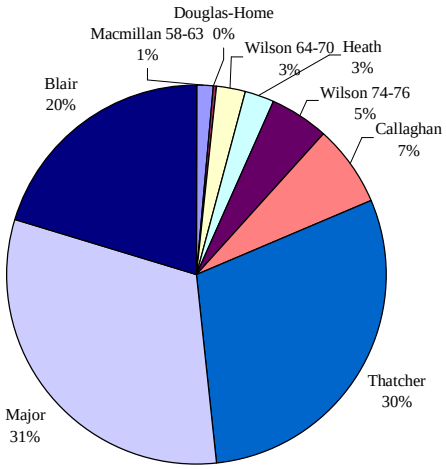
[166] Cm 4183 (as corrected)

Table 3: Surviving peers created since 1958 by Prime Minister in power at time of announcement

Position at 4 January 1999[167]

	Con	Lab	Lib/Lib Dem/SDP	Ind/XB/ Other	Total
Macmillan 1958-63	2	1	0	4	7
Douglas-Home	0	0	0	1	1
Wilson 1964-70	2	2	2	7	13
Heath	8	2	0	3	13
Wilson 1974-76	6	13	4	4	27
Callaghan	3	12	3	17	35
Thatcher	71	34	6	43	154
Major	71	38	16	38	163
Blair	21	56	14	14	105
All 1958-1998	184	158	45	131	518

Chart 4: Surviving peers created since 1958 by PM in office at time of announcement



Just over 60% of peers created since 1958 currently members of the House of Lords were announced while Mrs Thatcher or Mr Major was Prime Minister. In total, 65% of these peerage announcements have been under Conservative Prime Ministers and 35% under Labour Prime Ministers.[168]

[167] Excludes 5 new peers announced in New Year's Honours list of 31 Dec 98.

[168] Source: House of Lords Library – Figures consistent (but updated) with the methodology in House of Lords Library Note *Peerage creations 1958-1998* LLN98/005. The same caveats apply to the figures in the table and chart as to those in this note.