RESEARCH PAPER 99/6
28 JANUARY 1999

The *House of Lords Bill*: Options for 'Stage Two'

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 focuses on options for longer-term Lords reform, including the proposed Royal Commission ('stage two'). Research Paper 99/5 deals more directly with the Bill and the proposals for the ‘transitional’ House of Lords ('stage one'), 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 Research Paper 99/5 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 and Oonagh Gay

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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 99/5 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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I Options For Change

> "We had to adapt an ancient institution to new needs, fitting it to a system which presents new conditions, and seeking to overcome prejudices and antagonisms which generations of party conflict have made acute."[1]

> "We reiterate in conclusion that we are deeply conscious of the difficulties of devising the single 'right' solution for the reform of the House of Lords."[2]

> "There is a difference in approach between the consideration of what reforms could or should be made to the House of Lords, and consideration of what form of Second Chamber would be most appropriate for the United Kingdom in the years ahead."[3]

> "On summer evenings and winter afternoons, when they have nothing else to do, people discuss how to reform the House of Lords. Schemes are taken out of cupboards and drawers and dusted off, speeches are composed, pamphlets written, letters sent to the newspapers. From time to time, the whole country becomes excited. Opinion polls are taken, television programmes devised, professors and taxi drivers give their views. Occasionally legislation is introduced; it generally fails. The frenzy dies away until the next time."[4]

This present section seeks simply to outline, in very broad terms, some of the key aspects, which underpin any more detailed discussion of a reformed[5] House of Lords or replacement second chamber. A neat encapsulation of the various options for change in the Upper House is contained in Philip Norton's '4Rs': *retain, reform, replace and remove*.[6]

1. retention:

The two strands of the retention argument can be summed up as 'leave well alone' or even if it is not well, it is so insoluble as to be not worth the time and effort that change would require, which would be better spent on 'real' issues that impact on the public directly. This argument may even be put forward by those whose would openly accept that a second chamber created anew nowadays would almost certainly not resemble the present composition of the House of Lords.

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1 *Report of the Second Chamber Conference* (Bryce Report), Cd 9038, 1918, para 1

2 *The House of Lords*, Report of the Conservative Review Committee (chaired by Lord Home), March 1978, para 69

3 Mackay Commission initial report, Sept 1998, para 14

4 Janet Morgan "The House of Lords in the 1980s" *The Parliamentarian* vol LXIII, 1982, p 294

5 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

6 *The British polity*, 3rd ed, 1994, pp 299-301. For a similar approach see Lord Desai and Lord Kilmarnock, *Destiny not defeat: reforming the Lords*, Fabian discussion document 29, January 1997, examined in Research Paper 97/28

The strand of argument that the Upper House 'works', notwithstanding any theoretical flaws in its composition or functions, recognises, to some degree, the trend of pragmatic, incremental development said to be so central to the English/British constitutional tradition. Just as Parliament gradually evolved into two separate chambers, and that one of these chambers gradually evolved into the de facto primary chamber, the present House of Lords reflects the decline in the political system of the interests (aristocratic, ecclesiastical etc.) within it compared to the House which, through the medium of representative democracy, has gained greater political legitimacy and power. This is reflected in the various self-denying ordinances, especially in the legislative sphere, adopted by the House of Lords.[7]

There are people who will defend the existing hereditary principle, and argue for the retention of the hereditary element, either wholly or substantially in its present form. This is discussed further in the section IV B of the comparison Research Paper 99/5.

2. reform

This option and the third option of 'replacement' are really two levels of the same case, with differences being ones of degree and, often, of semantics. Thus the need for a second chamber is accepted,[8] but changes are proposed to the composition, and sometimes the powers and functions of the second chamber. If the concept of peerage is retained as a central aspect of composition, this could indicate that the change is more akin to 'reform' rather than 'replacement'.

Conservative policy on the constitution in recent years has tended to approve of incremental change when appropriate. Thus, on Parliamentary reform, Conservatives have supported, indeed promoted, change when they believe that it has been demonstrated that it will lead to practical improvement in Parliamentary procedures and practices. Some changes, such as legislation on life peerages in 1958 and on renunciation of hereditary peerages in 1963, were made under Conservative governments. It also is fair to note that the House of Lords as an institution has often been more innovative than the Commons, from the introduction of new technology to procedural changes such as the formal scrutiny of delegated powers and the 'grand committee' process. Nevertheless the option of reform, when applied to the core issues of composition and of powers, may often encompass much wider, and potentially more controversial, changes than those just described. These more fundamental changes generally have been made during non-Conservative administrations.[9]

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7 See further, Research Paper 98/103

8 On bicameralism, see the discussion in section II of Research Paper 99/5

9 The 1958 legislation on life peerages may be regarded by some as an exception to this general point, as it opened the door to a significant rebalancing of the membership of the House

An academic analysis in favour of "moderate change" rather than "radical reform" is that of Professor Brazier, who proposed a strategy which would "continue in the gradualist tradition of limited and pragmatic reforms, ideally pursued through a Constitutional Commission and with multi-party support."[10] He calls this a policy of 'reductions' i.e. reductions of the party imbalance, the average age of life peers, the imbalance between the sexes, the over-representation of the Church of England, the scope for intervention by 'backwoodsmen'. He recognised that this policy will be criticised as being too timid. "Dreaming up schemes is a simple and agreeable pastime. But ... reform plans ought to be formulated with the realities of the political situation clearly in mind if they are to stand a reasonable chance of being implemented and of lasting."[11]

3. replacement

When a scheme proposes a second chamber which differs from the present House of Lords not only in name, but also significantly in terms of composition, powers and functions, then it can be described as a scheme for replacement of the present House of Lords. Such schemes commonly give a new second chamber titles such as Senate (the recent IPPR draft constitution simply called it the 'second chamber'), to reflect, in many cases, a break with the past, the removal of the peerage concept from issues of composition, and the new role of the House in a new constitutional settlement.[12] Composition proposals concentrate on replacing the present hereditary element, either wholly or substantially, with an elected and/or appointed element, perhaps based on regional or functional representation. Schemes for the role and function of a new second chamber tend to concentrate on strengthening the main functions of the present House of Lords described earlier in this paper - the revision of legislation, general debate of current political issues, and constitutional control over the Commons and the Government.

4. removal

There have been many proposals for outright abolition, *without replacement*, i.e. for unicameralism.[13] For a time in the 1970s and 1980s this was official Labour policy, and a major immediate priority for any incoming Labour administration. A second chamber (as with other forms of constitutional obstacles to the legal and political supremacy of Parliament) was often seen as an impediment to the enactment of truly radical legislation. Others argue that there is no distinct role for a second chamber which could not be fulfilled adequately by a reformed House of Commons. When abolition became Labour policy at the 1977 Party conference, delegates argued that, as attempts at reform had been

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10 *Constitutional reform*, 2nd ed., 1998, p 98

11 pp 101-2

12 When, during the 20 January statement in the Upper House, Lord Gifford suggested that the Royal Commission examine the name of a reformed second chamber (he supported the symbolic value of a name like 'House of Senators'), Baroness Jay of Paddington replied that, although the name issue was not in the royal commission's terms of reference, "I am sure that the noble Lord, Lord Wakeham, and his colleagues may be inspired": HL Deb vol 596 c 597, 20.1.99

13 A concept discussed in Section II of Research Paper 99/5

unsuccessful, abolition was the only alternative. In the words of John Forrester, replying to the debate on behalf of the NEC, "what we cannot mend we must now determine to end!"[14] Tony Benn described the party's policy as "an important example of disengagement from feudo-capitalist institutions and their replacement by extending the role of a democratically elected Chamber."[15]

II Peerage, aristocracy and honours

> "As individuals the peers were the greatest people; as a House the collected peers were but the second House .… The House of Peers has never been a House where the most important peers were the most important. It could not be so. The qualities which fit a man for marked eminence, in a deliberative assembly, are not hereditary, and are not coupled with great estates."
> – Walter Bagehot[16]

One factor which makes the second chamber question particularly sensitive is the inter-relation (some would say, confusion) between membership of a House of Parliament, the title and status of peerage and the conferment of honours. For example some people who may wish to contribute directly to the work of Parliament (especially, but not exclusively, those who would not wish to participate by way of elective party politics, but, say, those who would be suitable for appointment in some way) but do not approve of the honours system generally or of the practical trappings of peerage, may find themselves excluded from membership. Again, for some for whom it is thought that a life peerage is an appropriate recognition for their public service or other achievements[17], membership of a House of Parliament may an incidental, irrelevant or even undesired consequence. When peerages are awarded primarily as an honour, membership of Parliament may be regarded as 'accidental' as for those who succeed to hereditary peerages.

Such factors lead some to suggest, for example, a new name for a second Westminster chamber, as the present one may be thought not to send the appropriate signals for an integral component of a modern democratic parliament.[18] Going further, they may propose a complete break between the award of the honour of a peerage (whether hereditary or life) and membership of a second chamber. Members of such a second chamber would presumably be eligible for all other honours in generally the same basis as members of the House of Commons and other representative bodies.

[14] 1977 Conference report, p 274

[15] *Arguments for democracy*, 1981, p 222

[16] *The English constitution*, 1867, (Fontana ed., 1993, p 127)

[17] In his speech at the Charter Mark awards on 26 January, the Prime Minister said that one of the 'non-financial rewards' of public service was "esteem - from ceremonies like today's to nominations to the House of Lords": *Modernising public services*, 26.1.99

[18] In a recent press interview, Baroness Jay of Paddington was said to be 'not keen on getting rid of the House of Lords name': "The ermine has to go .." *Financial Times*, 23.1.99

The 1978 report of the Conservative Party review committee on Lords reform, chaired by Lord Home, considered this issue:[19]

> **The Conferment of Peerages as Honours**
> 59. Membership of the House of Lords carries both an honorific title and a right to take part in the proceedings of one of the two Houses of our Legislature. We believe that the honours system needs to be separated from legislative responsibilities in the Second Chamber. Such a separation would implicitly follow from the adoption of either of the last two of the options discussed above. But even if neither were to be adopted we believe the Crown should take power to bestow the title of "Lord" either for life or on a hereditary basis without necessarily giving the beneficiary the right to sit in the Upper Chamber.

Baroness Jay of Paddington, the Leader of the Lords, has in the past been quoted as expressing a preference for life peers to be known as 'MLs' - Members of the Lords - and not to have titles as such, so as to distinguish them from hereditary peers.[20]

III The Royal Commission: terms of reference and operation[21]

This section considers the role and function of the proposed Royal Commission as described in the white paper. Its possible examination of the more general constitutional reform agenda is considered in section III of the companion Research Paper 99/7.

Labour's election manifesto talked in terms of further reform being examined by a joint committee of the two Houses. However there was much discussion in Parliament and outside about the most appropriate and effective vehicle for such an investigation,[22] and at the start of the two-day Lords debate last October the Leader of the House, Baroness Jay of Paddington, announced that the Government would set up a Royal Commission. This was confirmed in this session's Queen's Speech.[23]

The white paper set out the details of the Royal Commission's task, including its terms of reference:[24]

> 22. In its election manifesto, the Government said that a Joint Committee of both Houses of Parliament would be set up to consider longer-term reform. The

19 *The House of Lords*, p 32, March 1978
20 "Discreet charm of Blair's aristocrat", *Daily Telegraph*, 8.8.98
21 For general background on royal commission as an administrative device, see Research Paper 96/22
22 See, for example, the 1996 Constitution Unit report, *Reform of the House of Lords*
23 These developments were noted in Research Paper 98/105
24 Cm 4183, p 10

Government acknowledges that those who understand how Parliament works can make a special contribution in refining the options before any legislation is introduced. But there is widespread and legitimate public interest in the question of the reform of the House of Lords. The Government wants to take full account of differing views about change to the democratic institution of Parliament. We want to make the process of examination of future reform of the Lords as open and transparent as possible. We want the process of examination and recommendation to be inclusive, and open to public involvement. We have therefore decided that the Joint Committee should be preceded by a Royal Commission which will do much of the preliminary work of examining the issues and analysing the options. We do not believe this will delay the process of considering more fundamental reforms. The Royal Commission will be meeting outside the Parliamentary process. It can, therefore, begin work while the Bill concerned with the hereditary peers is still going through Parliament, which would not have been a practical possibility for the Joint Committee.

23. The terms of reference for the Royal Commission will be:

"Having regard to the need to maintain the position of the House of Commons as the pre-eminent chamber of Parliament and taking particular account of the present nature of the constitutional settlement, including the newly devolved institutions, the impact of the Human Rights Act and developing relations with the European Union:

- to consider and make recommendations on the role and functions of a second chamber; and

- to make recommendations on the method or combination of methods of composition required to constitute a second chamber fit for that role and those functions.

- to report by 31 December 1999."

The Royal Commission will be ready to begin its work shortly.

24. The Government believes that the Royal Commission can and should complete its work within the tight deadline we have set. This will allow the Commission's recommendations to be considered by the Government and the other political parties in advance of the next general election. It is for the Royal Commission itself to arrange its own programme of work. We wish it to consider all the options for reform, consistent with its terms of reference, without advance prescription.

25. The Government has itself considered the issues involved, and the final chapters of this White Paper detail some of this consideration.

The Leader of the Lords believed that the Royal Commission’s terms of reference “are deliberately non-prescriptive. They are intended to stimulate public debate as well as giving the Royal Commission its remit. The Government have not indicated their own preference in the white paper. However the two final chapters of the white paper set out a number of issues which the Government think the Royal Commission will find it useful to address."[25] Baroness Jay confirmed that "composition of the membership of a reformed House of Lords is not related to the composition of the membership of the other place at all."[26] She also explained, in her statement, that one reason for the Royal Commission's relatively short timetable was that "this debate has been taking place for most of this century. There is no need to undertake extensive gathering of evidence before any work can be done on the evaluation of the issues. It is analysis and judgment which are most important."[27]

Margaret Beckett indicated during exchanges on 20 January that the Government itself would not present evidence to the royal commission, although the political parties may well do so.[28] Ministers indeed have been very careful not to be drawn into giving any indications of the Government preferences for the outcome of the stage two deliberations.[29] As noted in the discussion in section IV.B of the companion Research Paper 99/5, the Government say that they have adopted a staged process for Lords reform, partly to avoid the problems which befell earlier 'big bang' attempts at reform. To this end ministers appear reluctant to discuss any further at present the merits of the various options they themselves have presented in the white paper.[30]

Lord Wakeham was quoted in a Downing Street press release on his appointment: "I agree with the Government that there should be proper examination of all the issues before further reform. I very much hope we can reach a consensus on the role and composition of the House of Lords in the future." In an intervention during the Lords statement he said that, in his view, "the terms of reference of the Royal Commission are sufficiently wide to allow us to look at these issues in the round."[31]

It may be significant that that the Royal Commission's terms of reference relate to a 'second chamber' and nowhere do they use the phrase 'House of Lords', although the white paper, when discussing 'stage two' longer term reform, uses both terms almost interchangeably. It may be that the Royal Commission will feel able to examine reform options which tend more towards (to use the terminology discussed earlier in this Paper) 'replacement' rather than 'reform' of the House of Lords. The first stage reform envisaged in the present Bill appears clearly to be a reform, albeit an extremely

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25 *op cit*, c 585

26 cc 596-7

27 c 585

28 HC Deb vol 323 c 915, 20.1.99

29 although the white paper does contain some indications of the Government's own preferences, such as the following on methods of composition, which appears to be ruling out novel suggestions of random selection by lottery and the like: "The Government's own view is that the best solution is likely to be found among the more conventional options of nomination and election": para 8.6, p 43

30 See for example the Leader of the Commons' replies to Robert Maclennan and to Donald Anderson on 20 January, *op cit*, cc 914, 917.

31 *op cit*, c 593

significant one, of the present House, and can be regarded as part of a continuous evolution of that House of Parliament. This evolutionary approach could be said to have been maintained in essence if any 'stage two' reform leaves a House of Lords in some recognisable form, even with changes in its composition, powers and functions.

However if the Royal Commission were to adopt a broad (and perhaps literal) interpretation of its terms of reference, and regard themselves as being presented with a 'clean slate' upon which they can create a totally new second chamber from first principles, what may be recommended may well be regarded as a break from the evolutionary development of the House of Lords, and the establishment of a distinct second House of Parliament. If such a radical option is pursued, it is unlikely to retain the title 'House of Lords' or the trappings of peerage at all.[32]

The deliberate creation of a new form of second chamber in something like the way described may well be more than just symbolically different from a 'reform' of the present (or transitional) House of Lords. It could generate, for example, an expectation that its role and function in Parliament and in the political system generally is to be substantively different from that of the House of Lords. In particular this could be the catalyst for a redefinition of the relationship between the two Houses of the Westminster Parliament, notwithstanding the explicit requirement in the Royal Commission's remit[33] for the maintenance of the pre-eminent position of the House of Commons.[34]

If the Royal Commission chooses not to adopt such a radical approach, and undertakes an examination of the existing House of Lords' composition, role, functions and powers[35] with a view to their improvement, this could still lead to some redefinition of the place of the second chamber in the Parliamentary and political system of the UK. Much could revolve around an examination of the House's powers. The 1997 Labour manifesto stated that "the legislative powers of the House will remain unaltered", and it is not entirely clear whether this was meant to be applicable just to the 'stage one' period[36] or to a fully reformed House. Mrs Beckett said on 20 January, in response to a question from Robert

[32] One indicator of a more 'involved' House would be to have enhanced financial assistance, such as salaries and office allowances for Members (and any consequential increases in House staffing and costs). In a recent interview, Baroness Jay of Paddington was quoted as supporting such increased support: "If you want good government you have to pay for it" ("The ermine has to go ..", *Financial Times*, 23.1.99)

[33] and in ministerial pronouncements

[34] On the other hand, the 1707 Union legislation demonstrates that express statutory statements of a new constitutional situation – the replacement of the separate English and Scottish Parliament by a totally new parliament of Great Britain – do not necessarily lead to an equivalent change of political perception in practice.

[35] although the terms of reference do not mention 'powers' as such, Margaret Beckett said, during exchanges on 20 January, that that aspect would also be within the Royal Commission's remit: HC Deb vol 323 cc 915-6

[36] The white paper said in its chapter on the transitional House: "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": para 6.4, p 31

Sheldon about a more legitimate House feeling able to exercise its powers more freely, that "we do not propose to change the de facto powers that currently exist, but we have made it plain … that the royal commission and, indeed, the House of Commons will have to consider what the balance of power should be."[37]

The white paper recognised the relationship between composition and legitimacy, and through that, the relationship between composition and powers:

> 25. The powers of the House of Lords, as normally exercised in practice observing the conventions, have most often produced a workable relationship between the two Houses of Parliament. It might be possible to replicate this situation with the reformed second chamber, perhaps by institutionalising the understandings under which the present House of Lords operates; leaving the powers intact but restricting the circumstances in which they might be used.
>
> 26. A better approach might be to reduce the theoretically available powers, recognising that they might as a consequence be used more frequently. Areas where the powers of the second chamber might be looked at include:
>
> - the length of time the Lords should be able to delay legislation approved by the House of Commons;
> - arrangements to give government Bills introduced first into the second chamber the same protection as those introduced first into the House of Commons, so removing an artificial restraint on the management of Parliamentary business;
> - any special procedures where the second chamber wishes to insist on amendments which have been considered and rejected by the House of Commons;
> - any scope for formal conciliation arrangements between the two Houses, rather than the somewhat adversarial shuttle of business which takes place at present;
> - the second chamber's powers over secondary legislation, in particular whether a power of delay should be substituted for the present power of rejection.

It should be borne in mind that the conclusions and recommendations of the Royal Commission, whatever they may be,[38] will be subject to consideration by the government, but also, to some extent at least, to examination by members of both Houses through the proposed joint committee. Some, if not most, of the proposals may also require

[37] *op cit*, c 916

[38] and, like the Kilbrandon Royal Commission on the Constitution which reported in 1973, it may well contain a significant minority report

legislative enactment.[39] This process may, for example, have the effect of 'filtering out' any proposals regarded by those involved as too radical or impractical, or too timid.

IV Electoral Systems for a second chamber

> "The House of Lords is the most eminent existing example of representation without election" -- *Benjamin Disraeli, 1835*[40]

A. Introduction

A key aspect of the future composition and function of the House of Lords will be the electoral system chosen to make up its membership. A number of questions arise which go beyond the technicalities of individual voting systems. In particular, the relationship between the Lords and the new devolved institutions has been under scrutiny, and the outcome of any forthcoming referendum on electoral reform for the Commons may well be relevant in the longer term. Whether or not a new electoral system is chosen for the Commons, arguments for complementary systems for Commons and Lords are strong. Where both Houses are elected on the same system, there may be difficulties in asserting the supremacy of the Commons, which the Government wish to retain,[41] since both Houses might claim electoral legitimacy.

A related question is the possibility of indirect elections, where elected members of one body choose representatives to sit on another body. These arrangements are common in local government, where joint boards, such as police authorities, are regulated by statute and the proportionality (political balance) rules of the *Local Government and Planning Act 1989* apply, to prevent the majority political party from nominating representatives from one political party only. (It is commonly councillors themselves who sit on such joint boards). The German second chamber, the Bundesrat, comprises representatives of the *governments* of the Lander and this arrangement formally guarantees Lander participation in the federal legislative process. The British-Irish Council will contain representatives of the administrations in Scotland, Wales and Northern Ireland, among others, but will have a consultative, rather than legislative or executive role.[42]

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39 The proposed timescale set out in the white paper suggests that such legislation could come before the two Houses near the end of the present Parliament, a similar stage as in 1969 with the unsuccessful *Parliament (No.2) Bill*. 'Stage two' may also be subject to a referendum or be incorporated in a general election manifesto

40 "A Vindication of the English constitution", in F. Hitchman (ed.), *Lord Beaconsfield on the constitution,* p.136

41 See the terms of reference for the Royal Commission set out para 2.23 of the White Paper Cm 4183

42 See Research Paper 98/76 *The Northern Ireland Bill: Implementing the Belfast Agreement*

B. Labour policy

The Labour manifesto for the 1992 general election contained the following section on the House of Lords:

> Further constitutional reforms will include those leading to the replacement of the House of Lords with a new elected second chamber which will have the power to delay, for the lifetime of a Parliament, change to designated legislation reducing individual or constitutional rights.

Following the election, policy on the House of Lords was reconsidered, as explained in John Smith's 1993 Charter 88 speech:[43]

> I share the widespread desire in the Labour Party to see the House of Lords replaced with an elected Second Chamber. I can see no possible merit in the continuance of a system which allows people to participate in the passing of legislation on the basis of a hereditary principle dating from the Middle Ages.
>
> The future of the House of Lords is one of the issues being considered by the Labour Party's Constitutional Committee chaired by Tony Blair and Richard Rosser. This was set up last autumn and it will report to our annual conference in October this year with what I hope will be a new and radical constitutional agenda for the twenty-first century.

The party's proposals were published later that year:[44]

> We do not believe there is any justifiable case for the Second Chamber in its present form. The sight of hereditary Tory peers wheeled out to vote through controversial legislation when entirely immune from electoral account, is a constitutional outrage. Of the 775 hereditary peers only 13 take the Labour whip. We believe the House of Lords in its present form should be abolished.
>
> Nevertheless, we still believe that there is a powerful case for a bicameral rather than unicameral legislature. The House of Lords, even in its current form, is a valuable revising chamber, its debates are often of high quality precisely because of the different experience of its members, and a second chamber is a necessary and important check on the power of the first. But it must be made democratically acceptable. We therefore propose replacing the House of Lords with an elected second chamber.
>
> As a first step, the hereditary peers should not be able to sit and vote in the House of Lords. We should then begin the process of introducing proper democratic elections

43 *A citizens' democracy*, speech by John Smith, 1.3.93, transcript, p 20
44 *A new agenda for democracy: Labour's proposals for constitutional reform*, 1993, p 35

More recently, direct reference to an elected second chamber has not been part of the party's policy statements, where words like 'democratic' and 'representative' tend to be used. However, Lord Richard, the former Leader of the Lords, noted[45]: 'I am heartened by the words of the Prime Minister in a Radio 4 interview on 30th July 1998 when he declared, "There are two stages to reform: one is getting rid of the position of the hereditary peers, and secondly, there is the longer-term reform for a more democratically elected second Chamber. I think it is important that we do both things". The important words are, in this context, "democratically elected".

The Labour manifesto for 1997 stated that the removal of the rights of hereditary peers to vote and sit in the Lords would be a 'first stage in a process of reform to make the House of Lords more democratic and representative', with no express mention of elections as a method of composition.

There are a variety of electoral methods employed in other bicameral legislatures, as summarised in an extract from a recent study:[46]

> Thus, hereditary membership in the House of Lords is now supplemented by lifetime appointments. And many other systems retain fully or partially appointed houses: Antigua, the Bahamas, Barbados, Belgium, Belize, Canada, Germany, Grenada, Ireland, Jamaica, Jordan, Madagascar, Malaysia, the Russian Federation, Swaziland, Thailand, and Trinidad and Tobago. Upper houses in Chile, Croatia, India, and Italy also include a nominal number of presidential appointees. Appointments may be designated by the monarchy (Jordan, Malaysia, and Thailand), but more commonly, members are designated by an elected government. In Germany and the Russian Federation (the 1993 constitution), regional governments appoint members to the upper house to represent regional interests. In Belgium, one-seventh of the members are selected by the senators themselves. More frequently, national governments appoint individuals to serve in the upper house. Selection may be based on outstanding performance or service to the government or to a particular profession, recalling the Roman model of wise legislators seasoned by experience and age.
>
> Nonetheless, in democratic systems, even this method may be viewed as illegitimate because the people, as citizens, are perceived as the repository of wisdom. Hence, the selection of upper house members is often delegated to the citizenry either indirectly or directly. Indirect elections are fairly common and include such countries as Austria, Belgium, Comoros, the Congo, France, Haiti, India, Ireland, Madagascar, Mauritania, the Netherlands, Pakistan, South Africa, Spain, and Swaziland. In most cases, local or provincial governments, elected directly by the citizens, elect upper house members. In other cases, such as France, an electoral college, formed by local and provincial councils, selects senators.

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[45] HL Deb vol 593 14.10.98 c 948

[46] *Bicameralism* 1997 by George Tsebelis and Jeannette Money pp 47-53 extracts. A table sets out methods of election for individual second chambers

The commentator John Osmond has noted, in a pamphlet for the Fabian Society[47] that several states have upper chambers connected with regional assemblies:

> *Methods of Election to Upper Chambers*, a survey undertaken for the Electoral Reform Society in March 1996, examined the constitutional structures of 26 democracies. Eight of them have unicameral chambers, and so do not count for the purposes of this comparison. Of the remaining 18, nine have Upper Chambers whose representatives are drawn from elected regional assemblies of one kind or another - Argentina, Austria, Canada, Germany, India, Italy, the Netherlands, South Africa and Switzerland. Three have Upper Chambers which are at least partially representative of regional assemblies - Belgium, France, and Spain. The United States Senate has national elections, but each state has equal representation regardless of size, thereby giving a disproportionate weighting to the country's smaller federal states. The Upper House of the Russian Federation is presently directly elected by simple majority, but is moving towards a position where its deputies will be appointed by regional governments.

Nevertheless, it is common to use direct elections for the upper chamber and Tsebelis and Money note that this is the most frequently used method of election. A report by the Irish All Party Oireachtas Committee on the Constitution has a table on method of selection by type of state (unitary or federal) which gives data on 58 second chambers.[48]

C. History

The question of a new electoral system for the Lords is not new; although the Royal Commission on Electoral Systems of 1909-10 rejected the Single Transferable Vote as unsuitable for the Commons it noted that the 'system shows at its best in elections where the comparative merits of candidates as individuals are at issue. Thus there would be much to be said in its favour as a method for the constitution of an elected Single Chamber'[49] (para 135). The Commission did not make a specific recommendation however, and the 1918 Bryce Commission proposals[50] were not adopted. In the post-war period the 1948 Conference of Party Leaders did not reach agreement on composition or powers. However the Agreed Statement noted that had a broader agreement emerged, the principle of the complementary role of the Lords would have been considered preferable

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47 *Reforming the Lords and changing Britain* August 1998 John Osmond Fabian Society Pamphlet no 587. The work referred to was compiled for the Electoral Reform Society and has not been published by them

48 *The All-Party Oireachtas Committee on the Constitution: Second Progress Report Senead Eireann* April 1997. See Annexe 1

49 *Report of the Royal Commission on Electoral Systems* 1910 Cd 5163 The background to the commission is considered in Research Paper 98/112 *Voting Systems: The Jenkins Report*

50 see below

to the 'establishment of a Second Chamber of some completely new type based on some system of election'. (para 5).[51]

Following the collapse of the Wilson government's reform plan in 1969 the Labour party expressed more interest in the option of outright abolition of the Lords. However, the Conservatives examined options for a continuing second chamber. The Report of the Conservative Review Committee in 1978, headed by Lord Home of the Hirsel, recommended a house of 400 members, two thirds of which would be elected by 'proportional representation'. The report did not specify the type of PR, noting that either the regional list system or Single Transferable Vote might be acceptable, depending on developments in elections to the European Parliament[52] but argued that: "there is a strong case for a proportional voting system for the election of what is essentially a controlling and checking body to which the Government of the day would not be constitutionally responsible" (para 30). It considered that members should be elected for a fixed term with a proportion retiring at regular intervals - such as a six year term with one third retiring every two years. The conclusions are set out as follows:

> 30. In such a situation only a Second Chamber with very strong moral authority could be expected to provide an effective constitutional check. In the present climate of opinion that moral authority can only come from the direct election of its members. However, if it were not merely to replicate in the Second Chamber the composition of the First, the method of election would obviously have to be different from that of the Commons. We assume, therefore, that the Second Chamber would have to be elected by some system of proportional representation. In effect we would have a House of Commons elected as at present, with a Government, as at present, normally formed by the Party that has obtained the largest number of seats as a result of the General Election. The legislative power of that Government, however, would be subject to check by a Second Chamber elected by proportional representation in which as a consequence it is unlikely that the party in office would have an overall majority. We also note in this connection that whilst the traditional relative majority voting system is widely held to be the most effective for the choice of Government, there is a strong case for a proportional voting system for the election of what is essentially a controlling and checking body to which the Government of the day would not be constitutionally responsible.
>
> 31 The members of such a second Chamber should preferably be elected for a fixed term with a proportion retiring at regular intervals, for example a six year term with one third retiring every two years, or a nine year term with one third retiring every three years. We would envisage a Second Chamber of this type having a membership of around 400. We do not, however, propose to put forward any more precise suggestions for the method of election under this approach,

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51 *Parliament Bill 1947 Agreed Statement on Conclusion of Conference of Party Leaders February-April 1948* May 1948 Cmd 7380

52 For further details about the type of electoral system eventually chosen for the first direct election to the European Parliament in 1979 see Research Paper 98/102 *European Parliamentary Elections Bill*

> since what scheme might be practicable and acceptable must depend very much on developments currently under debate. For example, if some form of the regional list system were later adopted for direct elections to the European Assembly, it would seem sensible to use the same system in elections for the Second Chamber; if, however, the relative majority system in single member constituencies were continued for the 81 European seats, a different system of proportional representation, perhaps the Single Transferable Vote, returning four to five members to the Second Chamber from each Euro-constituency might be preferable. Similarly developments in the direction of devolution and regional assemblies may suggest a different constituency basis for elections to the Second Chamber which would make it possible to build into the Second Chamber a distinct element of regional representation. In any event it would be sensible to try to combine elections to the Second Chamber with at least some other elections in order to avoid voters having to go too often to the polls. We do not, however, consider that it would be wise to combine elections to the Second Chamber with elections to the Commons, since this arrangement would be the one best calculated to provoke conflict between both Houses about the degree of authority which each could claim after such a double election.

It expressed concern over the possibility of deadlock between the Houses should the Lords be an entirely elected chamber (para 36) and considered that the best hope of constructive reform would be a chamber consisting partly of an appointed and partly of an elected element. It did not favour indirect elections, on the basis that this form of election, on local government precedents, had not been well-received in the UK (para 43)[53]. The 1999 white paper made reference to these proposals in para 8.33, while noting that if two thirds of the chamber were elected this might challenge the supremacy of the Commons.

As part of the Labour party debate on different electoral systems which began in the late 1980s, the Plant report[54] produced proposals appropriate for a deliberative chamber which would represent the regional interests of Britain. It expected that a second chamber would emerge which would be secondary to the House of Commons. It considered that there was a strong case for arguing that this chamber should be elected by a system different from the Commons, in order to prevent rivalry and to enable it to carry out a different range of functions. It rejected the Single Transferable Vote (STV) as too complex and recommended a regional list system designed for a chamber of around 320-330. Plant acknowledged objections on the basis that lists would increase political patronage but pointed out that it would be possible for voters to reorder the list, using the example of the ballot paper for the Australian Senate, where the electorate can either tick the party box or

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53 see for example, comments by Edward Leigh in committee stage of the *Greater London Authority Bill* about the possibility of nominating representatives from the London boroughs to the London Assembly as an example of the concerns: 'it would not be the leader of the council who would be nominated to serve on the new body- he would be far too busy;; it would not even be the high flyers - the chairmen of the committees; it would be the semi-retired, older members -Alderman Pompous or Councillor Hack- who would be put on the new body' (HC Deb vol 323 19.1.99 c 770)

54 *Report of the working party on electoral systems* Labour Party 1993

place a preference against an individual party candidate. Another possibility would be a legal requirement on parties to draw up lists on a democratic basis. The report noted the possibility of allowing an element of nominated representatives but considered that: "this would involve a continuance of patronage; and it would not seem consistent with the democratic objective of securing an elected Second Chamber" (p 33).

The initial report of the Mackay Commission set up by the Conservative party in 1998[55] considered issues such as timing of elections and length of tenure, without coming to specific conclusions.[56]

> 42. If there are to be elections, whether direct or indirect, to the Second Chamber, it will be necessary to decide whether these shall be held:
>
> (a) at fixed intervals;
> (b) as part of a general election;
> (c) separate from a general election, but subject to a power in the Prime Minister (or some other authority) to recommend the dissolution of the Second Chamber so that elections to it may be held;
> (d) so that all seats in the Second Chamber are contested simultaneously, or a proportion at a time;
>
> or by a combination of some of the above.
>
> 43. In addition, it will be necessary to decide whether members of an elected Second Chamber should be eligible to serve for more than one term, or for a limited number of terms.
>
> 44. Members of a nominated or appointed Second Chamber might:
>
> (a) serve for life;
> (b) be subject to a retirement age;
> (c) serve a fixed term;
> (d) be capable of having their term renewed
>
> 45. Consideration should also be given to the minimum age of members of the Second Chamber. It might be considered that a relatively high minimum age should be set, to encourage a membership of considerable experience; or, alternatively, that the age should be the same as that at which people become eligible to vote.
>
> 46 Peers - unless they disclaim their peerages soon after their succession - cannot thereafter renounce their seat in the House of Lords. Members of a new

[55] *Initial Report of the Constitutional Commission to consider options for a second chamber* September 1998 The Commission was established as an independent rather than a party inquiry

[56] *Constitutional Commission: The Future of the Lords-Options for Change* 17.9.98

> Second Chamber might be enabled to retire voluntarily from their seat in the Chamber

The Mackay Commission invited written evidence and is expected to report in March.

D. Length of term

An important consideration is the tenure of office for members of a new second chamber. The white paper noted that the advantage of long, and non-renewable terms of office was that members could not, by their actions, affect their continued membership. But this type of tenure would 'be difficult to reconcile with a number of the possible methods of nomination (and indeed of election)' (para 8.14). Nominations on a functional basis would unlikely to be for life, since, for example, members associated with the medical or educational profession would presumably need to stand down once retired from their profession or from any post which brought with it membership of the second chamber (akin to the present position of the Lords Spiritual). Similar problems arise with direct or indirect elections: a member 'representing' a region would presumably need to have continued association with that area. On the other hand, there are no 'term limits' for the Commons, or assemblies or local authorities and its imposition in the Lords would be a constitutional innovation. Another aspect is the question of the timing of elections considered in an extract from the independent Constitution Unit's publication *Reform of the House of Lords*[57]:

> **The Tenure of Office and Timing of Elections**
>
> 209 One obvious mechanism for distinguishing between the two Houses is the tenure of office (although this would depend on whether one or both chambers adopted fixed terms). But this raises problems of its own, in that the comparative legitimacy of the two Houses will depend on which has been most recently elected. Assuming that different terms of office are required and that there is no change in the current 4-5 year tenure of MPs, it is likely that the members of an elected second chamber will have longer terms of office: probably between 6 and 9 years. Experience of countries with short term membership of legislative chambers, like USA (where the House of Representatives is subject to re-election every two years) suggests that much of the time is spent in campaigning and canvassing, and the insecurity of office is not conducive to mature, reflective politics. Second chambers with terms of six years or more often stagger the elections of individual members - with one third or one half retiring every 2 or 3 years. This mechanism serves to keep fresh the accountability of the chamber, without creating a direct challenge that would result from elections of the whole House mid-way through the term of the House of Commons. The Liberal Democrats propose terms of nine years. with biennial elections of one third of all members in each region or nation.

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[57] 1996 p 69

> 210 The exact timing of the election will also depend on the desirability of ensuring a high turnout. Turnouts for general elections in the UK are usually around 75%, whereas turnouts for local government elections and European Parliament elections are no higher than 40%. It would be advisable to combine elections to the second chamber with other elections in order to maximise the turnout but they should not be held close to elections to the House of Commons, in order to guard against the possibility of differing results raising questions about the relative legitimacy of the different electoral systems used, and thus the legitimacy of the two chambers. If the elections were contemporaneous, the campaign for the House of Lords would also inevitably be subordinate to that for the Commons. Fixed terms for both Houses would assist in the smooth operation of these arrangements, as the possibility otherwise exists that elections to both Houses would coincide - but the prospect of early dissolution of the House of Commons means that this cannot anyway be entirely ruled out.

E. 'Regional' Representation[58]

There has been continuing interest in the question of the Lords fulfilling the role of representing regional interests. The 1918 Bryce Conference[59] proposed a system of indirect election whereby MPs, grouped into 13 territorial areas, would select representatives through the use of STV. The possibility of selecting sitting MPs to serve in the Second Chamber was not ruled out. These representatives would hold seats in a new Second Chamber, with one-third retiring every four years.

The Liberal Democrats have for some years suggested that a new Senate could represent regional interests. Their most recent policy statement declared: 'There should be a predominantly elected element in the Senate. Elected membership should be drawn from the nations and regions, which should have a direct voice in Parliament to protect their positions against centralisation'.[60]

In an *On The Record* interview Jack Straw raised the question of indirectly elected representatives from the devolved assemblies as a possible option.[61] No details are yet available on the method of indirect elections which might be considered. The time pressures on members of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly might well preclude their direct involvement in the

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58 for a more general treatment of the issue of the possible role of a second chamber in the new constitutional era of devolution/regionalism, see Research Paper 99/7

59 *Conference on the Reform of the Second Chamber Letter from Viscount Bryce to the Prime Minister* Cd 1918

60 *Moving Ahead: Towards a Citizens' Britain:* Policy Review Report to Conference August 1998 para 3.3.4

61 *On the Record* 17.1.99 Interview with Jack Straw, Home Secretary

Lords.[62] A Constitution Unit report of January 1998[63] suggested that indirectly elected membership in the UK might be more difficult than in France or Germany since devolution is non-uniform. It suggested that 'representatives could be indirectly elected from Scotland, Wales and any other parts of the country which have elected assemblies, and appointed from the remainder' (p11). In his Fabian Society pamphlet John Osmond, director of the Institute for Welsh Affairs, has argued for making the Lords representative of the regions and nations of Britain and noted that the importance of direct vs. indirect elections as a key issue:

> (i) Direct or Indirect election ?
>
> In federal systems and in unitary states around the world where the Upper House represents the provinces or regions, three methods of representation occur: direct election (Australia, United States, Italy); indirect election (Belgium, Netherlands); and appointment (Canada, Germany). Experience in these countries suggests that the last two methods may provide for more effective representation of the regional assemblies or their governments with the institutions of central government. This is clearly the case, for example, with the German Bundesrat, but not the case with the Australian Senate whose role within the federation is generally sidelined. When networking between institutional structures within a democratic system is required it seems to be the case that direct democracy does not work as effectively as indirect democracy.
>
> This question of whether a reformed House of Lords should be directly or indirectly elected or appointed is likely to emerge as a key issue. Should the Upper Chamber represent the people of the nations and regions (direct election); or the regional assemblies (indirect election); or the regional governments (appointment) ? The answer depends on the extent to which the reformed Upper House should be a piece of interlocking machinery and a forum for political brokerage, or a chamber to represent a regional voice but not necessarily regional governments. A number of other factors should also be taken into account:
>
> Direct elections would enhance the legitimacy of the Upper Chamber. On the other hand, it might entrench too strong a competitive role for the Chamber vis à vis the House of Commons to sit comfortably with British tradition, which has always regarded the Commons as paramount.
>
> Indirect elections would enhance the role and standing of the regional elected bodies.
>
> Indirect elections would answer the charge of those who take the view that direct elections would overburden the electorate who would already be voting in

[62] see comments by Alex Salmond in response to the white paper statement: 'what self-respecting, elected full-time member of the Scottish Parliament would consider coming down to London on day trips if the second chamber were still nominated and still full of 500 cronies?' HC Deb vol 323 20.1.99 c 20

[63] *Reforming the Lords: A Step by Step Guide*, Constitution Unit, January 1998

> elections for local authorities, regional and national assemblies, the House of Commons, and the European Parliament.
>
> (ii) Weighting of representation
>
> In considering this question the following factors should be taken into account:
>
> There is a case for giving each of the English regions the same representation regardless of their varying population size. As with the representation of the States in the Senate of the United States this would acknowledge the distinctive cultural identity and contribution of the various regions. Such an approach would further distinguish the reformed Upper Chamber from the House of Commons in a beneficial way
>
> This is equally a case for giving the nations of Wales and Scotland, and also Northern Ireland, a weighted representation in order to recognise their distinctive national status. This would help sustain the unity of the system overall.

The question of weighting may prove to be controversial. The overwhelming predominance of England in population terms makes a US style Senate arrangement difficult to justify, especially to English voters. On the other hand, voters in Scotland, Wales and Northern Ireland may feel that equation with English 'regions' would be inappropriate.

There is some uncertainty about what representatives from the regions could be said to be representing. There would be limited scope for the type of role carried out by constituency MPs and the new devolved institutions would presumably wish to lobby directly on issues of concern. Regional representatives may not therefore have a clear role to fulfil. There is further scope for confusion between the role of representing the devolved executive, the devolved assembly or the devolved geographic area. The fact that a representative comes from a defined area may not make him or her a delegate for that area.

The full-time nature of the work to be carried out by Members of the Scottish Parliament and Northern Ireland and Welsh Assembly might preclude full participation in the reformed Lords. One possibility is that list members[64] (who will not have constituency responsibilities, in the traditional sense) might be considered suitable representatives for assemblies and bodies (such as a Second Chamber) which will have a role in developing interrelationships between devolved institutions.

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[64] The method of election to the Scottish Parliament and the National Assembly of Wales is the Additional Member System. A proportion of members will be elected on a first past the post basis in constituencies, but others will be elected by a system of regional party lists. Members of the Northern Ireland Assembly are elected through the Single Transferable Vote and there is no such difference between list and constituency members there. For background see Research Paper 98/113 *Voting Systems: The Government Proposals (3rd edition)*

F. New methods of election for both Commons and Lords[65]

The interaction of Lords reform with possible Commons reform has also prompted much speculation. The Constitution Unit report *Reform of the House of Lords* (1996) considered some of the issues and difficulties involved in transforming a nominated chamber into an electoral chamber such as fixing the term of members, the choice between direct and indirect elections. It concluded: 'The decisions about the system for the House of Lords cannot, in any case, be taken prior to agreement on the electoral system for the House of Commons. They may be taken simultaneously, if one body is charged with the decision-making process; but if a referendum on the House of Commons system is held, that must precede decisions about the electoral system for the House of Lords.' (p206). It also considered that it would be 'inconceivable for any electoral system based wholly or partly on regional representation would be introduced by Westminster without consultation with the regions and nations themselves.' (para 208)

A report in the *Herald* [66] suggested that Gordon Brown was supporting the introduction of proportional representation in the Lords, as an alternative to implementation of the Jenkins Commission proposals on 'AV plus' for the Commons[67]. The *Financial Times*[68] reported that George Foulkes, an opponent of proportional representation for the Commons, would make a personal submission to the Royal Commission arguing for indirectly elected representatives from the devolved assemblies and also for representatives directly elected by PR. The Constitution Unit have argued that, logically, the Jenkins proposals are inextricably linked with reform of the Lords, particularly since the 'whole of the UK's constitutional architecture is changing'.[69] There may be practical difficulties in settling the future composition of the Lords without a final decision on the composition of the Commons. A referendum on the Jenkins proposals is not likely before the next election, although no final decision on timing has been announced by the Government. However the Neill Committee recommendations on party funding and election expenditure also cover the holding of referendums. A summary of its referendum proposals are set out below:

> 83. In any referendum campaign there must be a fair opportunity for each side of the argument to be properly put to the voters. (p 164)

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[65] This is a key issue on the wider consideration of the relationship between the two Houses, on which see the companion Paper

[66] *Herald* 2.1.99 'Brown plays PR card to trump the Lords'

[67] for details of the Jenkins proposals see Research Paper 98/112 *Voting Systems: The Jenkins Report* 'AV plus' involves using the alternative vote to elect constituency MPs, and a list system to elect 'Top-up MPs' who would form 15-20 per cent of the Commons

[68] 20.1.99 'Wakeham to oversee reform of the Lords' George Foulkes is a junior minister in the present Government

[69] *Reforming the Lords: A step by step guide* January 1998 Constitution Unit

84. Depending on the circumstances, each side should be given equal access to an amount of core funding sufficient to enable it to mount at least a minimal campaign and to make its views widely known. (p 164)

85. The Election Commission should decide which organisations, if any, should be in receipt of core funding. (p 164)

86. A campaign organisation in receipt of core funding should be required to submit its audited accounts to the Election Commission within three months of the referendum. (p 165)

87. The core funding provided to the two sides in a UK-wide referendum should, in real terms, be not less than that provided in connection with the 1975 referendum. It should be enough, in connection with all referendums, to cover the establishment of a campaign headquarters for each side, with basic equipment and staff. (p 165)

88. Each side should also be provided with the same facilities as parliamentary candidates in general elections, namely, a free mailing of a statement of its views to every household and the free use of public premises for the holding of meetings. (p 165)

89. The government of the day in future referendums should, as a government, remain neutral and should not distribute at public expense literature, even purportedly 'factual' literature, setting out or otherwise promoting its case. (p 169)

90. Donations to campaigning individuals and organisations in referendums from one source which total £5,000 or more should be publicly disclosed in audited accounts which should be delivered to the Election Commission within three months of the holding of the referendum. (p 171)

91. Campaigning individuals and organisations other than political parties that wish to incur 'referendum expenses' of £25,000 or more, should register, like a political party, with the Election Commission. No individual or organisation not so registered may incur expenses in connection with a referendum in excess of £25,000. (p 171)

92. Campaigning individuals and organisations taking part in referendum campaigns should be restricted to the receipt of donations only from a 'permissible source'. (p 171)

93. The Election Commission should have as part of its remit keeping referendums and referendum campaigns under review and making reports and recommendations to Parliament and the Government concerning them. (p 172)

The Government have accepted the Neill recommendations (although there are indications that a government might be allowed more of a role in referendums than allowed for in the text of Neill's recommendations)[70]. The Home Office is preparing a draft bill for publication in this session. [71] As yet it is not clear what the draft bill will cover, but it may be difficult to hold a referendum before some or all of the machinery recommended by Neill is in place. In particular, the creation of an Election Commission which would oversee the conduct of referendums may involve some delay and may preclude a referendum before the next general election. But the final composition of the Lords might well have been settled by the next general election if the Royal Commission can report by the end of 1999. There have been press suggestions that a 'Democracy Day' referendum could be held, asking the electorate their views both on Commons and Lords reform. However the *Financial Times* has reported opposition from Baroness Jay to a referendum which included a question on Lords reform.[72]

G. The White Paper

Chapter 8 of the white paper dealt with longer term considerations about the composition of a reformed House of Lords and noted that a mixed system of composition came within the terms of the reference for the Royal Commission:

> 5. The Government considers that, with so many issues to be taken into account, there is no need for the Royal Commission to feel constrained to recommending a single method of determining the composition of the second chamber. It may very well be that a combination of sources is the best way of creating a body fitted for all the functions identified for it. Among overseas second chambers, several have a part nominated, part elected structure. For this reason, therefore, the terms of reference of the Royal Commission allow, as did those of the Independent Commission on the Voting System for the House of Commons, for the recommendation of a combination of proposals.

The white paper saw some advantages in a nominated House; there might be a range of representation different from the full-time politician, with a independence from political party or from government, and with specialist knowledge and experience. (para 8.15) But it noted: 'some will argue that a system which contains no element of election, even indirect election, cannot be democratic or even properly representative of society as a whole' (para 8.16). However composition determined entirely through direct election might challenge the supremacy of the Commons; using a different electoral system or

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70 Home Office PN 13.10.98 'Government Welcomes Neill Recommendations' There was a debate on the Neill Committee recommendations on 9 November 1998 HC Deb vol 319 c47-116 during which Jack Straw expressed some reservations in this area (c57) Andrew Robathan is due to present a private members' ballot bill to implement the Neill proposals on referendums. Its second reading is expected on 19 March 1999.

71 HC Deb vol 319 9.11.98 c 53

72 22.1.99 'Jay signals opposition to Lords referendum'

scheduling elections at different dates from the Commons might actually enhance conflict between the Houses, rather than reduce it (paras 8.17-21).

The white paper considered the option of an indirectly elected chamber in some detail:

> AN INDIRECTLY ELECTED CHAMBER
>
> 22. About 30 per cent of overseas second chambers are elected by indirect methods, including France, the Netherlands and South Africa. Indirect elections can be found in both unitary and federal states. The electoral college often consists of members of local authorities or regional assemblies, and may include members of the primary chamber.
>
> 23. With regard to party political members, indirect elections to the future second chamber by bodies with specific local interests could work well alongside a system of UK-wide political appointments. The United Kingdom Parliament has now passed legislation establishing the devolved institutions of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly. All are intended to begin to operate in 1999.
>
> 24. There is in addition the beginning of a process in England for a stronger voice for the regions, each of which is similar in population, or larger, than the other nations of the Union. Regional Development Agencies and voluntary regional chambers based on existing networks of local authorities are already being established. A Bill to establish a Mayor and Assembly for Greater London is passing through Parliament with the intention of holding elections in May 2000.
>
> 25. Indirect election by these bodies would have two advantages. First, it would demonstrate a direct connection between these other bodies and the central institutions at Westminster. This is a common role for second chambers to play in other countries. Second, it would mean that in many cases those selecting the members had themselves been elected. It could therefore reinforce the democratic nature of an otherwise nominated House.
>
> 26. The Royal Commission may also wish to examine whether there is a possible role which could be played by MEPs in the second chamber, through a contribution to an indirect election system. The House of Lords already plays an important role in the examination of European legislation and it may be that there are reforms which can enable it to become even more effective in this task.
>
> 27. It would be for consideration whether those representatives had to be chosen from the institutions and the MEPs which formed the electoral college. If the Commission were attracted to this basic principle it would no doubt wish to take evidence, including from the devolved institutions themselves, as to how this part of the system might operate.

The white paper summarised the advantages of elected options as conferring greater legitimacy, and representation for all parts of the country, but considered that there might be considerable difficulties in transition if an electoral system were chosen where the whole House were chosen at the same time (paras 8.28-29). The tone of the comments suggested enthusiasm for a mixed chamber:

> 33. A mixed House would combine elements of nomination and election. This solution has been advocated in the past - for example in the report prepared by the late Lord Home of the Hirsel in 1978 - and has a number of champions in the present. Lord Home's report recommended a two-thirds directly elected and one-third nominated House, and several other more recent proposals have picked this up. There is, however, nothing peculiarly compelling about that balance. Up to two-thirds elected, especially if this were to be directly elected, could in terms of relationships with the House of Commons share many of the disadvantages of a wholly elected second chamber.
>
> 34. The most important consideration in judging the balance of membership would be what combination best fulfilled the functions the second chamber was being asked to perform. It may also be that more than two methods of selecting members of the second chamber would be appropriate.
>
> 35. The advantages of the right combination of a nominated and indirectly or directly elected chamber could be significant. It would combine some of the most valued features of the present House of Lords with a democratic basis suitable for a modern legislative chamber. In particular, the continued presence of nominated members, especially those who did not identify themselves with a particular party, would ensure that the second chamber retained these specific advantages of a wholly nominated House:
>
> - Independent scrutiny. An independent contribution to the scrutiny and revision of legislation.
> - Wide range of interests. Recruitment of members of the second chamber from a wider range of interests than those who are likely to be attracted to a career in politics.
> - Expertise. Access to specialist expertise within the House itself. This could be particularly important if the scrutiny function of the second chamber were enhanced.
> - Broader representation. The ability to correct for under-representation of particular groups, including women and ethnic minorities.
> - Ex officio members. The ability to accommodate the existing ex officio membership of the House of Lords, if it were decided that no change in the relationship of the second chamber to the legal system or in the relationship of the Church of England to Parliament was desirable.
> - Distinctiveness. A body that is clearly distinctive from the House of Commons, but yet with the ability to speak with the authority of expertise when necessary.

36. A mixed second chamber would also retain these specific advantages of an elected House:

- Legitimacy. The legitimacy that comes from an electoral mandate.
- Status. A clear message about the status of members.
- Range. An automatic way of ensuring a proper geographical spread of representation.
- Age. An enhanced likelihood of getting a significant number of younger people into the second chamber.
- Two chambers. A clear commitment to a bicameral system.

37. A mixed House, therefore, allows a variety and breadth of membership, and the combination of the best features of the present House with an indubitably democratic method of selection. It enables a number of factors which are regarded as important to be accommodated in a way which neither a fully elected nor a wholly nominated House would do.

There was no final conclusion or preferred option set out in the white paper. The Royal Commission is likely to address all these issues in some detail. A key issue will be the nature of representation in a second chamber. Composition and functions are inevitably linked, since until what members of a reformed Lords are to do is settled, the rationale for their election/nomination will remain obscure. Functional representation of defined interests in an upper chamber is unlikely to be a serious option, as it is not considered successful in other second chambers,[73] but attempts to 'represent' devolved areas can be seen as analogous and subject to the same practical difficulties.[74] Indirect elections can be criticised as inherently 'undemocratic'. The representative who is chosen to serve on another body is most unlikely to have been elected in order to fulfil that role.

On the other hand, direct elections can encourage the overt politicisation of an institution, and in the long-running debate about the legitimacy of appointees to quangos some commentators have noted that if all appointments to local public bodies were channelled through local councillors, party politics might dominate all other considerations in such bodies. Tony Wright, for example, has argued that 'to insist on traditional forms of election as the only entry point to public service would be to exclude almost the entire population from such participation. For that entry is only open to those in possession of

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73 see the white paper comments on Ireland and Hong Kong para 8.12

74 The Belgian upper house is indirectly elected by linguistic communities and the Northern Ireland Assembly will make key decisions on a cross community basis. There has been criticism of the potential within such schemes to entrench rather than to diminish differences between religious or cultural communities

party cards and this is a tiny (and diminishing) proportion of the population'[75] He suggested that lot or random selection might be developed as a way of representing people on some public bodies, including a reformed second chamber.

V Particular categories of peer[76]

Excellent analyses of the historical development of the House in the past 400 years, including the involvement of particular categories of peers such as bishops and representative peers, are contained in two recent collections of essays, C Jones & DL Jones, eds., *Peers, politics and power: the House of Lords 1603-1911*, 1986 and C Jones, ed., *A pillar of the constitution: the House of Lords in British politics 1640-1784*, 1989. What follows is a brief overview directed as issues relevant to the current debate.

A. Lords spiritual: the bishops[77]

1. History and participation

Twenty-six bishops of the established Church of England[78] sit in the House of Lords. They comprise the Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester as of right and the 21 most senior bishops (from among all the other eligible diocesan bishops) from date of first appointment. Bishops sit until they retire (those appointed since 1975 must do so at 70) or die; unlike other members of the Upper House they do not sit for life as of right.[79] They are Lords of Parliament, but not peers. According to a recent study, "the House of Lords is unique among the Parliamentary chambers of democratic states in still having a body of members present by virtue of a prescriptive right enjoyed by their religion."[80]

In the early days of what became Parliament in England representatives of the Church sat as natural members of such an assembly. They had wealth and position (not least through

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75 *Beyond the Patronage State* Fabian Society Pamphlet no 569 1995 Tony Wright p 24

76 Excellent analyses of the historical development of the House in the past 400 years, including the involvement of particular categories of peers such as bishops and representative peers, are contained in two recent collections of essays, C Jones & DL Jones, eds., *Peers, politics and power: the House of Lords 1603-1911*, 1986 and C Jones, ed., *A pillar of the constitution: the House of Lords in British politics 1640-1784*, 1989. See generally the new House of Lords Library Note 99/001, *Membership of the House of Lords*, January 1999

77 For the ceremony of introduction for lords spiritual, see Appendix G of the Companion to the Standing Orders (available on the Lords pages of the Parliamentary website)

78 The link between establishment and membership of the Upper House was demonstrated when the Irish and Welsh Churches were disestablished in 1869 and 1919 respectively

79 although they may be appointed life peers

80 F Bown, "Influencing the House of Lords: the role of the lords spiritual 1979-1987, (1994) XLII *Political Studies* 105, citing a 1977 House of Lords Information Office publication, *Religious elements in representative assemblies*

their extensive feudal landholding), and came from the most learned class in society, holding many of the senior public offices. As well as the bishops, abbots and priors used to be summoned by the monarch to Parliament, and until the time of Henry VIII, the spiritual lords outnumbered the lords temporal.[81] Following the dissolution of the monasteries, the bishops alone were summoned. All bishops were entitled to a seat,[82] including holders of newly created sees, until following the creation of the see of Manchester in 1847, statute forbade any further increase.

Because of prime ministerial patronage,[83] the spiritual bench had tended to be a source of support for the political ministry of the day, and felt able to be independent only in ecclesiastical matters. However Bromhead could assert in the 1950s that "bishops have long since ceased to feel any sort of obligation to come down to the House of Lords to support with their votes the Party under which they have been appointed, and they no longer regard a record of faithful voting as a means of obtaining translation."[84]

By the beginning of this century, the practice of the bishops not involving themselves in overt political controversy was starting to evolve,[85] restricting their participation generally to social, educational or moral issues. Often only one bishop would participate in a debate, giving rise to the impression that such speakers (especially if one of the archbishops) were representing the view of the spiritual bench, or even of the Church of England itself.[86] Even in the range of issues in which they did participate, ecclesiastical attendance was sparse[87], and this generated comment from the bishops themselves and from peers generally. By the 1950s, Bromhead could conclude that "although it would be wrong to say that any convention has grown up precluding bishops from voting in divisions, it is nevertheless true that nowadays bishops do not often vote."[88] He described the lords spiritual as "essentially a group of specialist members of the House, having the function of stating, where appropriate, Christian opinions on the problems of the day."[89]

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81 as members by virtue of their position, rather than by election or other form of selection, they joined with the barons in the Lords when Parliament gradually evolved into a bicameral body. Their deteriorating relative position arose because of the increase in the membership of the temporal peers.

82 except when all bishops were excluded by statute during the Civil War/Cromwellian era

83 Such patronage was not always welcomed by incumbents of No. 10, as demonstrated by Melbourne's famous cry, "Damn it, another bishop dead! They do it to vex me"

84 P Bromhead, *The House of Lords and contemporary politics*, 1958, p 55. The former Bishop of Liverpool, David Shepherd, provoked some comment when taking the Labour whip on being made a life peer recently. See "Defiant bishop joins Labour in the Lords" *Sunday Times*, 5.4.98

85 For example, the then Archbishop of Canterbury, Randall Davidson, deliberately refrained from involvement in the great Parliamentary battles over the 1909 Finance Bill. However the bench was active in opposition to Irish Home Rule legislation in the period before the First World War, and was involved in issues which had both a religious and political aspect, such as Welsh Disestablishment. See further, Bromhead, op cit, pp 55-58

86 on which see Bown, op cit, p 108

87 although the participation of a few such as Cosmo Lang, Archbishop of Canterbury 1928-42, were often regarded as influential

88 op cit, p 63

89 op cit, p 53

A study published in 1971 updated Bromhead's work.[90] It confirmed the perceived practice of the participation of a single 'representative' from the spiritual bench in appropriate debates,[91] which also meant that there tended to be much less disagreement (in debate and in divisions) between bishops than, say, between law lords.[92] The bishops' participation tended to be wide, as most issues tended to have a social, ethical and moral dimension. In addition bishops regarded themselves as having a 'constituency' role, representing the interests of the area of their diocese. The authors unhesitatingly believed that the presence of the bishops improved the quality of debate in the Lords: "their impact on the House is out of all proportion to their numbers … their [ie bishops and law lords] utterances are invariably listened to with respect by their fellow peers, particularly on those matters where they are peculiarly well qualified to express an authoritative opinion. The fact that the bishops seem to have adapted themselves to the increasingly liberal demands of modern life has in itself played no small part in laying the legislative foundations for an edifice of more humane (some might say 'permissive') laws in several important fields."[93]

More recent studies[94] demonstrate how the bishops have continued to be active in social and moral matters, as substantive issues themselves or as components of more general, political issues, from abortion to immigration control, and capital punishment to family law. They act as representative of more domestic issues on behalf of the Church, in its religious aspect (including issues such as Sunday observance) or in its other capacities, such as landholders or education-providers. However in recent decades they have become more involved in a number of high-profile issues of political controversy, such as in the field of local government, including the abolition of the Greater London Council in the mid-1980s. This has included voting against the government of the day, even when their votes have contributed to defeats for the government. These tensions between Church and government, not confined to activity in the Upper House, were particularly pronounced and public during Margaret Thatcher's premiership. Participation in the House cannot be measured solely in terms of speeches or voting; bishops, like peers generally, will also participate in the work of the House's committees, initiate debates and put down questions to ministers.

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90 G Drewry & J Brock, "Prelates in Parliament", (1971) 24 *Parliamentary Affairs* 222

91 It also noted the conjunction between such participation and the names on the 'prayer rota' for that day, ie the bishop (or other peer) who would conduct prayers at the beginning of a daily sitting, the 'duty bishop'. Generally the 5 'ex officio' senior archbishops and bishops are exempt from this rota

92 there is, of course, no 'bishops' whip' as such, though the lords spiritual will often operate on a basis of collegiality and consultation, much of which will arise from their non-parliamentary work in the church and its various institutions

93 Drewry & Brock, op cit, p 248

94 such as Shell, op cit, pp 52-56 and N Baldwin, "The membership of the House" in D Shell & D Beamish, *The House of Lords at work*, 1993, p 58

Bown's study of the 1979-87 era produced a mixed verdict: "In terms of voting, the Lords Spiritual achieved virtually nothing in the period under review, affecting the outcome of only one division in 8 years. Their attendance was patchy. A few were enthusiastic participators; rather more were content to do little more than the minimum. Some spoke a great deal; others uttered not a word other than to read the formal prayers at the beginning of each sitting … While the respect afforded to individual bishops differs sharply, there is no shortage of peers who will opine -- frequently off the record -- that the bishops' participation was insignificant and their role negligible …. But when the bishops are not themselves divided and when they act on matters where the Church is recognized to have a particular and proper interest .. they have a sway out of all proportion to their numerical strength."[95]

While Bown was writing about a period of particular tension between the Church and the Government, his conclusions perhaps have a more general relevance: "Perhaps for a government -- particularly a Conservative government -- what matters about the Lords Spiritual is their ability to sustain or withdraw a degree of legitimacy. To a large extent this was withdrawn from the Thatcher Government. However, limited or marginal the importance of this withdrawal, it acted as an irritant, even to some of those at the pinnacle of governmental power."[96]

A relatively recent study of the House in action analysed peers' participation, dividing attendance into four categories. The following statistics, which are derived from that study compare the bishops' participation with those of all peers, for the 1988-89 session:[97]

	all peers	**bishops**
▪ *rare* (up to 5% of sittings)	19.5%	26.9%
▪ *infrequent* (>5-33 1/3%)	33.6%	69.2%
▪ *frequent* (>33 1/3%-66 2/3%)	19.0%	3.8%
▪ *regular* (>66 2/3%)	27.9%	0.0%

It should be noted, when examining such statistics, that, like the law lords, attendance in London on the Parliamentary work of the House of Lords is only a part, perhaps a small part, of a bishop's overall duties: "their role as Lords of parliament is very much a part-time affair."[98] However Shell claimed that it was reasonable to argue that "more effort should be made to ensure that bishops are present and do contribute on a wider range of topics than at present …. One view would be that where the Church as a body is openly and publicly critical of the Government, its bishops ought to be prepared to use the forum

95 op cit, pp 118-9
96 p 119
97 Baldwin, op cit, pp 52-53
98 Drewry & Brock, op cit, p 232. The study noted that the location of the law lords 'other tasks' generally tended to be far nearer the Palace of Westminster than those of many of the lords spiritual

of the House of Lords to join debate with government ministers – not spasmodically but in a regular, detailed and hence more responsible way."[99]

The bishops' parliamentary work is supported, in part, through the Archbishop of Canterbury's Secretary for Public Affairs (formerly known as the Lay Secretary) at Lambeth Palace, who will for example liaise as appropriate with the Whips' Office. The Secretary informs the bishops of forthcoming business and will often assist in ensuring the presence of (at least) one of them (whether or not the duty bishop for that sitting, or perhaps one with a particular interest or expertise in that subject[100]) at relevant debates.

2. Their place in a reformed chamber

There have been suggestions from time to time in Parliament that the bishops should no longer sit in the Lords,[101] or that their number should be reduced.[102] In a wider sense, the issue of ecclesiastical representation in Parliament is just one aspect of the Church-State relationship, including the existence of an established church, subjects which are beyond the scope of this Paper.[103] The *Parliament (No. 2) Bill* in 1969 contained the following provision:

> **6** -(1) The number of Lords Spiritual who are Lords of Parliament shall be progressively reduced, as provided by sub-section (2) of this section, from twenty-six to sixteen.
>
> (2) Of the next twenty vacancies among the Lords Spiritual who are Lords of Parliament which arise after the commencement of this Act on the avoidance of sees other than those of Canterbury, York, London. Durham and Winchester, only ten shall be supplied pursuant to section 5 of the Bishoprics Act 1878; and the vacancies to be so supplied shall be the second of each two which so arise.

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99 Shell, op cit, p 56. A study of the activities of the bishops in the 1979-87 period quoted various parliamentarians as describing them as "a broken-backed group" (Frank Field), "really more spectators than participants" (Lord Orr-Ewing) and "visitors rather than contributors" (unnamed Minister): F Bown, "Influencing the House of Lords: the role of the lords spiritual 1979-1987, (1994) XLII *Political Studies* 106

100 Lists of bishops' interests etc are held at Lambeth Palace

101 see, for example, see attempts in the Commons to bring in bills in 1834 and 1870 (HC Deb vol 22 cc 131-153, 13.3.1834 and vol 202 cc 676-704, 21.6.1870)

102 see, for example, the Wilson Government's proposal in 1968 for a gradual reduction to 16: Cmnd 3799, para 63-67. This was followed a decade later by the Conservatives' Home Report, adding that "retention of some of the Lords Spiritual would be a way of resolving the difficult questions about the status of the Established Church and the legislative procedures to which its measures are subject which would necessarily arise if they were excluded altogether" (March 1978, para 51)

103 The Church in Ireland had four representatives in the Lords until its disestablishment in 1869. No representatives of the Church of Scotland sit in the Upper House by virtue of their spiritual office. Although there have been suggestions for such representation (eg in the report of the royal commission on Scottish affairs, Cmd 9212, 1953, para 106), it would be difficult to arrange on doctrinal and practical grounds. For a history of Prime Ministerial ecclesiastical patronage see B Palmer, *High & mitred: Prime Ministers as bishop-makers 1837-1977*, 1992

> (3) The bishop of any see other than those of Canterbury, York, London, Durham and Winchester may, by notice in writing given to the Lord Chancellor, disclaim for himself the right to sit as a Lord of Parliament as such ; and where such notice is given-
>
> (a) if at the time of the notice the bishop is one of the Lords of Parliament, section 5 of the Bishoprics Act 1878 as amended by this section shall apply as if the see were avoided by his retirement;
>
> (b) whether or not he is then one of the Lords of Parliament, he shall be left out of account for the purpose of supplying pursuant to that section any vacancy among the Lords Spiritual which arises during his tenure of the see on the avoidance of any such see.
>
> (4) Sections 2 to 4 and subsection (1) of section 5 of this Act shall apply to the Lords Spiritual who are Lords of Parliament as they apply to peers of first creation, and as if the sees of Canterbury, York, London, Durham and Winchester were offices to which the said section 5 applies.

In their 1971 study already cited Drewry & Brock supported the Wilson Government's white paper's proposal for a reduction from 26 to 16 bishops, but also wanted better provision for the representation of other faiths and churches. They accepted the practical and doctrinal difficulties involved, and would extend representation to 'thinking disbelievers' through the membership of a number of humanists. They concluded that, in the absence of substantial Lords reform, and disestablishment, "we anticipate that the Episcopal bench will carry on very much as now, causing very little offence (except to left-wing fundamentalists) and in general playing a valuable role in the work of the second chamber."[104]

In his speech to a conference on Lords reform in June last year, the then Leader of the Lords, Lord Richard, said:[105]

> We believe, too, that the Church of England should continue to be represented in a reformed House of Lords. It is also important, though, in a more representative second chamber, to consider representation for other Churches and faiths. There is no question of reform leading to disestablishment, whatever *The Daily Telegraph* may say!

Following his removal from the government the following month, Lord Richard gave an interview to the *New Statesman* (31 July issue):

> "Lord Richard briefly lifted the veil on his former cabinet committee to illustrate the problems of merely establishing an interim chamber. "The more we looked at it, the more complicated it became. What do you do with the bishops? How will Lambeth Palace react? What do you do about the law lords? Do you have a cap

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[104] op cit, p 248

[105] ICR/Daily Telegraph conference on Lords reform, 8.6.98, transcript, col 8

> on the size of the interim house and what's the size of the interim house? How many life peers are you left with? What are you going to do with the Tories? Are they going to get more life peers, in which case how are they going to get them?"

During the Lords' Queen's Speech debate on constitutional matters, the Bishop of Bristol considered the reform proposals, especially from the viewpoint of ecclesiastical representation:[106]

> As a leasehold Member of your Lordships' House and a Bishop of the Church of England, the issue of reformation is life and breath to my life. But I recognise the unease in parts of your Lordships' House in relation to its proposed reform. That unease represents not only the shock it entails for the status quo but also uncertainty and legitimate concern about embarking on a journey for which the destination is not clear at the time of departure.
>
> One declared stop along the way is the transitional arrangements for a House whose numbers may be made up by appointed Peers. We may well ask, as has already been asked, how that will be done. My friend, the right reverend Prelate the Bishop of Oxford, on 14th October in your Lordships' House suggested the model of the Crown Appointments Commission as a useful starting point. I hope that that will be kept in mind and become part of our deliberations.
>
> For the rest of the journey, much will depend on the Royal Commission, not least on its membership and terms of reference, which we await with interest. There is an opportunity to contribute to an important process. It will clearly be important for the membership of the commission to be sufficiently broadly based to consider effectively all aspects of that complex matter, including the future of faith community representation in your Lordships' House. …..
>
> I wish to underline the issue of representation. The Church of England is happy to see a broadening of that representation, but the key question concerns the framework in which that representation is set. At present, Bishops not only strengthen the spiritual dimension of the work of your Lordships' House--at least, I trust they do that although I heard the rebuke of the noble Lord, Lord Rodgers of Quarry Bank, as to whether we should be involved in certain aspects--they also contribute to its regional diversity. The fact is that the Bishops in your Lordships' House represent diverse parts of the country in a manner unmatched, perhaps, by any other element in your Lordships' House. Bishops are related to parishes, local communities and dioceses and they have local knowledge and points of reference which enrich debate and inform the legislative review.…….

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106 HL Deb vol 595 cc 40-3, 25.11.98. The Archbishop of Canterbury, Dr George Carey, was recently quoted as saying, "We have been in the House of Lords for many hundreds of years, and please God, will continue being there for many more years to come": D Sampson, "Churchmen essential", *House Magazine,* 6.4.98

> The Bishops and the Church of England, because of their parochial and diocesan system, are able and willing to contribute to that important aspect of debate on the future of your Lordships' House. We commit ourselves to ensuring, to the best of our ability, that the reform will be such that it will be for the sake of good government of the whole nation, for all its people, so that they may participate fully in the life of our country.

In its examination of the present House, the white paper stated:[107]

> **6.** Bishops have always been members of the House of Lords. Originally they were summoned in their dual role as major landowners and as the king's counsellors. In more modern times, the presence of the Bishops became increasingly associated with the establishment of the Church of England, although in law the two are quite separate. The establishment of the Church of England rests upon Parliament's powers over its legislation and the requirement for the Sovereign as its Supreme Governor to be in communion with it. The Bishops and Archbishops now sit by virtue of the Bishoprics Act of 1878, which provides for the two Archbishops, the Bishops of London, Winchester and Durham, and the next 21 most senior diocesan Bishops to have a seat in the House of Lords. The Bishops are the only true ex officio members of the House of Lords, as they retire from the House on retirement from their see. Since clergymen of the Churches of England, Scotland and Ireland, and Roman Catholic priests, are not able to be members of the House of Commons, the presence of Bishops in the House of Lords was before the introduction of life peers the only significant non-lay representation of the principal religious denominations in Parliament.

Turning to the issue of religious representation in the longer-term, it stated:[108]

> **21.** The Government does not propose any change in the transitional House of Lords in the representation of the Church of England within the House. The Bishops often make a valuable contribution to the House because of their particular perspective and experience. To ensure that contribution remains available, the Government proposes to retain the present size of the Bishops' bench which we accept is justified, because the Church's official representation is made up of serving diocesan Bishops, who have duties which frequently call them away from the House. The present representation makes it possible for the Church to ensure its perspective is represented on all occasions when it would be particularly valuable.
>
> **22.** The Government also recognises the importance of the House of Lords reflecting more accurately the multicultural nature of modern British society in which there are citizens of many faiths, and of none. We shall be looking for ways of increasing the representation in the Lords of other religious traditions. In

[107] Cm 4183, para 3.6, p 15
[108] paras 21-22, pp 39-40

> particular, there is a case for examining the position of the Church of Scotland which is an established church but has never had representation as of right in the second chamber. However, at least during the first phase of our reforms, other religious representation will not take the form of providing regular representation such as is enjoyed by the Church of England. Nonetheless, considering if there is a way of overcoming the legal and practical difficulties of replicating that regular representation for other religious bodies should form one of the issues for examination in longer-term reform of the Lords.

During discussing of the Government's policy on 20 January the Leader of the Commons, Margaret Beckett, confirmed that the Government planned no immediate change to the membership or role of the bishops.[109] In the Lords the following exchange took place:[110]

> **The Lord Bishop of Chichester**: My Lords, perhaps I may make three brief points on the document before us. First, I wish to express our appreciation for the kind remarks made in the document in relation to the contribution of the bishops to the work of this House. Secondly, we look forward to offering our own comments and contributions to the work of the Royal Commission when it comes into being. Thirdly, I want to make it quite clear, as I have done on previous occasions, that we would welcome the expansion of religious representation in this House to include other faiths, not only Christians.
>
> **Baroness Jay of Paddington**: My Lords, I am grateful to the right reverend Prelate for those words. As I said in my original Statement, there is no intention in the transitional House, and certainly no understanding in the terms of the Bill, that there should be any difference in the representation on the Bench of Bishops during that period. He is right that in relation to the general discussion of the work of the Royal Commission it speaks of the possibilities of embracing a wider faith and a different cultural approach to the citizens and subjects of this country, which I am glad to hear he feels is appropriate.

B. The Law Lords

1. History and participation

As a major study of the law lords noted,[111] the idea of judges as legislators is, on the face of it, strange in constitutional terms, especially in the context of the doctrine of the separation of powers.[112] While the broader issue of the highest domestic court[113] being

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[109] HC Deb vol 323 c 921
[110] HL Deb vol 596 cc 594-5
[111] G Drewry & J Morgan, "Law lords as legislators" (1969) 22 *Parliamentary Affairs* 226-39
[112] On this doctrine see generally Research Paper 96/82, section IV.B
[113] except for Scottish criminal cases

formally part of a House of Parliament is beyond the scope of this Paper,[114] this duality of role has to be borne in mind when considering the membership of certain senior judges in Parliament. The term 'law lord' has no formal or legal status. A concise definition is given in Walker's Oxford *Companion to Law*:[115]

> A colloquial term signifying sometimes the Lords of Appeal in Ordinary and sometimes the rather larger body of persons who may sit in the House of Lords in its judicial capacity to hear appeals.

The *Appellate Jurisdiction Act 1876* requires a case before the Lords to be heard before three or more of the following [*s5*]:

(1) *Lord Chancellor*,

(2) *Lords of Appeal in Ordinary* (appointed under s6 of the Act), and Peers who are for the time being holding or have held any high judicial office.

'High judicial office' is defined generally in *s25* of the Act as the office of Lord Chancellor or of a judge of one of the 'superior courts' in the UK.[116]

In the original version of *section 6* of the 1876 Act Lords of Appeal in Ordinary could not receive a writ of summons for the Lords after they ceased to be Lords of Appeal even though they had 'life peerages'. This was changed by the *Appellate Jurisdiction Act* 1887, s2 of which in effect removed this disability. Nowadays some 'law lords' will be appointed under the *Life Peerages Act 1958*.[117]

Drewry & Morgan, analysing the work of the House in 1967, showed that the participation of the law lords in that year related exclusively to Bills; they asked no questions of ministers, for example. However the authors noted that, like the bishops,[118] their Parliamentary work is a small part of their overall activity. More generally "they constitute a highly expert and readily accessible body of expert opinion on technical

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[114] The initial report of the Mackay Commission, established last year by William Hague, stated that "consideration must be given to an existing function of the House of Lords which would not necessarily be appropriate for a new Second Chamber: that is, its role as Final Court of Appeal for the United Kingdom" (Sept 1998, para 26). The Home Report in 1978 had commented that an elected second chamber would mean, in addition to the removal of the bishops that "the Law Lords, although they could continue to exercise their judicial functions by transferring the jurisdiction of the Judicial Committee of the House of Lords to the Judicial Committee of the Privy Council, would lose their place in the legislature. Both these aspects are likely to be highly controversial, not least within the Conservative party" (March 1978, para 34, and see appendix 10)

[115] p 726

[116] Including the High Court and Court of Appeal (in England & Wales and in Northern Ireland) and the Court of Session

[117] and some, in the past, would have received hereditary peerages. The pre-1876 history of the composition of the House for its appellate jurisdiction is neatly summed up in Walker's *Oxford Companion to Law*, p585. For an analysis of the Law Lords in their judicial capacity, see A Paterson, *The Law Lords*, 1982

[118] on which see the previous section of this Paper

points of legislation; their failure to speak on a particular measure may only mean that their views have been fully canvassed beforehand."[119] While they mainly participated on technical legal issues, "sometimes however they appear to assume a more controversial role – as self-appointed guardians of the nation's moral conscience in issues such as the abolition of the death penalty, and the relaxation of the law of abortion."[120] They also provided a link between the courts and the legislature, which could be useful when the House was debating legislation, or calls for legislation, arising, directly or otherwise, from legal judgments.

As Shell notes, "legal expertise may be regarded as an essential requirement in any legislature." He describes their participation in the non-judicial work of the House:[121]

> Serving law lords are not forbidden to take part in any business before the Lords, though there is a predisposition against their participation in matters of political controversy. Their judicial duties also inevitably impose restrictions on the amount of time they can give to the work of the House. Once retired they may have more time to participate, and need no longer feel that the independence of their role as judges is threatened by their entry into matters of political controversy. But advancing years may well limit the activities of some, and others may feel that discretion and a sense of decorum ought still to inhibit participation in political matters.

Baldwin asserted that not only was there a convention against them becoming involved with a political party, "but also one preventing them from participating in partisan political controversy", although this did not prevent them from becoming involved in the legal aspects of politically controversial topics.[122]

Law lords often chair royal commissions, committees of inquiry and the like, and will generally participate in debates (including those on legislation) which result from these bodies' deliberations and reports. They will also be active in various legal/technical House committees, such as ad hoc select committees on issues like capital punishment, or scrutiny committees on EU legislation or delegated powers and deregulation.

A relatively recent study of the House in action analysed peers' participation, dividing attendance into four categories. The following statistics, which are derived from that

[119] Drewry & Morgan, op cit, p 231

[120] p 232. As the authors noted, many law lords at that time came from a politically active background before becoming judges

[121] D Shell, *The House of Lords*, 2nd ed., 1992, pp 56-7. For a detailed recent analysis, see M Rush & N Baldwin, "Lawyers in Parliament" in D Oliver & G Drewry, *The law and Parliament*, 1998, esp pp 163-173

[122] Baldwin, op cit, pp 57-8

study, compare the law lords' participation with those of all peers, for the 1988-89 session:[123]

	all peers	law lords
▪ *rare* (up to 5% of sittings)	19.5%	22.2%
▪ *infrequent* (>5-33 1/3%)	33.6%	61.1%
▪ *frequent* (>33 1/3%-66 2/3%)	19.0%	11.1%
▪ *regular* (>66 2/3%)	27.9%	5.6%

Baldwin asserts that, although the law lords nowadays are not barred from the ordinary work of the Lords, "there is undoubtedly not only a convention against their becoming involved with any political party but also one preventing them from participating in partisan political controversy. Such restraint does not of course prevent law lords from speaking out on the legal aspects of politically controversial topics, nor indeed from participating in the divisions which take place in the House."[124] In 1969, Drewry & Morgan summarised the law lords as "a politically neutral caucus of legal advisers."[125]

Shell's conclusion in 1992 on the role of the law lords is as follows:[126]

> The law lords do play a significant role in the House of Lords. In part this is a matter of being 'resident technical consultants to the legislature on legal points arising out of proposed legislation' (Blom-Cooper and Drewry, 1972, p. 203); in part it is their capacity to contribute generally to debates on crime and the penal system, though their contribution here is fairly irregular; in part it is their readiness to act as guardians over the whole machinery of justice when they see this being affected by some change they consider foolish. Among the law lords of each generation there also appear to be one or two who choose to become House of Lords men, drawing on their legal expertise but applying it in an unabashed way in debate on a wide range of topics.

2. Their place in a reformed chamber

As already noted, the broader question of the dual function of the Lords as a House of Parliament and a final court of appeal is outwith the scope of this Paper. The overall programme of constitutional reform legislation (especially devolution and human rights) may lead to a more public profile for the senior judiciary, especially the law lords, which, allied to other developments,[127] could prompt reconsideration of this question, or at least the active involvement of the law lords in the non-judicial work of the House.

[123] N Baldwin, "The membership of the House" in D Shell & D Beamish, *The House of Lords at work,* 1993, pp 52-53
[124] Baldwin, op cit, pp 57-58. Retired law lords will feel even less constrained
[125] op cit, pp 237-8
[126] op cit, p 59. See also the 1968 white paper's consideration of their role: Cmnd 3799, paras 59-62, November 1968
[127] such as the controversy over the recent appeals concerning General Pinochet

The 1968 white paper stated that "the judicial function of the House of Lords have not been examined in the context of the proposed reform and no change is contemplated in the responsibilities or rights of law lords in relation to the judicial business of the House. In particular, all law lords would continue to be able to vote on the judicial business of the House."[128] The initial report of the Mackay Commission, established last year by William Hague, stated that "consideration must be given to an existing function of the House of Lords which would not necessarily be appropriate for a new Second Chamber: that is, its role as *Final Court of Appeal* for the United Kingdom" (Sept 1998, para 26). The Conservatives' Home Report in 1978 had commented that an elected second chamber would mean, in addition to the removal of the bishops that "the Law Lords, although they could continue to exercise their judicial functions by transferring the jurisdiction of the Judicial Committee of the House of Lords to the Judicial Committee of the Privy Council, would lose their place in the legislature. Both these aspects are likely to be highly controversial, not least within the Conservative party" (March 1978, para 34, and see appendix 10).

The white paper considered the role of the Law Lords in the present House:[129]

> **7.** The position of the House of Lords as the supreme court of the realm also comes from the House's origins as the King's Council. Until 1876, the judicial functions of the Lords had to be provided by those who happened to be members of it, or hereditary peerages had to be conferred to bring suitably qualified men into the House. At that point, concern about the lack of available expertise led to the innovation of conferring life peerages specifically for judicial work in the Lords, so that those who did not feel they had the resources to maintain the estate and dignity of a peerage through future generations could still be appointed. There are 12 active Law Lords at any one time, but retired Law Lords are still able to act judicially up to the age of 75, and all Law Lords are members of the House for life.

Turning to the issue of judicial representation in the longer term, it stated:[130]

> 19. It is a very important part of the House of Lords' work that it constitutes the highest court in the land. That function is carried out by the specially selected peers known colloquially as the Law Lords and does not involve other peers. However, the Law Lords' presence has a significant effect on the ethos and contribution of the House as a whole. They are full members of the House, even when not sitting in a judicial capacity, although by convention they do not become involved in politically contentious issues. The contemporary rationale for the Law Lords being life peers as opposed to ex officio members of the House is the major contribution they can make to the cross-bench element in the House. Thus they remain members, even after their retirement as Law Lords. The retired Law Lords play a particularly distinguished role in the examination of legislation, especially that with a highly technical or legal content. Most significant is their

128 *House of Lords reform*, Cmnd 3799, Nov 1968, para 60. See generally paras 59-62
129 para 3.7, p 15
130 para 19-20, p 39

> contribution to debates on the administration of justice, penal policy and civil liberties, where law and politics intersect.
>
> 20. Whilst therefore the judicial system is kept quite separate from the political process, it is unusual, compared to most major democracies, to have judges sitting as members of the legislature in this way. It would therefore be legitimate to consider, when looking at fundamental reform of the purpose and nature of the House of Lords, whether the present arrangements should continue. But consideration would also have to be given to what this would do to the nature of Parliament as a whole, and how the supreme judicial authority could be reconstituted elsewhere in the system and where it could be suitably accommodated. Detailed proposals on this would fall outside the scope of the Royal Commission's terms of reference.

Responding to questions following her Commons statement on 20 January, Margaret Beckett said that "the issue of the existence and the role of the Law Lords is, at least in part, also a matter for the judiciary and the judicial system. It was not thought sensible, even in the transitional House, to take steps to change that role."[131]

C. The cross-benchers[132]

A significant segment of the membership of the Upper House[133] is that group of peers which sits on the cross benches, thereby signifying allegiance to no party. By the mid 1960s some of them combined into a loose grouping under what later became known as a Convenor.[134] This group, which should not be regarded as a party in the recognised sense, generally meets every Thursday afternoon to consider future business and related matters, and operate through a notice of future business[135] and so on, but with no request or demand for attendance.[136] The Convenor is, however, part of the House's 'usual channels' other than as a voice in future business. As Shell noted, in 1992, "in some respects cross-

[131] HC Deb vol 323 c 921

[132] See the interviews with the present convenor, the former Commons Speaker Lord Weatherill, in the 24.3.97 and 11.1.99 issues of the *House Magazine*

[133] a majority, around two-thirds, of whom are hereditary peers

[134] It must be borne in mind that not all non-party peers sit on the cross-benches, as there is a significant number of peers who are generally listed in tables of the membership of the House as 'others'. Lord Weatherill has expressed a preference for non-party peers to be called 'independents' rather than 'cross-benchers'

[135] This cannot be compared to a party whip, although it is sometimes described in textbooks as an 'unlined whip'

[136] Lord Weatherill has neatly made the point in his recent House Magazine interview: "By definition independents cannot be whipped or told what to do. Crossbenchers are not encouraged to come here just to plod through lobbies – they come in when they think they can make a contribution." As law lords and bishops are technically cross-benchers, they receive notices of cross-bench meetings, and join in the group's more social occasions

bench peers may look like another party in the House of Lords, but this is misleading."[137] He continued:[138]

> Their opinions range widely and their organisation is minimal. They have no leader, and could not have one in the usual sense of the term because they do not seek - nor could they - to formulate common views on issues coming before the Lords. But having a regular meeting, a recognised spokesman and an unlined whip are all useful devices for keeping non-party peers in close touch with the work of the Lords. For example, their convenor sits on the various select committees which deal with domestic House of Lords matters, such as procedure, leave of absence and expenses, privileges and the Committee of Selection. She can report back on matters covered by these committees, sound out the opinions of cross-bench peers, and feed these in as necessary.

The Convenor, Lord Weatherill, has said that he "would never wish to see the Cross Bench peers acting as a party. We are not a party. We are a group of 316 individuals exercising our judgement. We vote here in an individual way and 'on our honour, and on our judgement'. It's a good phrase."[139] Their formal non-party status can be an advantage as cross-benchers are often asked to chair subject select committees, for example. Their voting patterns suggest that some may have tended routinely to support a party, while others may sometimes have adopted a policy of supporting the government of the day whatever its colour. Their votes can inject a degree of uncertainty in the outcome of any division.[140] The cross-benchers can be regarded as part of the 'Opposition', in a 'Westminster model' sense, only in so far as they are not part of the Government benches.

Cross-benchers choose the subject of a day's debate three times a year. Lord Weatherill described the subject of those debates as "of a non-political nature which is of interest to the general public." Peers also seek amendments to Bills, where appropriate. The Convenor believed that "the Cross Bench peers are more influential today than they've been for a very long time." [141] It was the cross-benchers who floated the proposal at the end of last year for the retention of a proportion of the hereditary peerage during the transitional phase of Lords reform.[142]

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[137] Shell, op cit, p 90. For example the cross-benchers are not a party for the purposes of financial assistance by way of 'Cranborne Money' (the Lords equivalent of Short Money), and the Convenor is an unpaid post

[138] pp 90-1. At this time the convenor was Baroness Hylton-Foster

[139] 1997 *House magazine* interview, op cit, p 18

[140] see Baldwin, op cit, p 57

[141] 1997 *House magazine* interview, op cit, p 18

[142] on which see Research Paper 99/5, section IV E

The 1968 white paper on Lords reform considered the cross-benchers mainly in the context of post-reform review of the working of the House:[143]

> **72.** A further question which should engage the committee is the position of the cross bench peers. Attention has been drawn to the importance of the cross benchers in the reformed House and to the fact that their presence is needed to safeguard its independence. They do not at present act in any way as an organised group or possess a sense of corporate identity and those who are active in the House do not give regular support to any one party. There is no reason to think that they would cease to act in this way in the future or become in any sense a new constitutional force, but it would nevertheless be important to ensure that they do not as a group become identified with any one party or with any one point of view. As part of its general task the proposed committee should satisfy itself that the cross bench element was constituted in a way which fully maintained the independent and non-aligned spirit of its present membership.

The section of the Labour manifesto in 1997 dealing with Lords reform contained the following: "We are committed to maintaining an independent crossbench presence of life peers." This was reaffirmed by the Leader of the Lords, Baroness Jay of Paddington, during the two-day debate on Lords reform last October.[144] The Cabinet Office's detailed press briefing on the 1998-99 Queen's Speech stated that, in the forthcoming Bill, "the strong independent element of the cross-benchers will be preserved." In the Lords' debate on the Queen's Speech, Baroness Jay contrasted the cross-benchers' independence with those of hereditary peers generally:[145]

> I accept that some Cross-Bench hereditary Peers are independent. For them, independence is real. It is prized. It is valued and the Government are committed to maintaining that genuinely independent voice. But this House knows what the reality is for the majority. This House knows which Lobby they go through time after time after time. "Independent" they may call themselves; well, independent by name--but not independent by nature or behaviour.

In the two-day debate in October last year, Lord Weatherill said:[146]

> As Convenor of the Cross-Bench Peers I cannot speak for them all; nor do I presume to do so. Nevertheless, if there is a consensus it is that we have a very high regard and affection for the 203 hereditary Peers who sit on our Benches. Many of them have played, and continue to play, an active and valuable part in the work of the committees of this House. Others sit on the Woolsack as Deputy Speakers and Deputy Chairmen. Others regularly participate in debates and amendments to legislation and bring to bear their personal experience and

143 *House of Lords reform*, Cmnd 3799, para 72, November 1968
144 HL Deb vol 593 cc 925-6, 14.10.98
145 HL Deb vol 595, c 24, 25.11.98
146 HL Deb vol 593 cc 936-7, 14.10.98

> expertise. No fewer than 141 Cross-Bench hereditary Peers serve on the main committees of this House at the moment.
>
> It is sometimes alleged that our voting record is not good, but we do not issue a Whip and do not plod through Lobbies to vote for or against arguments that we have not heard. I believe that the House will sorely miss the wisdom and experience of the hereditary Peers. We have a legitimate concern as to who will do the work that they currently carry out and how they will be replaced. It will take time for the Royal Commission to make its recommendations. I believe that most Back Benchers are in favour of evolutionary change rather than sudden death. Would it not be wise to phase out the hereditary element in this House rather than guillotine it? While accepting that the hereditary Peers will have to go eventually, is it not wise and sensible to delay their departure once the Government's Bill in the new Session has been passed--not until the Royal Commission has finally reported but at least until the end of this Parliament? What is two to three years in the scheme of things in a matter as important as this? ……I will conclude by repeating that before we bulldoze this House we should see the plans. We on the Back Benches await with great interest the White Paper that has today been promised to us.

The white paper, in its consideration of the role and function of the hereditary peers, recognised the value of the independent element provided by the hereditary and life peers on the Cross-benches:[147]

> **7.** There is a genuinely independent element in the House of Lords: the independents who choose to sit on the cross benches. These peers take no party whip, though many have a significant voting record of consistently supporting one political party, in spite of their nominal independence. Around 100 life peers have made the choice to sit as Cross Benchers. We recognise that a genuinely independent voice such as this is one of the great strengths of the House of Lords.

Such an independent role would be retained in the transitional House:[148]

> **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.

[147] Cm 4183, para 5.7, p 28. It stated later when explaining the role of the proposed Appointments Commission in the selection of cross-benchers: "We recognise and value the tremendous contribution made to the work of the House of Lords by the independent cross-bench peers": para 6.9, p 33

[148] para 6.3, p 31. The Appointments Commission is considered in section VII.C of the companion Research Paper 99/5

Turning to the longer term, the white paper considered the role and functions of a reformed second chamber, which included those such as the deliberative function, where the perceived benefits of independence and expertise on the cross-benches would appear to be relevant. The white paper suggested that the Royal Commission "will wish to take account of those characteristics of the present House of Lords which are widely regarded as among its more attractive features", which included "the cross-bench element of the chamber."[149] Systems other than those of direct election may be more appropriate for ensuring an expert or non-partisan element, composed of those who may not wish or feel competent to compete for a seat by way of a popular election. So the white paper examined, for what it describes as "the non-political cross-bench members", the routes of central appointment through self- and public nomination, and trawls, administered by a body similar to the proposed Appointments Commission, or by way of nomination through 'functional constituencies.'

[149] para 8.4, p 43