Reform of the House of Lords

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Executive Summary

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After several years in which a threat to abolish the House of Lords was lurking in the political shadows, there is now a broad political consensus as to the desirability of a bicameral parliamentary system in the UK. But if there is agreement on the need for a second chamber, there is not agreement that the second chamber we need is the current House of Lords.

The Labour Party and Liberal Democrats are committed to reforming the House of Lords if they win the next general election. Both parties aim for a second chamber whose members are chosen by election; but the Labour Party envisages a two step approach, with the removal of hereditary peers from the House of Lords as the first step. The Conservative Party does not currently advocate any major reform of the House of Lords, but limited procedural reforms have been made under this Government.

An Ideal Second Chamber

One of the difficulties in identifying the "ideal second chamber" is that there is no agreed role for a second chamber within the British parliamentary system, nor any clear idea of the intended relationship between the two Houses of Parliament, to use as a starting point. The second chamber is variously defined as a constitutional protector, legislative reviser, and a source of independent counsel and expertise.

Unlike many other countries with a bicameral system, the agreement between the political parties in the UK on retaining a second chamber is not influenced by the demands of a federal state, nor by a desire to address issues of regional, social or cultural dislocation.

Many, although not all, of the reasons given for maintaining a second chamber are derived from the de facto pursuits of the House of Lords, rather than from any more fundamental analysis of the necessary functions of parliamentary government. In addition, a number of the arguments for retaining a second chamber in the UK represent implicit criticisms of the House of Commons: for example, providing an independent voice as a counterweight to MPs' lack of independence from the demands of party politics. These are just as much reasons for reform of the first chamber as justifications for a second chamber.

Without common ground as to what we want a second chamber to do, and some objective evaluation of its performance of those functions, there can be little agreement on whether the current House of Lords is working as well as it might, and therefore whether and how to fix it.

Moreover, debate about the House of Lords tends to begin and end with its composition. But any satisfactory, constructive reform must start by defining the intended functions, powers and relationship with the House of Commons of a new second chamber - together these define its role within the political system. Only then is it possible to determine the composition required to carry out those functions; exercise those powers; and fulfil that role.

International Experience

Analysis of second chambers in other countries suggests some key conditions for an effective second chamber:

- a second chamber that positively complements, rather than compensates for, the first chamber is more likely to be accepted and effective.

- the need for, and role of, a second chamber is most readily discernible in federal states like the USA, Australia, Canada and Germany; but even in these states the political authority of the second chamber will depend on its specific composition and powers.
- the composition of the chamber (whether through nomination or election) must be clearly and deliberately representative of **something** if the body is to have political authority.

The Impetus for Reform

Demands for reform of the existing House of Lords arise principally from dissatisfaction with two key aspects of its operation:

- the hereditary basis of membership. At the end of the 1994-95 Session, 770 of the 1190 eligible members of the House of Lords were hereditary peers.
- the predominance of Conservative supporters. Of the 1037 peers eligible to vote at the end of the same session, 476 took the Conservative Party Whip - corresponding figures for the Labour Party are 109, and for the Liberal Democrats 52.

Many regard both these features of the House of Lords as fundamentally undemocratic. For the current Opposition parties, such constitutional concerns mix with a political concern about the implications for a non-Conservative Government's legislative programme.

In attempting to resolve the tension between the constitutional and political imperatives for reform, the three main parties have taken different views, each coloured in part by self-interest. Their different positions also illustrate that decisions about how best to reform the House of Lords are influenced not only by the intrinsic merits of different policy options, but also by the practicalities involved in implementing reform.

The Process of Reform

Would-be reformers need to understand both the evolution, and current working, of the House of Lords, in order to:

- appreciate that the legislation relating to the House of Lords is only a small part of the framework within which it operates - convention, practice and procedure are of equal importance. Any attempt to reform the House of Lords by legislative means should bear this important fact in mind.
- recognise the complexity of the relationship between functions, powers and composition. So tackling composition without creating knock-on effects may be difficult.

Whether reform involves one, two or more stages may be irrelevant. What is more important is that a clear set of goals is established and each stage of reform is directed towards achieving them.

Consultation

The creation of an elected second chamber is likely to involve a process of political negotiation, which attempts to establish shared objectives. Crucial to the progress of reform will be clear political direction and terms of reference. The very fact that a Government wishes to promote reform means that it has already identified deficiencies that it wants to remedy, and these should be clearly stated. A variety of mechanisms has previously been used to consider reform of the House of Lords and other constitutional measures:

- Inter-Party Conference.

- Joint Committee or Conference of both Houses.
- Royal Commission.
- Speaker's Conference.

But history suggests strongly that consultation is not always a problem-solver. In particular, a Royal Commission is not an appropriate mechanism for resolving the tension between political and constitutional goals that is implicit in finding a long-term solution for the House of Lords.

The most productive way forward for a Government seeking to build consensus around long term reform of the House of Lords, would be first to convene a Party Leaders' Conference on the principles of reform. The terms of reference might be as follows:
To determine -
- *the functions appropriate to the second chamber.*
- *the powers appropriate to the second chamber.*
- *the role of the second chamber in relation to the House of Commons and other tiers of government - local, regional, and international.*
- *the basis on which to select members of the second chamber.*
- *the balance of party power, if not predetermined by the basis of selection.*

The agreed principles would then be remitted to the Government for further development of the scheme, to be published for wider consultation before introduction as legislation.

For a Government that wishes to consult on its own proposals, or on one specific aspect of reform, it is recommended that the same practice be employed, adopting more specific terms of reference.

Functions of a New Second Chamber

It seems probable that, save for the judicial role of the Law Lords, the current functions of the House of Lords will persist in a reformed second chamber, and be supplemented rather than completely revised. Thus, in addition to the existing work of the House of Lords in scrutinising European legislation prior to enactment, for example, a new second chamber might be charged with extending liaison with the European Parliament and/or conducting pre-legislative scrutiny of domestic legislation.

The House of Lords, and any replacement, will remain a second chamber responsible for checking, delaying and resisting - but not preventing - the actions of the Government of the day. It is also likely to have an enhanced role of constitutional surveillance. In the context of wider devolution, the principal additional function of a new second chamber is likely to be to provide a voice for the regions and nations of the UK at the centre of the political system.

Powers of a New Second Chamber

Removing the hereditary peers will remove one of the inhibitions on the House of Lords' use of its present powers. There may be a resurgence in the authority of the House of Lords and a willingness to use long-dormant powers of delay or veto on primary and secondary legislation, which may prompt further reform sooner rather than later.

The credibility of a predominantly elected second chamber (and its ability to attract high quality candidates) will also depend on the extent of its powers, which should therefore include the power to delay non-financial legislation for at least as long as the one year currently permitted.

Composition of a New Second Chamber

Enhancing the Current Chamber

A number of non-legislative changes to the composition of the House of Lords could be initiated immediately - for example, introducing an attendance requirement, making the system of appointments more transparent, and the balance between the parties more equitable by increasing the number on the Opposition benches. Such reforms might prove attractive to the Conservative Party as part of their policy of incremental enhancement of the House of Lords, and as a pre-emptive strike against the prospect of more radical reforms from the Opposition parties.

A Nominated Chamber

The Labour Party is likely to face parliamentary, public and media dissatisfaction with a limited measure to remove the hereditary peers. There will be pressure to establish a constructive agenda of reform for the interim nominated chamber, to ensure that it is sustainable in its own right. The extent to which a Labour Government would embrace such changes will depend on:

- the degree of support they can secure in Parliament without taking such measures.
- whether the Labour Party wishes to turn the chamber into a working chamber, in which peerages are jobs, rather than honours.

Recommended options for a "democratic" nominated chamber include:

- the appointments system could be reformed to provide for peers to be chosen by party lists, but with public nominations invited for cross-benchers; recommendations to the Queen would ultimately be the responsibility of the Prime Minister, but he or she could be required to seek the advice of an advisory body of Privy Councillors. Criteria for decisions on appointments could be published.
- party strengths could be determined in the short term on the basis of the party of government having a majority of one over the nearest opposition party (this would require the creation of 63 new Labour peers on taking office). In the longer term, party strengths could be determined on the basis of nominations proportionate to votes cast in every general election, but this would need to be accompanied by some mechanism to limit the number of peers created.

An Elected Chamber

The Liberal Democrats would move directly to an elected chamber - as would the Labour Party in due course. There are obvious attractions, not least the legitimacy and authority that are derived from the electoral mandate. But there are also difficulties in deciding on the exact form of election. Foremost amongst these difficulties is that by enhancing the democratic legitimacy of the second chamber, it could become a rival to the House of Commons - unless its powers and functions are clearly defined. The creation of a rival chamber may not be considered a negative outcome in itself - but in political terms is critical, as any reforms to the House of Lords will need to be agreed to by the House of Commons. The following factors would need to be considered in defining and distinguishing an electoral system:

- the form of representation - direct or indirect.
- the units of representation.
- the total number of members.
- the possible retention of a nominated element.
- who might seek election.
- the likely party structure.
- the tenure of office and timing of elections.
- the electoral system.

Chapter 1

Introduction

"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 newspapers. From time to time, the whole country becomes excited... Occasionally legislation is introduced; it generally fails."

Janet Morgan, 'The House of Lords in the 1980s',
The Parliamentarian, October 1982

The Demand for Reform

1 There is little public or parliamentary clamour for reform of the House of Lords, and even less understanding of the way the chamber currently operates. The Joseph Rowntree Reform Trust & MORI *State of the Nation* poll in 1995 suggested that only 3% of the population knows "a great deal" about the House of Lords; more than three quarters of the population admit to knowing "just a little" or "hardly anything at all". Despite this, in the same poll, 43% supported replacement of the House of Lords with an elected second chamber when the proposal was put to them.[1]

2 This "gut democracy" is an understandable reaction. In our political system, the burden of proof lies with the defender of the non-elected body, and the one thing that most people will know about the House of Lords is that its members are not elected. And of course, the desire for an elected second chamber is not new. The preamble to the Parliament Act 1911 states that "it is intended to substitute for the House of Lords as presently constituted a second chamber constituted on a popular instead of a hereditary basis, but such a substitution cannot immediately be brought into operation." Since then, the attempts of subsequent generations of politicians to reform the composition of the House of Lords have produced equally imperfect results.

3 Yet even now, there is no shortage of proposals for reform; the main Opposition parties have outlined reform proposals in varying degrees of detail; and academics and think-tanks regularly produce new blueprints for a reformed second chamber.

The Prospects for Reform

4 This report does not seek to add to the already large pile of "possible schemes for reform." The Constitution Unit is conducting a technical inquiry into the implementation of constitutional reform, aiming to identify not only the practical difficulties facing a reforming Government in implementing change, but also the possible solutions to those difficulties. Our starting point is the policies that the political parties have set out. For this reason, little attention is paid to the option of unicameralism, which is currently not favoured by any mainstream political party.

5 The report examines the history of reform attempts and the current workings of the House of Lords in Chapter 2 before considering the arguments for bicameralism and the ways in which other countries have tackled the difficulties inherent in creating a "second chamber" in Chapter 3 and the objectives of reform and the three main parties' views on the way forward in Chapter 4.

6 In Chapters 5 and 6, the Labour Party and Liberal Democrats' policies are reviewed to identify the key issues of implementation, and solutions to potential difficulties are suggested. Chapter 7 assesses how the wider constitutional reform agenda may affect the timing of reform of the House of Lords; what consultative mechanisms might be most useful in developing policy in this area; and the practicalities of legislating. In conclusion, Chapter 8 charts three possible routes to reform.

Chapter 2

The House of Lords in the 20th Century

"The history of all former attempts at coming to close quarters with the House of Lords Question shows a record of disorder, dissipation of energy, of words and solemn exhortation, of individual rhetoric and impressive ipse dixits without any definite scheme of action..."

Edwin Montagu writing to the Prime Minister, Herbert Asquith, 1909

The Story So Far

7 The current House of Lords - and in particular its predominantly hereditary membership - is a remnant of an age in which the social standing of an individual determined his personal authority to govern the country; or to elect those who were deputed to govern. With the introduction of mass suffrage in the 19th century, and the consequent emergence of what A.V. Dicey termed the "political sovereignty" of the whole people, the House of Lords could no longer maintain its former claim to be co-equal with the House of Commons, and its political authority diminished.

8 As a consequence, since the beginning of this century a range of proposals for the abolition, reform or replacement of the House of Lords have been put forward. Table 1 analyses the key features of some of the main schemes. What is clear from this historical outline is that would-be reformers this century have, almost without exception, begun with the premise that the base of membership in the House of Lords needs to be changed (and in particular, that the hereditary principle is indefensible), and from this need flows all other reforms, including reforms of functions and powers, which might logically be regarded as a prior consideration. Equally apparent is that no completely satisfactory solution to the complex question of the most appropriate membership for the second chamber has yet emerged.

9 Although none of the comprehensive schemes for reinventing the House of Lords have come to fruition, more limited legislative and procedural changes this century have impacted significantly on the composition, powers and functions of the second chamber. These changes include the Parliament Acts of 1911 and 1949, which limited the powers of the House of Lords in relation to public bills; the Acts of 1958 and 1963, which introduced life peerages and entitled all Scottish peers, and peeresses from across the UK, to sit in the House of Lords; and the establishment in the last two decades of a number of influential permanent committees - in particular, the European Communities Committee, the Delegated Powers Scrutiny Committee and the Science & Technology Committee.

10 Indeed, the House of Lords continues to adapt to the changing political environment - following the recommendation of the Procedure Committee Sub-Committee chaired by Lord Griffiths, the House of Lords has agreed to the establishment of a register covering "any arrangements, such as consultancies, whereby members of the House accept payment or other incentive or reward for providing Parliamentary advice or services, or any similar arrangement; and any financial interest in a business involved in Parliamentary lobbying on behalf of clients", as well as the voluntary registration of other interests. It has also responded to new areas of interests - a newly instituted Select Committee on relations between central and local government has been heralded as a significant move to fill an obvious gap in parliamentary activity, and a committee better suited to the relatively non-partisan arena of the House of Lords than to the House of Commons.

Composition

11 At the end of the 1994-95 Session (on 8 November 1995) there were 1,190 eligible members of the House of Lords. This total includes 755 peers by succession, 15 hereditary peers of first creation, 372 life peers, 24 archbishops and bishops (the Lords Spiritual), and 24 Law Lords - 12 of whom are "Lords of Appeal in Ordinary", forming the final Court of Appeal. Of the 1,190 members of the House of Lords, 79 were women[2].

Table 1 Proposals for Reform of the House of Lords, 1908 - 1994

Proposers	Number of Members	Hereditary?	Nominated? How?	Elected? How?	Government Majority?	Attendance	Functions and Powers - Any Changes
1908 Select Committee.	c. 400.	majority of members, but not automatic - elected for one Parliament by whole peerage.	limited number of life peers. Plus ex-Cabinet Ministers, etc. if hereditary peers.	no.	not explicitly.	no mention.	not considered.
1917 (Report 1918) Bryce Conference on the Reform of the Second Chamber.	81 nominated 246 elected 327 total.	eventually insignificant. Hereditary peers would make up the 81 nominated peers initially - then reducing to 30.	yes - by a committee of both Houses. But see previous box.	indirectly elected by MPs grouped regionally. Hold seats for 12 years one third retiring every 4 years.	Not in-built. Disagreements resolved by "Free Conference Committee" - 30 members of each house.	no mention.	defined functions as: • ultimate Court of Appeal • debating matters of public interest • initiation of uncontroversial bills • examination, revision and delaying of bills.
1948 Conference of Party Leaders on the Parliament Bill 1947.	no total indicated.	not automatic membership - selected for personal distinction or public service.	yes - life peers, plus Law Lords, Bishops, Crown descendants.	no.	"no permanent majority assured for any political party".	"provision should be made for disqualification", plus renumeration.	limited discussion - related to Parliament Act 1949.
1968 White Paper *House of Lords Reform* and Parliament (No. 2) Bill.	230 voting peers plus unspecified number of non-voting peers including Law Lords and Bishops.	no - but free to stand for election or to be nominated.	yes - by PM. A committee would be established to review periodically the composition of the reformed house.	no.	yes - a small government majority "in normal circumstances".	required to attend not less than one third of sittings in each session. 72 = retirement age for voting peers. Renumeration recommended.	• power to delay bills for six months • power to oblige House of Commons to debate and vote again on SIs, but remove power of final rejection. • a further review of the functions and procedures of both Houses.
1978 *The House of Lords: The Report of a Conservative Review Committee.*	402 - two thirds elected.	eventually no - but free to stand for election or to be nominated.	yes - initially all life peers and 50 active hereditary peers. Would eventually have one third nominated members - chosen by PM with advice from Committee of Privy Councillors.	yes - would eventually have two thirds elected, with one third of this number seeking re-election every three years under some form of PR. Each member elected for a 9 year term.	no.	no mention.	• power to delay bills from the House of Commons for two years • right to call referendums on constitutional issues.
1989 Labour Party *Policy Review for the 1980s: Meet the challenge, Make the change.*	no total indicated.	no - but free to stand for election.	no.	yes - "indirect link" to regions. In 1991, the Plant Working Party recommended regional list PR, agreed to by 1993 Party conference.	no.	Ministers would not sit in the second chamber. No mention of attendance requirements or renumeration.	• "deliberative" not "legislative" chamber - no bills introduced, only limited power to delay bills. • new delaying power in respect on measures affecting "fundamental rights". • new Standing and Select Committees.
1994 Institute for Public Policy Research *Reforming the Lords.*	270 elected Senators plus 30 nominated Senators.	no - but free to stand for election or be nominated.	yes. Chosen by joint committee of both Houses and approved by the PM. One third would change every 3 years.	yes. elected for 9 year terms under regional list PR, with one third of seats being contested every 3 years. Each region would have 18 senators.	no.	Senators would be regarded as full time, and would be salaried. Co-options could be made to Senate Committees.	• retain delaying powers • new committees to cover government departments. • equal standing with the House of Commons on constitutional matters and special role in relation to human rights • enhance pre-legislative scrutiny.

Note: none of these proposals represent the current polices of any Party.

12 All members of the House of Lords, including those whose entitlement stems from their professional duties, sit in the House of Lords in their personal right. Thus, the bishops do not represent the Church of England and the Law Lords do not represent the judiciary. Equally, life peers and hereditary peers have no official representative function. The one important concession to representative politics - party political affiliations - differs from the party system in the House of Commons by the presence of a statistically significant group of independents, the cross-benchers, and by the comparative weakness of the whipping system, dealing with an unremunerated, part-time House. The total number of sitting days in 1994-95 Session was 142 and the average length of a daily sitting was 6 hours and 22 minutes.

13 In calculating party strengths, the notional total of 1,190 members cannot sensibly be used. This is because of the number of members on leave of absence (68 members at the end of the 1994-95 session) and those without a Writ of Summons (85). In addition, a significant number of peers at any one time have not taken the Oath of Alliegance in the current Parliament and therefore have no entitlement to attend, sit, or vote until they do so. As a result of these factors, and the unpredictability of attendance, the average daily attendance in the 1994-95 Session was 376, less than one third of the total membership.

Table 2 Party affiliations of members of the House of Lords at the end of 1994-95 Session

Conservative	Labour	Lib Dem	Cross-Bench	Other	Bishops	Total
476	109	52	289	88	23	1037
(19)	(4)	(0)	(16)	(41)	(2)	(82)

Source: House of Lords Information Office, Information Sheet No. 13. Totals exclude those on leave of absence and without Writs of Summons, but include those who have not taken the Oath. Figures in brackets show how many peers have not taken the Oath within each category; these are also included in the main figures.

14 The preponderance of declared Conservatives in the House of Lords is criticised by many of the House's detractors, and the party's numerical dominance is given as a reason for the need to reform the institution. Analysis of voting patterns in the 1988-89 Session by Donald Shell and David Beamish has shown that where the Government formally took sides, there were 172 Government victories and 12 defeats. If the votes of the hereditary peers had been excluded and all other votes had remained the same, there would have been 21 Government victories, 159 Government defeats and a "draw" on 4 occasions.[3] This appears to provide strong evidence of the Government's reliance on hereditary peers to provide it with a majority. But this must be tempered by recognition of the many factors influencing voting patterns - whether policy commitments have appeared in party manifestos, the size of the Government majority in the House of Commons, the passage of time since the general election.

15 Considerable attention has in the past been paid to the "backwoodsmen", mainly hereditary peers who it is believed can be called upon by the Conservative Party to turn out for a particularly crucial vote. In fact, the number of peers who only ever attend the House of Lords on such a summons is limited - rather, the Conservatives are able to ask a sizeable proportion of peers who attend on a day or two each month to do so on a particular day. Such heavy whipping is used only rarely - perhaps once or twice a year. And the same analysis of the 1988-89 Session concluded that "in no case...would the result of a division have been altered by eliminating those votes cast by rare attenders - members attending not more than 5% of sittings."[4]

16 In the face of criticisms of party imbalance, the Government Chief Whip pointed out in 1984: "In almost every case and almost every way of looking at it, the Government do not have an

overall majority in this House"[5]. One critical assumption underpinning this calculation was that the cross-benchers might all be counted as potential Opposition supporters, although some observers have held that the cross-benchers are overwhelmingly Conservative supporters. Again, the detailed analysis of the 1988-89 Session suggests a more complex picture than this; although cross-benchers votes were more than 60% in favour of Government motions, the cross-benchers never saved the Government from defeat. In fact, it is the existence of the cross-benchers that makes it particularly difficult to draw conclusions about the relative party strengths. As a recent report by a group of predominantly cross-bench peers comments:

> *"It is possible to attempt analysis of their voting patterns at different times and in different ways, but unfortunately such analysis tends to come up with contradictory conclusions....What is more, there is no guarantee that any pattern identified would obtain in the future....it may seem that the Crossbenchers habitually vote with the Conservatives, since the Government has in recent years won most divisions. This is actually less significant than it may seem. It is a long-standing constitutional presumption that the Government should secure its business in both Houses of Parliament. Government defeats must therefore remain exceptional events for Parliamentary government to work at all."*[6]

17 Nevertheless, the current numerical strength of the Conservative Party in the House of Lords means that in theory even an alliance of Labour, Liberal Democrats and cross-benchers could not defeat a Conservative Government - and many on the Opposition benches are uncomfortable about relying on constitutional conventions (however long standing), or the reassurance provided by historical patterns of attendance, as defences against this eventuality.

18 In addition to representing party views, peers may also have an informal role in representing particular interests or social sectors. The 1968 White Paper *House of Lords Reform* described the second chamber glowingly as a "blend of the active parliamentarian and the independent expert...which gives the House its special distinction and special qualifications for performing the functions assigned to it" and sought to preserve exactly those elements in its proposals for reform. In fact, many of the "active parliamentarians" in the House of Lords are former MPs who regard the second chamber as honourable retirement, rather than an opportunity to (re)dedicate themselves to public service, and the "independent experts" are greatly out-numbered by the largely inexpert hereditary peers, who may nevertheless have merits of their own.

19 Peerages are formally created by the issue of Letters Patent by the Queen. Newly created peers must be ceremonially introduced to the House of Lords before taking their seats; peers who have inherited titles need no formal introduction. Lords of Appeal in Ordinary - commonly referred to as Law Lords - are appointed under the Appellate Jurisdiction Act 1876 (as amended) "for the purpose of aiding the House of Lords in the hearing and determination of appeals" but are also entitled to "a writ of summons to attend, and to sit and vote in the House of Lords". To be eligible for appointment, an individual must have held high judicial office (as Lord Chancellor, judge of the Supreme Court or the Court of Session or of the Supreme Court of Judicature of Northern Ireland) for at least two years or hold a Supreme Court qualification. The Lords Spiritual are the archbishop and bishops of the Church of England who are given seats in Parliament by "ancient usage" and by a number of statutory provisions which provide for a fixed number of Lords Spiritual. They have no restrictions on their rights to sit and vote, but lose their seats on retiring or resigning (although the Archbishops of Canterbury and York are usually given life peerages on retirement).

20 Aside from the Lords of Appeal in Ordinary and the Lords Spiritual, a person will formally receive a peerage today through one of six different lists[7]:

- working peers. These are usually drawn up once a year. Such peers belong to a political party, and will usually be recommended by the Prime Minister after consultation with the Leader of the Opposition and others.
- Queen's Birthday and New Year's Honours Lists. Inclusion mainly signifies the conferment of an honour.
- Dissolution Honours Lists. These are issued early in the life of each new Parliament on the recommendation of the sitting Prime Minister, following consultation with other party leaders. Primarily intended to honour former Ministers and MPs of all parties who did not seek re-election. Former Cabinet Ministers will normally receive a life peerage in that list.
- Resignation Honours List. These are issued on the occasion of a Prime Minister's resignation, and consisting only of members of the Prime Minister's party and others who have served him or her.
- special appointments by the Queen, not necessarily on the Prime Minister's advice e.g. for members of the Royal Family and former Prime Ministers.
- appointments of non-parliamentarians to enable them to become Ministers.

21 The way in which names get onto the lists is not intended to be public knowledge, but two recent accounts (John Walker *The Queen Has Been Pleased* and Michael De-la-Noy's *The Honours System*)[8] have shed light on the procedures and practices involved. For most honours, this first stage is consideration of possible recipients of honours by a series of committees, covering every area of public life. The existence, composition and discussions of these committees are well guarded secrets, but they involve both senior civil servants and distinguished experts in specialist areas. Two basic criteria are used: degrees of excellence and levels of responsibility. These area committees submit their lists to the main Honours Committee whose interests are watched over by a committee chaired by the Cabinet Secretary and made up of permanent secretaries. The co-ordination of the process is the responsibility of the Ceremonial Branch of the Cabinet Office - and in particular, the Ceremonial Officer.

22 However, although one or two names might emerge from this process as suitable for the award of a peerage, most are identified through a process of discussion between the Prime Minister and the Chief Whip - and consultation with Opposition party leaders. Names are suggested throughout the year, and some individuals may be chosen because they meet party needs, for example, to provide specialist expertise on the frontbenches.

23 Once the Prime Minister has considered the list and made any additions or deletions, it will be sent to the Political Honours Scrutiny Committee, which consists of three Privy Councillors who are not members of the government, usually members of the House of Lords. The Committee is only concerned with political honours - nominations placed on the list by the Prime Minister personally in order to reward someone in his or her own party or to strengthen the party's representation in the House of Lords; or names submitted for the same purpose by the Leader of an opposition party. Its remit is to act in an advisory capacity to the Prime Minister and to report whether "after making such enquiry as they think fit", those nominated for political honour are "fit and proper persons", taking into account "past history or general character". Each nomination is accompanied by a statement outlining the services performed and the reasons for the recommendation and a statement expressing satisfaction that the recommendation is not connected directly or indirectly with payment, or expectation of payment, to party funds. (This requirement is interpreted to mean that a contribution to party funds is not a bar to membership of the House of Lords in itself, but only where it appears to be the sole factor influencing a recommendation.)

24 The Committee has only once voiced any concern about the creation of peerages. Prompted by intense media speculation, Lady Summerskill, the Labour Party's representative on the Committee at

the time of Harold Wilson's resignation honours list, wrote after the event to *The Times* to say that the committee "could not approve of at least half the list", and that they had been astonished to find it published (with one exception) as originally submitted. Their concerns were more to do with questions of suitability than financial propriety. But the Committee felt it inappropriate to ask the Queen to intervene and were therefore effectively powerless if the Prime Minister (who in turn felt obliged to observe his predecessor's wishes) did not act on their concerns. There also appears to have been confusion about whether the Committee's remit extended to resignation honours (which were not strictly political honours). Those being offered a peerage on the Prime Minister's recommendation are sounded out by the Prime Minister before the list goes to the Queen.

25 Hereditary peerages normally descend to the "heirs male of the body" of the first holder. However, certain ancient baronies and some Scottish peerages may be inherited by a woman. In addition, there are a few peerages which descend by "Special Remainder" - i.e. a special arrangement was made when the peerage was created - and some of these may be inherited by women. Women who hold hereditary peerages received the right to sit in the House of Lords under the Peerage Act 1963.

26 Since the introduction of the Life Peerages Act in 1958, there have been very few hereditary peerages bestowed. Harold Wilson had announced in 1966 that he would not create any new hereditary peers and successive Prime Ministers - both Labour and Conservative - limited themselves to the appointment of life peers. This emerging convention was weakened by Margaret Thatcher's recommendation of viscountcies for William Whitelaw and George Thomas in 1983 (although, in practice, these honours were little different to life peerages as neither has a male heir) and an earldom for Harold Macmillan in the following year.

Functions

27 Aside from the judicial function of the House of Lords in providing a supreme court of appeal, there is a range of functions currently fulfilled by the House in its role as part of the legislature. In 1918, the Bryce Report on Reform of the Second Chamber[9] identified four key functions:

1. the examination and revision of Bills brought from the House of Commons.
2. the initiation of Bills dealing with subjects of a comparatively non-controversial nature.
3. the interposition of so much delay (and no more) in the passing of a Bill as to enable the opinion of the nation to be adequately expressed upon it.
4. full and free discussion of large and important questions.

28 Although the 1968 White Paper, *House of Lords Reform*,[10] did not specifically refer back to the Bryce Report's definition of functions, there is a significant degree of correlation between the views of Bryce and the White Paper - written ten years after the introduction of life peers. The White Paper included versions of 1, 2 and 4 and added three more:

1. the provision of a forum for full and free debate on matters of public interest.
2. the revision of public bills brought from the House of Commons.
3. the initiation of public legislation, including in particular those Government bills which are less controversial in party political terms and Private Members' Bills.
4. the consideration of subordinate legislation.
5. the scrutiny of the activities of the executive.
6. the scrutiny of private legislation.

29 There is a tendency, even amongst reformers, to assume the continued relevance of both of these now classical descriptions of function, and to add to them as practice dictates (most current lists of functions would now also include a reference to select committee work). However, there are discrepancies between the two lists that raise interesting points for further consideration.

30 First, the inclusion of "the scrutiny of the activities of the executive" in the 1968 White Paper. Since the reduction of the Lords' powers in 1911 had signified a formal end to the notion of co-equal Houses (although in practice, this change in the relationship had taken place much earlier) the House of Lords' role in holding the executive to account had not been expressed so explicitly - this was widely regarded as the responsibility of the elected House of Commons. The Lords' willingness to take on this role is evident in the extent to which Ministers are now quizzed over the activities of the executive both on the floor of the House and in specialist committees. Nevertheless, it remains debatable whether this function is appropriate to a second chamber as currently constituted, how it should properly be exercised (e.g. through a more wide ranging series of select committees), and whether and how it should be distinguished from the parallel functions of the House of Commons. Second, the 1968 White Paper excluded from the list of functions the power to delay legislation or any other reference to the House of Lords' constitutional functions. This was probably done for political reasons, in that the White Paper proposed reducing even further the powers of delay and it would therefore have been judged prudent to minimise the significance of this function.

31 By far the largest percentage of the House of Lords' time is taken up with consideration of public bills - more than 50% in the 1994-95 Session; general debates also secured nearly 20% of the House's time, with starred questions (short oral questions) taking up around 7% and unstarred questions (leading to full debate) nearly 5%. But many believe that the Lords' greatest influence now lies in the more specialist work, particularly in relation to science and technology and the scrutiny of European legislation much of it undertaken away from the floor of the House. The 1982 Report of a Study Group of the Commonwealth Parliamentary Association on "The Role of Second Chambers" concluded that the Lords provided:

> *"the only really deep analysis of the issues that is available for the parliamentary representatives of the ten countries in the [European] Community. The Lords' reports are far more informative and comprehensive than those produced by the Commons committee on European legislation. That is because the Lords' committee Members are more objective and often have close knowledge of the subject under scrutiny. In the Commons, party allegiances can come to the fore."*

32 Ad hoc select committees (recent examples include Unemployment, Overseas Trade, Murder and Imprisonment) have had more varied degrees of influence on policy making, but there are some notable successes. In the 1980s, for example, the Brightman Committee on Charities and the Halsbury Committee on Protection for Laboratory Animals both helped towards the framing of subsequent legislation. Recent procedural experiments - consideration of a bill in committee of the whole House off the floor; an informal meeting on a bill between second reading and committee stages; and in particular the commitment of several bills to Special Public Bill Committees - mean that the scope for detailed scrutiny of public bills is increasing, and the fact that a guillotine cannot be imposed in the House of Lords and opportunity to make amendments at Third Reading mean that, in theory, there are greater opportunities for debating and seeking to amend public bills than in the House of Commons.

Powers

33 The House of Lords has three principal powers: to delay, to amend and to introduce public legislation. These are restricted in various ways.

34 First, under the Parliament Acts 1911 and 1949, the Speaker of the House of Commons may certify a bill as a money bill on the grounds that it deals only with national taxation or public money. Such a bill must receive Royal Assent not more than one month after its introduction in the House of Lords, even if the Lords have not passed it, and the House of Commons may direct that any amendments which were passed in the House of Lords should be disregarded. If the Lords reject any other Commons bill, then the same bill introduced and passed by the Commons in the following session (one year having elapsed between its first Second Reading in the Commons and its final passing in the House of Commons) may receive Royal Assent in the form in which it reaches the Lords even if the Lords amend or reject it again.

35 Only the War Crimes Bill in 1990-91 has passed into law under the Parliament Acts since the Parliament Act 1949 itself, which reduced the period of delay from two years to one year. (The Government of Ireland Act 1914 and the Welsh Church Act 1914 were passed under the Parliament Act 1911). Since 1949, two other bills have been reintroduced under the Parliament Acts, but then enacted by agreement between the Houses without further recourse to the Parliament Acts[11]; another was lost through opposition in the Lords and not reintroduced[12]; and another was reported against by a House of Lords Select Committee and not reintroduced[13].

36 Just as important as the House of Lords' formal powers, though, are the self-imposed restraints on their exercise. Since 1945 the House of Lords has observed "the Salisbury convention", as explained by Lord Carrington:

> *"Cranborne [Conservative Leader of the House of Lords, later Lord Salisbury] reckoned that it was not the duty of the House of Lords to make our system of government inoperable. Nor, he considered, was it justified that the Opposition peers should use their voting strength to wreck any measure which the Government had made plain at a General Election they proposed to introduce. He thus evolved guidelines, now unofficially known as the Salisbury Rules, which meant that the Lords should, if they saw fit, amend, but should not destroy or alter beyond recognition, any Bill on which the country had, by implication, given its verdict. The Lords in other words, should not frustrate the declared will of the people. I doubt if this amounted to a formal constitutional doctrine but as a way of behaving it seemed to be very sensible...by and large the Salisbury strategy worked."*[14]

37 Although this convention rests on the debatable assumption that measures included in a Government's general election manifesto are *de facto* approved by the public at large, its force remains. This convention does not, however, prevent the House of Lords from amending a bill, and there is a delicate balance between an Opposition party expressing its dissatisfaction and presenting a menace to the security of the Government. In the 1970s, for example, Labour Governments suffered significant amendments to some bills which implemented manifesto commitments, including the Scotland and Wales Bills (although there was never any threat to the plans for devolution *per se*, as the amendments were principally concerned with the electoral system which had not been mentioned in the 1974 manifesto). In total the Labour Government suffered some 355 defeats in the House of Lords during the 1974-79 Parliament[15], although many were subsequently overturned in the House of Commons.

38 Bills introduced by Conservative Governments are not so susceptible to amendment on the floor of the House, but they are not entirely exempt (the Conservative Government experienced some 156 defeats in the House of Lords between 1979 and 1990[16]) and some bills have involved considerable behind the scenes negotiation with Ministers to secure changes. Other factors may sway the second chamber in their response to Government measures - for example, they might be more inclined to express concerns and objections if the party of government cannot claim a majority in the House of Commons or, conversely, has such a large majority in the Commons that peers may speak their minds without fear of confounding the democratic authority of the lower House, as amendments can certainly be overturned.

39 The House of Lords has the power of absolute veto over most secondary legislation, private bills and bills originating in the House of Lords, where the Parliament Acts do not apply. This sanction is rarely used. The House of Lords has preferred to use other means to force or invite the Government to amend delegated legislation, and the convention is that the Lords will not normally try to vote down a statutory instrument which the Commons have approved. The only successful exception to this rule has been the rejection of the Southern Rhodesia (United Nations Sanctions) Order 1968, which action prompted Harold Wilson to proceed more quickly than was prudent with introducing the Parliament (No. 2) Bill in 1968. Other mechanisms for displaying disapproval are also used - debates on Unstarred Questions or "non-fatal critical motions". The Lords, currently in the shape of the Delegated Powers Scrutiny Committee, established in 1992, also have powers to scrutinise delegated powers, which have increased in volume in recent years. The Committee will highlight concerns as legislation passes through the Lords and amendments will usually be introduced to meet these points.

40 Although the Lords has the power to introduce legislation, there are invariably fewer Private Members' Bills than in those originating with MPs in the Commons. For example in 1992-93, 15 were introduced in the Lords, and 5 received Royal Assent. The comparable figures for the Commons are 163 and 16. Most major or controversial Government bills are introduced in the House of Commons "as a consequence of the acknowledged political authority of the elected Chamber, the distribution of senior Ministers between the two Houses, and financial privilege"[17], although convention dictates that bills for which the Lord Chancellor has responsibility are introduced in the Lords.

41 Finally, the House of Lords also has formal powers to prevent the extension of the life of Parliament beyond five years and to veto any proposed dismissal of a High Court judge or Lord of Appeal in Ordinary. This, combined with its role as scrutineer of delegated powers, enables the second chamber to act as a form of deterrence to a would-be authoritarian Government. But its role as an important constitutional check and as a safeguard of judicial independence is far greater in theory than in practice. This is not least because the House of Lords is self-conscious about its vulnerability to criticism on the grounds of unrepresentativeness and is understandably reluctant to claim for itself a greater understanding of the popular will than the elected chamber.

Conclusion

42 Would-be reformers need to understand both the evolution, and current working, of the House of Lords. First, in order to appreciate that the legislation relating to the House of Lords is only a small part of the framework within which the it operates - convention, practice and procedure are of equal importance. In any attempt to reform the House of Lords by legislative means, this should be borne in mind. Second, in order to recognise the complexity of the relationship between functions, powers and composition. So tackling composition without creating knock-on effects elsewhere may be difficult, not least because of the extent to which the exercise of powers and discharge of functions is controlled by convention - which in practice means the behaviour of members.

Chapter 3

Bicameralism - Theory and Practice

"...hereditary members of the present House of Lords - who are well aware of its shortcomings - would vote themselves into history with barely a backward glance in favour of a reformed House which was more effective, and whose composition commanded wider acceptance, than the present one."

The Earl of Carnarvon, et al.
Second Chamber: Some remarks on reforming the House of Lords, 1995

The Rationale for Bicameralism: International Perspectives

43 The most recent comprehensive survey of national parliaments, conducted by the Inter-Parliamentary Union in 1995, identifies that 51 of the total of 178 state legislatures were bicameral[18]. Most second chambers fulfil both constitutional and political roles. At a basic level, the adoption or retention of a bicameral system usually reflects a perceived need for a second consideration to be given to draft legislation. Second chambers may also provide an alternative form of representation from that of the other chamber. In both these senses, the role of a second chamber may be regarded as essentially compensating for apparent deficiencies elsewhere in the system. In addition, second chambers often fulfill a classic constitutional role of providing checks and balances within the political system, and providing "democratic protection of peoples' liberties". The specific composition and role of the second chamber within the parliamentary system is, however, the product of one of two main forces: historical accident and accretion, and federal pragmatism.

44 First, the design of parliamentary systems in many parts of the world - and especially in Commonwealth countries - coincided with the high point of the British system of government, which was widely taken as a blueprint. The British system itself has its origins in the medieval Great Council and *curia regis* and the later establishment of the Chambre des Communes, which became the House of Commons.

45 Second, there is a clear link between federalism and two-chamber assemblies. A 1989 survey of 165 political systems of the world concluded that of the 20 federal states identified, 16 (80%) had two-chamber assemblies; whilst of 145 unitary states, only 32 (22%) had two-chamber assemblies[19]. In federal states, a two-chamber system enables one chamber (usually, but not always, the upper house) to be designed to represent regional interests. This analysis is supported by the Commonwealth Parliamentary Association, whose 1982 report *The Role of Second Chambers* offered the verdict that:

> *"[although] there was no feeling that the Second Chambers could claim to have been a special success...the two chamber system offers great advantage over any other, and especially in a federation or union of states where the rights and the legitimate demands of the people in regions widely disparate in geography, social make-up, traditions, and sometimes language can be effectively represented."*

Because this representative responsibility of a federal second chamber is so important, it is perhaps more accurate to describe the role of such chambers in relation to first chambers as complementary rather than compensatory. Indeed, "complementation" is regarded by most commentators as the key feature of an effective bicameral systems, whether federal or not.

46 By the same token, the size of the population appears to be a significant factor in considering the need for a second chamber at all. Those countries that have done away with their second chambers or never saw the need for one - for example, Sweden, Denmark, Portugal and New Zealand - are notable for their comparatively small populations (and in many cases, a well established and effective system of parliamentary committees to scrutinise legislation). The argument runs that the elected members of the lower house are therefore nearer to the people they represent and held more closely to account, so the need for a revising second chamber is reduced. A Commonwealth Parliamentary Association meeting in 1991 supported a unicameral system for smaller countries "dismissing upper chambers variously as a waste of money and manpower, ineffective, undemocratic and a needless duplication of effort."[20]

47 Amongst those countries that have a bicameral system, the majority of second chambers are weaker than, or enjoy only parity with, the first chamber. Only one, the US Senate, can be said

to be stronger. Moreover, the power of second chambers in relation to the executive is also generally weak. The twentieth century has witnessed a decline in the authority of popular assemblies (whether first or second chambers) vis-à-vis the executive, as a result of the increasing dominance of party control which provides greater actual power for the executive regardless of the theoretical powers of the legislature.

48 Political systems with parliamentary executives, made up of members of the legislature, have in many cases seen the virtual disappearance of non-party affiliated, independent politicians (it has been reported that "Kiribati, the Maldives, Nauru and Tuvalu seem to be the few contemporary states where assembly elections are contested by politicians standing as independents"[19]) and the rise of powerful and well disciplined parties, which demand that their members unfailingly toe the party line in the voting lobbies and in other fora. One of the traditional functions of second chambers - providing wise counsel and a voice of caution - is therefore increasingly ineffectual. It has been argued that the trend towards executive dominance has been reinforced in those countries, like the UK, where a simple majority electoral system is used. Political systems with limited presidential executives (like the USA and a number of South American countries) and countries with electoral systems that encourage coalition government (including several West European countries) have been less affected by this trend.

Second Chambers Around the World

49 Of the 51 states with second chambers identified in the Inter-Parliamentary Union survey, membership is based wholly on elections in more than half the states, with the remaining states split roughly equally between those who favour a wholly appointed system and those who have adopted a part-elected and part-appointed basis of membership. In some of the small states, especially those that are modelled on a Westminster system, the mixture of election and appointment is designed to reflect the political balance in the first chamber. Provision is made in several Commonwealth countries for the nomination of representatives of professional groups or sections of society: literature, science, arts and social service in India; minority racial groups in Malaysia, the tribal chiefs in Zimbabwe. In states modelled on the US system, direct election is the most common model, whilst in Europe and South Asia, indirect election predominates, in the majority of cases by regional assemblies. In some states - as in Australia - regions also have bicameral legislatures.

Nominated Chambers

Canada

- The Senate consists of 104 members.
- Senators are nominated by the Governor-General on the advice of the Prime Minister, distributed as follows: 24 each for Ontario and Quebec, 10 each for Nova Scotia and New Brunswick, 6 each for Newfoundland, Alberta, British Columbia, Manitoba and Saskatchewan, 4 for Prince Edward Island, and 1 each for the North West Territories and the Yukon. Despite the regional basis of representation, the provincial governments play no part in the nomination procedure and there are no mechanisms for holding the "representatives" to account once appointed, so claims to regional representation are widely regarded as nominal.
- If absent for two consecutive sessions, a Senator will lose his or her seat, but otherwise is a member until the retirement age of 75 (this applies only to Senators created since 1965). Each Senator must be at least 30, and must reside and own property in the province he or she represents.

- The Senate includes a large number of lawyers, former regional government Ministers and business people. The nominations system has sometimes been used to give recognition to economic, ethnic and religious groups (for example, organised labour and farmers have benefited, and the Protestant minority in Quebec and English speaking Catholics elsewhere have been over-represented in the Senate to compensate for under-representation in the House of Commons). One of the Senate's more cynical critics has described it as "little more than a patronage bin for party men, cronies and hacks."[22]
- The Senate's powers are the same as the House of Commons, with some exceptions: appropriation and tax bills must originate in the Commons and it cannot increase the amounts in Money Bills. But because of its composition, it has only limited authority in relation to legislation and normally accepts the House of Commons' position.
- The Senate has a suspensive veto of 180 days on constitutional amendments.
- Senate committees are regarded as effective and non-partisan. In the Senate itself, there are no time limits on speeches or on the question period, and no closure.

Indirectly Elected Chambers

France

- The Senate has 321 members.
- Senators are elected indirectly for nine year terms (one third being elected every three years)
- Most are elected by a restricted electoral college made up of local National Assembly members, mayors, Département council members and delegations from municipal councils. 296 Senators represent the 95 metropolitan departments, 8 Senators represent the five Overseas Départements; 3 Senators represent the Overseas Territories; 2 Senators represent the territorial communities. Départements are entitled to different numbers of Senators - those entitled to between 1 and 4 conduct elections on a simple majority basis; those entitled to five or more use a proportional list system.
- An additional 12 Senators are elected indirectly, on the same terms, by the Council for French Nationals Abroad.
- Senators must be at least 35 years old.
- Rural areas are over-represented. The National Economic and Social Council invites representatives of sectors of society and the professions (including unemployed people) to come together as a forum, to produce studies and reports, but is not part of the legislature.
- The Senate has fewer powers than the lower chamber, the National Assembly. Government proposals may be tabled in either chamber, but the lower chamber is usually the first to discuss the draft prepared by the executive. Agreement between the two houses is effected by means of shuttling the proposed text between the two for repeated examination.
- However, the executive is more powerful than either branch of the legislature. If the government wishes to block a text proposed by one assembly, all it has to do is manipulate the other so as to avert a compromise: the proposal then founders. In addition, only the government has the power to unblock the situation when they fail to reach agreement. In effect, "the two chamber system provides the executive with an extra means of implementing its own decisions".[23]

Ireland

- The Senead has 60 members.
- Each Senator is mandated for 5 years (the same period as the members of the Dail).
- Senators must be at least 21 years old.

- Six members are elected by the two oldest universities and 11 are nominated by the Taoiseach. The remaining 43 are elected indirectly from five lists made up of people with knowledge and practical experience of certain interests and services: agriculture and fisheries (11 representatives); labour (11 representatives); arts, culture, education, law and medicine (5 representatives); industry and commerce (9 representatives); public administration and voluntary activity (7 representatives). In addition, there is currently pressure to provide for a number of representatives of expatriate citizens of Ireland.
- Selection of members takes place a few months after the Dail elections. The electorate consists of the members of the newly elected Dail, members of the outgoing Seanad and members of the county councils and urban Corporations, and voting is by a system of proportional representation.
- Although vocational representation via electoral college offers a different basis of representation that enables it to complement rather than challenge the Dail, Dr. Garret FitzGerald, the former Taoiseach, has expressed the caution that such representatives quickly become politicised, and do not in fact offer an alternative expert view to complement the party political approach of the lower House[24]. Such representatives are inevitably either retired or only employed in their "vocation" part-time, and there are also doubts about the cohesiveness of such a chamber.
- The main functions of the Senead are to revise and, to a lesser extent, introduce legislation. It has a maximum of 90 days to consider legislation after it has been considered by the Dail, but no powers to veto. A joint committee of both houses is used for some limited purposes.

Germany

- There are 68 members of the Bundesrat.
- The 16 Länder are entitled to nominate at least 3 representatives (Länder with more than 2 million inhabitants send 4, those with more than 6m send 5 and those with more than 7m send 6.)
- Members of the Bundesrat must be at least 18 years old and have had German citizenship for at least a year.
- Members are more accurately described as delegates - officially, the key postholders of the Länder governments attend, but other members of the Länder governments or senior civil servants may deputise for them. Regardless of how many representatives are present, each Land has a number of votes equal to the number of delegates, but they must be cast as a block vote to reflect each Land government's position. Members' mandates come to an end when their governmental functions do. The chamber is therefore never dissolved, its composition only changing as Länder governments rise and fall.
- Although the Bundesrat lacks legislative equality with Bundestag, it can initiate legislation and does wield power to block some legislation that British and French counterparts do not have. First, all legislation relating to Länder responsibilities must receive the Bundesrat's approval. This provision was originally intended to apply to only about 10% of federal legislation, but now affects nearer 60%. This is because the federal government provides no services other than railways, defence and postal services; so most legislation has to be implemented by the Länder even if the power to legislate is not theirs, and the Bundesrat has insisted it has a right to approve all legislation that will be implemented by the Länder. In addition, all constitutional amendments, boundary changes and emergency legislation require two thirds of the Bundesrat in favour. In other strictly federal matters, opposition from the upper house can be over-ridden by the Bundestag.
- Much of the Bundesrat's work is done through committees, where experts from the Länder governments and bureaucracies can have significant input - all decisions are made in plenary sessions.

- There have been two significant periods in the last 25 years when the majority in the Bundesrat was not reflective of the Bundestag, and a more classical political (rather than territorial) style of representation developed. The increasing politicisation of the house, together with the extended scope of the power of veto, means that the Bundesrat has assumed a more important role within the political system.

Directly Elected Chambers

Italy

- There are 315 elected members of the Senate, plus 11 life Senators.
- Only citizens over the age of 40 may stand for election as a Senator.
- Until 1994, the majority of Italian Senators were elected by PR, plus 5 Senators appointed for life by the President of the Republic. Under the new electoral system, 75% of the 315 seats are elected in single member constituencies by simple majority and 25% by proportional representation, on a regional basis. An additional 11 life Senators can be appointed from eminent persons in the social, scientific, artistic and literary spheres.
- The normal life of the Senate is 6 years, and the Chamber of Deputies is 5 years.
- Government proposals may be tabled in either chamber, but the lower chamber is usually the first to discuss the draft prepared by the executive. The Senate has 12 permanent committees and close relationships are established with government departments. Hearings and inquiries conducted by the committees are a regular feature. Measures can be transferred indefinitely between the two chambers with only procedural constraints: at second reading, each can only pronounce on the amendments tabled by the other, and only amendments that have undergone such modifications may be accepted. There are no formal arbitration procedures although mixed commissions are frequently set up either through the Constitution or as a result of ordinary legislation.
- Having similar powers to the Chamber of Deputies, and similar electoral arrangements, has created political and constitutional difficulties to the extent that the Senate's existence and purpose are often in question. Neither house can claim to be more representative. Prior to the 1994 reforms, unsuccessful attempts had been made to turn it into a Senate of the regions, or otherwise to distinguish it from the lower house.

Australia

- There is a total of 76 Senators.
- Candidates must have resided for at least three years in Australia and be at least 18 years old. There is no statutory upper limit, although some parties have set a limit for their own candidates
- Each of the six states elects 12 Senators by single transferable vote (each State and Territory is a single electorate) to sit in the Senate. Since 1975 the federal Capital Territory and the Northern Territory elect two each. The House of Representatives has almost exactly twice the number of members - the numbers chosen in the different States being proportionate to population sizes - and is elected by alternative vote.
- State Senators serve six year terms and half the Senate retires every three years, but Territorial Senators serve terms in line with the three year duration of the House of Representatives.
- Independents and candidates from minority parties are more likely to be elected to the Senate than to the House of Representatives and for most of the last 40 years, since the introduction of proportional representation, neither main party has held a majority in its own right in the Senate.
- The Senate is intended to be a "House of the States" as well as a "House of review" - but most Senators belong to political parties and are subject to party discipline. In practice, the Senate does little to represent the states or to bind the Australian federation together.

- There is co-equal legislative power in the Senate (apart from the power to initiate or amend certain money bills) to ensure that states with small populations have a voice in Parliament. The Senate has the power, when in disagreement with the House of Representatives to precipitate a double dissolution of Parliament. This power is derived from the Senate's power to veto all legislation, to request amendments to some money bills and to amend other bills. Simultaneous elections for both houses have been considered, in order to reduce the probability of hostile Senate majorities asserting the Senate's power to remove a government which enjoys the confidence of the House of Representatives (as happened in 1975).
- The Senate's committee system scrutinises every government department and its work is credited with increasing the prestige of the Senate. The Scrutiny of Bills Committee is responsible for examining bills before they are formally introduced, to see that the personal rights and liberties of citizens and corporate bodies are not infringed.

USA

- The Senate has 100 members.
- Senators are elected by direct ballot in each state, with 2 Senators representing each state regardless of population size.
- Senators must be at least 30 years old, resident in the state they wish to represent and have lived in the USA for nine years.
- Senators serve for six years (in contrast to the 2 year terms of the House of Representatives), with no restrictions on re-election. One third are elected at a time; elections therefore occur biennially.
- The Senate's approval is required for key federal appointments and for the ratification of foreign treaties; and it hears cases of impeachment against federal officials. It can initiate any legislation except money bills, which must be introduced in the House of Representatives, but can amend or reject any legislation. A series of Senate committees is responsible for detailed scrutiny of legislation.
- The comparatively long term of office - together with their statewide constituency base which is wider than members of the House of Representatives - has enabled the Senate to claim a political mandate and exercise political power exceeding that of the House of Representatives. The Senate is regarded as having greater authority than the much larger House of Representatives, but not directly because of the nature of its membership.

Learning from International Experience

50 Few second chambers have had a settled existence; and as the Commonwealth Parliamentary Association report identified "there are some countries where second chambers are frequently under attack, especially when it is a nominated House or when it neglects to use its powers properly through apathy or indolence".[25] No exercise in comparative politics can hope to find an "off the shelf " answer to the question of how best to reform of the House of Lords. Perhaps more than any other part of the political system, second chambers reflect the history and character of the state. But it is clear that in all cases there is a close relationship between powers and composition and of the second chamber and its legitimacy in terms of its relations with the first chamber, and the executive.

51 Some key conditions for effectiveness can also be identified from the case studies. First, a second chamber that positively complements, rather than one that compensates for, the first chamber in the state legislature is likely to be most effective. Second, the need for and purpose

of a second chamber is most readily discernible in federal states like the USA, Australia, Canada and Germany; but even in these states the specific composition and powers of a particular second chamber may still undermine its political authority, as in Canada where the system of Prime Ministerial nomination diminishes the political credibility of Senators and is reflected in the limited powers of the Senate. Third, the composition of the chamber (whether through nomination, indirect or direct election) must be clearly and deliberately representative of something if the body is to have political authority.

The Rationales for Bicameralism: The House of Lords

52 The modern House of Lords came into being with the Life Peerages Act 1958. In the four decades since (and more particularly since the failure of the Labour Government's attempt at reform in 1969) levels of activity in the House have increased markedly - including an enthusiastic and occasionally combative response to a growing burden of legislative revision; and increased levels of professionalism have been reflected in the quality of peers' contribution to the parliamentary process, an increase in attendance rates and the more systematic appointment of spokespersons from all parties in the Lords. Some have interpreted these developments as a conscious attempt by the House of Lords to justify its own continued existence and relevance.

Winning the Argument

53 Against this backdrop, the peers have scored a significant public relations success. After many years in which the threat of abolition was lurking in the political shadows, a broad consensus has now been maintained for ten years amongst mainstream political parties as to the desirability of a bicameral parliamentary system. This agreement on retaining a second chamber is not influenced by the demands of a federal state, nor by a desire to address issues of regional, social or cultural dislocation.

54 In political terms, the Labour Party's reversal of its commitment in the 1970s to abolition without replacement is widely held to be the result of the Lords' willingness and ability to act as a parliamentary counterweight to successive Conservative Governments in the 1980s; the House attracted widespread popular support, for perhaps the first time.[26] Moreover, the shift in public awareness of Parliament from the printed page to the television may also have influenced public opinion on the House of Lords. The House of Lords was televised before the House of Commons, but (perhaps because of the ostensibly more placid activities of the Lords) attracted none of the criticism engendered by the subsequent televising of the Commons - and in particular Prime Ministers' Questions. If, as some have held, the reputation of the House of Commons with the public has suffered from television exposure, the televising of the House of Lords may by contrast have helped to preserve its reputation as a "House of Honour".

55 But if there is public and political agreement on the need for a second chamber, there is little consensus about the role it should fulfil - and in particular, the precise nature of the checks and balances it could or should provide. Politicians, academics and others advance a host of reasons for the retention of a second chamber, the most common of which are listed below:

- to provide a measure of protection against unconstitutional actions (although the House of Lords currently has only limited powers to veto the prolongation of the life of the elected chamber, and proposals to remove members of the judiciary).

- to provide for the participation in the legislature of those with relevant qualifications and experience but who would be unlikely to stand for election - or unlikely to win if they stood.
- to revise bills from the House of Commons, acting as a check on ill-considered legislation.
- to introduce legislation, allowing more legislation to be considered.
- to delay legislation, giving time for reconsideration by the House of Commons.
- to relieve the House of Commons of committee work.
- to debate matters of general policy in an independent atmosphere.

56 It is clear that many, although not all, of the reasons given for needing a second chamber are derived from the *de facto* pursuits of the House of Lords, rather than resulting from any more fundamental analysis of the necessary functions of parliamentary government. Furthermore, a number of the justifications for a second chamber in the UK represent implicit criticisms of the House of Commons: for example, MPs' lack of independence from the demands of party politics, the narrow range of experience and expertise. These are, therefore, just as much reasons for reform of the first chamber as justifications for a second chamber. Comparatively little attention is paid to the argument that a supplementary - and distinctive - form of public accountability is beneficial within the parliamentary system. Thus, the arguments for the retention of a second chamber for the UK rests essentially on a continuing belief in the accuracy of Bagehot's oft-repeated observation:

> *"though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary."* [27]

The Pressure for Reform

57 Just as the basic argument for retention of a second chamber has not shifted in the last century, the criticisms of the current second chamber also echo the concerns of earlier decades. The principal considerations underpinning the demands for reform are first, dissatisfaction with the hereditary basis of membership and second, the predominance of Conservative supporters that is a corollary of the first objection. Many regard both these features of the House of Lords as fundamentally undemocratic. For the current Opposition parties, such constitutional concerns mix with a practical concern about the implications for a non-Conservative Government's legislative programme. Within the House of Lords, the recent Parliamentary Policy Forum survey of the opinion of working peers' views on the possible reform of the House of Lords revealed that 53% of those asked supported significant reform - although an overwhelming majority (93%) were in favour of life peers continuing to play an active part in the chamber's work.[28]

58 But there is not universal agreement about the need to address the twin issues of the hereditary peers role and party political balance, or even about their identification as problems. Assessments of how well the existing House of Lords is working as a second chamber can only be made of there is common ground as to its functions and some objective evaluation of its performance of those functions. Because there is no clear picture of what the House of Lords is for, there is little agreement on whether it is working as well as it might, and therefore whether and how to fix it. Some, for example, defend the hereditary peers as representing a random element, distinct from the professional politicians, and able to furnish the House of Lords with a number of relatively youthful members. Others recognise the deficiencies in the current House of Lords, but see in the history of failed bids for reform a warning against further attempts; or see no better option than the current House given the difficulties of creating an elected second chamber in a non-federal state.[29]

59 There is even less agreement as regards other perceived deficiencies (e.g. the number of peers who fail to attend regularly or at all; the size of the chamber; the system of political patronage; the duplication of some Commons activities; the party imbalance; the comparative powerlessness of the House against the executive; and its consequent inability to operate as an effective constitutional check) or whether a reformed second chamber should take on new functions or powers (e.g. representation, constitutional watchdog) particularly in the context of wider constitutional reform.

The Need for Continuity

60 In reforming any institution it is always as well to keep in mind the advantages of the unreformed arrangements as well as the deficiencies. Identifying and tackling only the negative aspects may have unforeseen consequences if the positive attributes are not also protected from change. In the case of the House of Lords, these positive features might include: direct access to expertise across a diverse range of subjects; the provision of an independent voice less constrained by party politics than the House of Commons; the willingness of the House of Lords to take up minority or unpopular causes; the inclusion of individuals who are not, and would not wish to be, professional politicians. The fact of the House of Lords democratic illegitimacy also means that the House of Commons' supremacy is secured, and any challenge to this position through "democratising" the House of Lords is likely to create institutional tensions.

61 There are also a number of ways in which the House of Lords' effectiveness in fulfilling existing functions could be enhanced through reform of procedure, although the appropriateness of some changes would depend on the composition of the chamber. For example:

- more effective scrutiny of government activity, especially the administration of government (rather than policy making) - the role of the National Audit Office might be extended to serve both Houses.
- encouraging the development of special standing committees on bills to take evidence from external bodies.
- pre-legislative scrutiny of domestic legislation - mirroring the House of Lords EC Committee's work on European legislation.
- scrutiny of human rights issues, including monitoring of Government responses to international obligations and auditing the policy effectiveness on anti-discrimination issues, responsibility for which is currently spread across at least three Whitehall departments.
- establishing wider terms of reference for the Joint Committee on Delegated Legislation e.g. to examine Statutory Instruments on their merits and report, or expanding the work of the Delegated Powers Scrutiny Committee.
- liaison with MEPs - a possible role for the House of Lords EC Committee.
- establishing a Committee to consider draft legislation in order to detect potential legislative conflicts with the European Convention on Human Rights, or prima facie conflicts with EC law.

The Constraints on Reform

62 The democratic case for retaining a second chamber, as identified earlier in this chapter, is founded on a recognition of the constitutional need for "checks and balances" - which in turn reflects the constitutional doctrine of the separation of powers. If these principles were to be accepted as informing the development of proposals for reform, they would have significant effects. The potential impact is highlighted in Eric Barendt's recent commentary on the Labour Party's plans for reform:

"What would be clearly unacceptable on separation of powers grounds is for all members of the Upper House to be appointed, even temporarily, by the government, once hereditary peers lose their voting rights. This would be a monstrous expedient, for the head of the executive would be claiming a right to choose one branch of the legislature."[30]

63 But it is unlikely that constitutional principles or doctrines will be effective constraints on policy making in this field. To the extent that the modern UK constitution does observe some constitutional principles, they cannot be regarded as immutable, because of the renowned flexibility of the UK's unwritten constitution. There is no agreed role for a second chamber within the British parliamentary system, nor is there any clear delineation of the intended relationship between the two Houses of Parliament, to use as starting point. The current House of Lords has been described variously as a "constitutional long stop"[31]; "the guardian of good government"; and as providing "the influence that comes from special knowledge or the representation of interests".[32] In looking for constitutional benchmarks, the reformer cannot therefore expect definitive answers.

64 However, other constraints arise from the wider political environment. For example, any proposal for a chamber that deliberately excluded women (or men for that matter) would be unacceptable. And there are constraints inherent in the process of reform which will shape the nature of reforms - the vested interests of the Government, the legislature and the party system are almost certain to dictate that a power balance must be maintained in which the House of Commons retains the upper hand and the political parties hold sway to a significant degree over the membership of the second chamber; the prejudices and opinions of the individuals responsible for developing the policy (at both Ministerial and official level) will have a significant part to play; and the extent to which the views of those outside the party of government are accommodated will depend in some measure on whether or not the political arithmetic means that the Government cannot secure reform without the support of others.

65 Whatever the specific proposals for reform, there will be obstacles to successful implementation. As with any institutional reform, changes to the House of Lords inevitably require detailed planning if they are to be effective. But even then, success is not secured. The history of the Parliament No. 2 Bill in 1968-69 (see **Table 1**) suggests the extent to which a combination of personalities, politicking and intellectual introversion can rout an otherwise widely accepted and agreed measure for reform. The introduction of the Bill was preceded by inconclusive cross-party debate involving members of both Houses and the publication of a White Paper, but failed to get beyond the House of Commons. Had it gone to the House of Lords, it is likely that there would have been little resistance - the debate on the White Paper proposals produced a 5:1 vote in favour.

66 Contemporary and historical accounts[33] suggest that a complex web of factors caused the Bill to fail, some avoidable, others not so:

- an isolated civil service policy unit, which suffered from diffuse departmental responsibility and confused Ministerial roles.
- the simple jealousy of the House of Commons when faced with the prospect of an increasingly active House of Lords. Peers' own enthusiasm for the proposals did nothing to diminish MPs' concerns in this regard.
- inadequate support for the Bill from Whips and Cabinet, combined with poor Party discipline and breakdown of the "usual channels".

- the Speaker's bias against the scheme and the Prime Minister's vacillation about the best way to proceed.
- an unhelpful political backdrop - a destabilising international economic situation, low poll ratings, lost bye-elections, a general election less than two years away, other bills pressing for time, an overcrowded parliamentary timetable.

67 Although the House of Lords was not an obstacle to reform in 1969, that cannot be relied upon - especially if the scheme involves the wholesale ejection of existing members to make way for an elected chamber, whether immediately or at some unspecified point in the future. Objections may be overcome to some extent by the inclusion of detailed proposals in the election manifesto; and by ensuring that members of the House of Lords (and preferably the Opposition parties too) are involved in preliminary discussions as to the nature of the proposals; and by giving careful consideration to the question of the reformed chamber's relationship with the House of Commons. Ultimately, the Parliament Acts ensure that the House of Lords could only ever delay, not veto, any legislation.

68 External pressures will also be brought to bear, not least by a potentially hostile media. For example, although there is no constitutional or political reason why the reform of the House of Lords need affect the position of the monarchy, the removal of voting rights from hereditary peers will certainly provide an opportunity for public and media debate about the position of the monarchy as part of a wider system of hereditary power - there is then a danger of the narrow issue being lost in a wider debate.

69 Precisely because root and branch reform of the House of Lords necessarily involves an assessment of the inter-relations between the two Houses of Parliament (as well as between the legislature and the executive) and brings under the spotlight the wider question of the role of the monarchy in the modern Parliament, it is unlikely to be achieved except by a far sighted and very determined Government, which has prepared the political ground well.

Conclusion

70 The argument for bicameralism has been won in the UK. But unlike many other countries, the need for a second chamber is not influenced by the demands of federalism; and there is little obvious consensus about the roles the UK's second chamber should fulfil or about the principles that should inform any attempt at reform of the House of Lords. In fact, there are two competing agendas - the political and the constitutional - which confuse the question of reform: in terms of a commitment to democratic renewal, any reform of the House of Lords that does not involve elections to a second chamber will not go far enough for some; but in terms of parliamentary handling, even limited reform is not guaranteed a smooth ride through either House. Moreover, the only party in a position to effect reform is the party in government, and yet the changes which will enhance the contribution of the second chamber to effective democracy will, in many respects, curtail the freedoms and power of the executive.

Chapter 4

Options for Reform

"To say that an issue is constitutional does not mean that a change should never be made, but it should be made only with great care, great deliberation and great trepidation; and, too, only when a very strong case has been made out. This supersedes any manifesto commitment."

Baroness Birk, House of Lords, *Official Report*, 9 April 1984, col. 911

Party Policies

71 There is no right answer to how to reform the House of Lords. Each possible scheme of reform has merits, and brings with it problems. Unsurprisingly then, the three main parties have divergent views on where the balance of advantage and disadvantage lies; and how to fuse the constitutional and political imperatives outlined in the previous chapter. Their approaches to reform are examined in turn below.

Conservative Party

72 Speaking in the House of Lords' debates on the 1958 Life Peerages Bill, the then Lord Chancellor spoke of the Bill as "a demonstration that your Lordships' House is both organic and dynamic", and the Leader of the House of Commons echoed this sentiment, referring to the changes as part of a "a small step...in the evolution of Parliament."[34] This remains essentially the Conservative Party perspective on the House of Lords. The Party's Campaign Guide produced before the last general election explains: "Under this Government the procedures of the House of Lords have been reviewed, and improved, in a number of respects...It is through such specific improvements that progress can best be achieved in present circumstances."[35] Such change has tended to be implemented cautiously and has had only a limited impact on the workings of the House.

73 Conservative Governments were, however, the architects of two important reforms of House of Lords membership this century - the Life Peerages Act 1958 and the Peerage Act 1963. On the first occasion, the prompt was a recognition that the House of Lords was falling into desuetude through lack of participation by the hereditary peers, and criticism about the stark party imbalance in favour of the Conservatives. On the second occasion, the reform was prompted by what was popularly known as "The Case of the Reluctant Peer" - the particular circumstances surrounding Tony Benn's wish to disclaim his peerage in order to sit in the House of Commons. It also provided an opportunity to tackle some other matters concerning the rights of Scottish and Irish peers and female hereditary peers.

74 More wide-ranging reform has not been dismissed out of hand by the Conservatives in recent times. In 1977, Lord Carrington (then Leader of the Opposition in the House of Lords) argued in the *Illustrated London News* for an elected second chamber, elected regionally by proportional representation, with its powers to delay legislation and act as a constitutional safeguard restored to the position prior to the 1949 Parliament Act.[36] Lord Home of the Hirsel was asked by Margaret Thatcher to chair a committee into reform of the Lords prior to the 1979 general election - largely as a response to the Labour Party's then commitment to abolition - and the subject was considered at Cabinet level at least once during Margaret Thatcher's term as Prime Minister) but it has never been included in a party manifesto or acted upon.

75 In political terms, the Conservative Party currently has no pressing reason to revise the composition of the House of Lords, given its numerical supremacy amongst the current membership. However, the Party cannot fail to recognise the force of the democratic arguments of principle against the presence of hereditary peers in the legislature. Recent newspaper reports[37] have suggested that the Conservatives might be considering whether reforms to the House of Lords might now be timely - in part perhaps to upstage the Opposition parties as they have attempted already with proposals for greater use of special Scottish and Welsh parliamentary procedures in response to the Opposition parties' proposals for devolution.

76 In a speech in February 1996, Dr Brian Mawhinney, Chairman of the Conservative Party, outlined the reasons for the Government's opposition to the Labour Party's plans for reform of the House of Lords, on the grounds that they were ill thought through and "driven by class envy", but he did not offer objections to reform *per se*. This fact was obscured by the media coverage which concentrated on a passing and somewhat oblique reference to the potential impact of reform of the House of Lords on the future of the monarchy[38]. Even if the Government proposes no substantive reform of the House of Lords, the Conservative Party will want to have ready a cogent response to the opposition parties' proposals during the general election campaign and will certainly need to have a policy line prepared in the event of their losing the election: the Prime Minister's vision of the classless society sits uncomfortably with the Conservative Party acting as the defenders of hereditary privilege.

77 A wide range of policy options is available for consideration by those, like the current Government, who believe existing constitutional arrangements to be perilously balanced and that substantial reform would jeopardise the stability of our system of government; or those who would rather not devote precious legislative time to implementing more substantive changes. In fact, maintaining the "gradualist tradition of limited and pragmatic reform", dependent on refining and developing existing conventions, is regarded by one leading constitutional expert, Professor Rodney Brazier, as the only alternative to the status quo that has "a reasonable chance of being implemented and of lasting". Specifically, he contends that reform of the House of Lords is best achieved by a policy of "reductions of imbalances" and unrepresentative elements through mainly procedural changes, rather than legislation.

78 Although there is no public indication that the Conservative Party is yet considering such a move, there is a range of possible incremental improvements to the existing system of membership that have been put forward by politicians and others that they might draw upon. They include the following[39]:

- scrap the leave of absence scheme and replace with an attendance requirement, diluting considerably the impact of the "backwoodsmen". This would entail a review of the expenses system and consideration of the options for remuneration.
- offer government support for legislation to provide the right for female children to inherent all hereditary peerages, or agree to establish a Lords Select Committee to examine the subject.
- introduce measures to make the appointments system more open and accountable through use of the Public Appointments Unit and/or through adoption of more transparent appointments procedures.
- increase Opposition party representation and ensure a greater diversity of social representation - more women, younger people, ethnic minorities, regional representation, etc..
- introducing a number of ex officio peers e.g. the Governor of the Bank of England, the General Secretary of the TUC.
- initiate formal or informal inter-party discussions on the future growth of party strengths in the House of Lords.
- create an advisory body to support the Prime Minister in the appointments process.

79 If introduced, such reforms would not preclude further changes. But there is also a possibility that they would bestow sufficient legitimacy on the House of Lords that there would be little impetus for more comprehensive reform. Indeed, this may be just what the Conservatives would wish. But not all of these limited measures are without difficulties of their own: which organisations would be entitled to ex officio peers? to whom could they be accountable? who would make the selection? what criteria are used to decide which applicants for life peerage are

entitled to a place? why should the second chamber reflect the demographics of society? Some of these issues are considered in more detail in Chapters 5 and 6.

80 Another gradualist proposal advanced by some (although one with less logic in its favour) would allow all current hereditary peers to retain their attendance and voting rights until their death but to prohibit their heirs from becoming members of the House of Lords. As the average age of hereditary peers is only just over 61 and the youngest is the Earl of Craven who is 6, although he will not be able to take his seat until he is 21, it is clear that this policy would take several decades to work through the system. Moreover, the defence of heirs' rights during debates on Lord Diamond's recent Private Members Bill (which would have had the effect of removing some male heirs' entitlement in favour of their older sisters) indicates that legislation to give effect to this policy would be no less contentious than removing hereditary peers' rights with immediate effect. If the principle of hereditary peers' participation in the House of Lords is to be tackled, there can be little reason to protect from any changes those who by accident of timing happen to be members of the House at the date of the reform.

81 But all this is speculation. No clear plans, nor any formal statement of intent, has yet emerged from either the Government or the wider Conservative Party. Press speculation focuses on the possibility of the Conservatives' establishing some sort of electoral college of hereditary peers to elect a core number (an idea first mooted by the Wilson Government), to remove voting rights from infrequent attenders or to create a two-tier chamber with hereditary peers entitled only to speaking rights. Alternatively the powers of the House of Lords might be further reduced. The changes to composition would tackle the question of the democratic legitimacy of the hereditary peers and usher the "backwoodsmen" into history; they would also represent a positive, though limited and arguably insubstantial, approach to reform. But again, each presents practical problems of implementation - an electoral college of hereditary peers, for example, only reduces and does not remove the main source of dissatisfaction with the House of Lords. The same objective could be achieved with greater presentational advantage by offering life peerages to those selected as the most meritricious of the hereditary peers, and removing the rights of all others. An electoral college also relies on the questionable assumption that the hereditary peers are a cohesive social group, well placed to judge one anothers' merits. A reduction in powers with no change in composition, on the other hand, would be consigning the House of Lords to ignominy, by amplifying its lack of legitimacy.

The Labour Party

82 The Labour Party's current proposals for reform of the House of Lords assume a two stage process, with the ultimate goal of an elected chamber. The 1993 Conference paper *A New Agenda for Democracy* states that "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". There is no intention to make changes to functions or powers at the first stage, but in a speech earlier this year, Tony Blair hinted at the adoption of "a better, more open and independent means of establishing membership" as part of this first stage. The detail of the second stage elected chamber is so far unspecified, although in the same speech, Tony Blair referred to the possibility of making provision in an elected chamber for "people of a particularly distinguished position or record"[40]. Although no formal statement on the period of transition has been made, Lord Richard, Leader of the Labour Party in the Lords, has said that decisions on the second stage would be taken only after consideration of the issue by a Royal

Commission or Speaker's Conference and would not produce results until at least a second term of Labour Government on the basis that the "constitutional implications are simply too big".

83 Whilst the objectives may be regarded as satisfying the constitutional imperatives, therefore, the timing is more influenced by the political context. It must be presumed that one key reason for phasing the process is to tackle quickly the political disadvantage presented by the predominantly Conservative hereditary peers. Certainly, the possibility of hostility from the Lords to a Labour Government has historical resonance - and the Labour Party would not want to be forced to introduce precipitate reform legislation to overcome Lords' opposition to their legislative programme, as happened in 1968. But as outlined earlier in the report, the attitude of the House of Lords towards a Labour Government would depend not only on the formal party strengths, but on the size of the Government's majority, the nature of pre-legislative consultation and the detail of any manifesto commitment.

84 It may also be thought that the phasing of reform will assist the smooth parliamentary passage of reforming legislation - the first stage would be difficult to oppose as a limited measure tackling an obvious injustice; and would then make it easier to move to the second stage of reform. However, whilst a two stage approach is not inherently problematic (see paragraphs 226-232), the absence of clear proposals for the second stage does bring with it certain practical difficulties.

85 First, there are likely to be political pressures to provide more than the promise of a Royal Commission or Speaker's Conference on long-term reform of the House of Lords, and Ministers will undoubtedly be pressed to give an official view on the merits of various proposals for reform during the passage of the first stage legislation. It may prove to sustain the position that "the matter raised will be referred to the Royal Commission."

86 Even with a manifesto commitment to reforming the House of Lords, there would almost certainly be objections raised by the House of Lords to agreeing to a transitionary scheme without seeing details of the final proposals. Some suggest that the nearest parallel is the passage of the Local Government (Interim Provisions) Bill during 1984. The effect of the Bill was to cancel the 1985 elections to the GLC, substituting nominations from London Boroughs which would secure a Conservative majority until the passage of the Abolition Bill - estimated to be at least one year away. When the Paving Bill (as it quickly became known) was published in March 1984 it aroused a storm of protest: Edward Heath described it during the House of Commons second reading as "a negation of democracy...It immediately lays the Conservative Party open to the charge of the greatest gerrymandering in the last 150 years of British history".

87 As John Carvel has explained, the GLC used a constitutional argument to persuade the Lords to vote against the Paving Bill: "The whole Paving Bill was built on the hypothesis that it would be followed a year later by the Abolition Bill proper. The government could not, however, write one piece of legislation on the assumption that Parliament would later pass another Bill which at that stage did not even exist. The reason was obvious. If, once the GLC elections had been scrapped, the main Abolition Bill failed to get through, then the council would be put indefinitely into the hands of nominees."[41] As a result, the Lords carried an amendment to the Bill to the effect that the 1985 elections could be cancelled only when the final, main Abolition Bill had become law. The Government was dismayed but secured the peers support to a revised set of proposals which would extend the term of the existing GLC administration until its abolition, whilst imposing a series of strict controls on its powers.

88 A similar problem could well arise if the Labour Party persists in presenting its proposals as a two stage operation (and especially if the manifesto is not sufficiently clear about the process of reform). Where its own future is under discussion the House of Lords would almost certainly be unwilling to back down without a fight. The difference is that in 1984 the Conservative Government was intent on curtailing democratic elections - and thus restricting the voting rights of the public - to make way for a nominated chamber, whereas a Labour administration would be removing an undeniably undemocratic element in the House of Lords in order to create a nominated chamber. But in both cases, objections to the outcome can be articulated.

89 Some argue that the entirely nominated chamber that would result from the removal of hereditary peers would be no more democratic or accountable than the House of Lords as currently composed. The caricature of "a quango stuffed with placemen" would be an easy target for public and Opposition criticism, as the Labour Party itself recognised in its 1995 policy document on local government: "appointed bodies are not very public - far from it. Appointment is usually a private affair, secret even. The appointed do not have to tell the public who they are or what they have done. They are not exposed to public questioning or criticism before they are appointed. They do not have to get or keep the support of local people. People find it hard to lobby or influence them. They can't be held to account. Local people can't dispense with their services."[42] To deflect the same criticism of its own plans for the House of Lords, Labour will need to consider changes to the system of nomination for its first stage of reform - and explain how and when the goal of an elected chamber will be fulfilled; and preferably, therefore, what its powers and functions will be.

90 Persuading the House of Commons to accept a House of Lords with increased political authority will be an important consideration with the first stage - in part because of the immediate gain in authority that the removal of hereditary peers will bring; but also because of the fear of where the first stage is leading. This fear will be all the greater (and more widespread) if the second stage plans are not spelt out clearly.

91 The consequences of removing hereditary peers cannot easily be ringfenced from the further stages of consideration, including those relating to functions and powers. The same questions arise in both situations: how many peers should there be? what sort of people are needed? should there be a retirement age? what or whom should they represent? should the chamber be renamed - if so, at which stage, with what consultation? what is the minimum and maximum number of peers required to maintain the current levels of work - are different numbers needed for stage one and stage two? how should anomalies such as the voting rights of the Prince of Wales, the Law Lords and Lords Spiritual (whose presence in the second chamber is arguably just as undemocratic as the hereditary peers) be tackled - and should a different approach be taken at stage one to stage two? It will be difficult for the Labour Party to argue convincingly that they have the right answers on the first stage, unless they are also prepared to commit themselves to giving the same answers to these questions at the second stage. In addition, the greater the coherence between the changes made in the first stage and the proposals for the reformed chamber, the more likely it is that the transitional chamber will maintain its credibility and a sense of stability.

92 All of these factors indicate that, if a two stage approach is adopted, it would be of considerable advantage to ensure that the strategic underpinning - the future plans - are in place before implementation of the first stage. The passage of the first stage reform, might, however, be

facilitated by negotiations outside the formal legislative process - there have, for example, been suggestions that hereditary peers might be allowed to retain "dining rights" as party of a deal with the Conservatives[43] and Tony Blair has indicated to the cross-benchers that they would retain the balance of influence in a nominated chamber.[44]

93 The implementation of the Labour Party's proposals is considered in more detail in Chapter 5.

Liberal Democrats

94 Of all the political parties, the Liberal Democrats have the most detailed proposals for long-term reform of the House of Lords. In essence, they would turn the House of Lords into an elected Senate with responsibility for scrutinising legislation and maintaining a check on the House of Commons; acting as a constitutional watchdog and providing regional representation - apparently all in one move.

95 The Liberal Democrats identify the principal role of a reformed second chamber as the representation of regional interests within the UK, to "reflect the institutional reforms we propose at regional and community level". Members of this Senate would be directly elected by single transferable vote for fixed terms of six years. Scotland, Wales, Northern Ireland and 12 English regions would have 15 Senators each, with 5 elected from each constituency at biennial elections. In addition, the 1993 Liberal Democrat Conference, at which the policy was considered, approved an optional provision allowing for a further 60 non-voting members to be selected by a committee of the Senate for a six year term (one third retiring every other year).

96 In anticipation of a written constitution, the Liberal Democrats also propose that their Senate would have a veto over proposed constitutional changes - requiring a two thirds majority to approve changes. The Liberal Democrats propose an elected chamber that would be empowered to delay most legislation (the exception being money bills) for up to two years, which they describe as "a powerful constraint on the Commons". Senators would have the right to speak in regional assemblies and delegates from the assemblies might attend the Senate. UK MEPs would have the right to attend and speak, but not vote. The Liberal Democrats also propose what they refer to as "tough codes of conduct which all elected and appointed public representatives would be required to observe."[45]

97 The Alternative Queen's Speech produced by the Liberal Democrats in 1995 indicated that their plans for reform of the House of Lords would be enacted through a "Great Reform Bill", which would also encompass the introduction of "a fair voting system" for local, national and European elections; the establishment of elected assemblies in Scotland and Wales; a framework for decentralisation of power within England and a strategic authority for London; a statutory framework for the funding of political parties; and increased accountability of quangos. The timetable for actual *implementation* of this package of reforms is not identified, but Liberal Democrat policy documents suggest that the process would extend over the course of the first Parliament - with some changes not coming into effect until the next Parliament to coincide with or follow the first elections to the House of Commons under a proportional representation system. In particular the Liberal Democrat policy paper *We the People* (June 1990) envisaged a phased approach to reform in which the process of constitutional reform would take six years in total and an elected House of Lords would be legislated for only in the second Parliament, by which time the House of Commons would have been elected by proportional representation.

98 One consequent potential political weakness (although perhaps an intellectual strength) is that the Liberal Democrats' proposals for the House of Lords stand or fall alongside the rest of the Party's constitutional reform proposals. Were their proposals in relation to the House of Commons to be amended in Parliament - and not just in relation to the electoral system - the proposals for the Senate would need to be thoroughly reviewed.

99 There is also an element of picking the best features of other second chambers and assembling them in the hope that they will stick. In particular, combining in one chamber both professional representation and geographical representation smacks of "too many cooks" - there are very few chambers that attempt to combine different representational roles, for obvious reasons. The most notable exception is Hong Kong, where recent reforms (that are inevitably transitional) have limited the role of electoral colleges based on the professions by the introduction of some directly elected constituency members. Finally, the Senate's collected powers and responsibilities are such that the question is likely to arise as to which chamber is the more attractive for an elected politician - and perhaps over time, which is the stronger; particularly if the Senate's responsibilities in respect of Europe were to grow.

100 As the proposals put forward by the Liberal Democrats present a detailed account of their intended second chamber, it may be thought that they exclude any possibility of consultation or discussion. In fact, their proposals are more complex than they first appear: they propose that following the introduction of their proposals by means of ordinary law, a Constituent Assembly should be elected to draw up a written constitution and as part of that process, the Constituent Assembly would "revise, codify and supplement" the measures already introduced.

101 Although the Liberal Democrats share the Labour Party's goal of an elected chamber, the Liberal Democrats do not agree with the Labour Party's proposals to remove the hereditary peers as a first step, as Paddy Ashdown's comments at the Liberal Democrats' Annual Conference in 1995 make clear: "I would rather rely on the serendipitous opinion of the illegitimate progeny of past kings' mistresses, than the appointees of a modern Prime Minister."[46] This view is perhaps not so surprising when one considers that many of the Liberal Democrat representatives in the House of Lords are themselves hereditary peers. Opposition to an all nominated chamber may, however, be difficult for the Liberal Democrats to sustain were the Labour Party to form a government. As recent speeches from both party leaders have suggested, there would almost certainly be a degree of co-operation between the parties across the whole constitutional reform agenda, so that, for example, the promise of support for proportional representation for the House of Commons may well secure Liberal Democrat support to the phasing of the introduction of an elected second chamber.

102 The implementation of the Liberal Democrats' plans is considered in more detail in Chapter 6.

Conclusion

103 Reform of the House of Lords is not a topic that is easily susceptible to principled analysis. In attempting to resolve the tension between the political and constitutional imperatives, the three parties have taken different views, each coloured in part by self-interest. Their different positions also illustrate that decisions about how best to reform the House of Lords are influenced not only by the intrinsic merits of different policy options, but also by the practicalities involved in implementing reform.

Chapter 5

A Nominated Chamber

"...the system of nomination by the Executive...is why the Bill is not acceptable to a very large number of hon. Members on whatever side of the Committee they sit."

Nicholas Ridley MP, House of Commons, *Official Report*, 12 February 1969, col. 1365 - debate on the Parliament No. 2 Bill

Creating a Nominated Chamber

104 The Labour Party proposes the creation of a nominated chamber as an interim measure on the road to an elected chamber. The decision to tackle reform in two stages rather than one presents a challenge for the Labour Party that is both presentational and substantive. They will need:

- to convince the members of both Houses to adopt a limited reform by providing sufficient guarantees of its effectiveness and credibility.
- to secure the stability of the interim chamber for as long as is necessary to determine the next steps and to implement them.

105 There are two principal ways of approaching the task, and it will be important for the Labour Party to decide which approach it is taking, as this will influence the answers to many of the questions that are subsequently posed:

- first, the Labour Party could insist that it is following a minimalist path and the consideration of further reform must be subject to wider consultation. This approach envisages that nothing about the House of Lords will change in the short term except that hereditary peers will no longer be present. The obvious difficulties are that such a policy offers little succour to those seeking wider democratic reform and, as importantly, it is not possible to predict the consequences of such a move in terms of the behaviour of the interim chamber.
- second, the Labour Party could insist that in the entirely nominated chamber, the grant of a life peerage would involve taking on a job, rather than accepting an honour. Democratic principles of openness, accountability and transparency would be applied to the system of appointments; and the operation of the chamber would be on the basis that it should be a professional, working House. As the following sections will show, a decision of this sort would have a considerable knock-on effect on the operation of the House of Lords.

Balance

The Size of the Interim Chamber

106 Although Labour Party front-benchers have on occasion referred only to the removal of hereditary peers' voting rights, as Tony Blair did at the Labour Party Annual Conference in 1994[47], this chapter assumes that both voting and sitting rights are to be removed in accordance with the proposals in the 1993 *A New Agenda for Democracy* policy document.

107 If all hereditary peers were to be removed by an incoming Government following a general election, and we assume that the life peers at that point are the same as those in place at the end of the 1994-95 Session, the party balance in the House of Lords would be as follows:

Table 3 Total Membership of Interim Chamber

	Total	%	Total No. Under 70	Total No. Under 75
Labour	96	22.7	38	57
Conservative	140	33.2	62	92
Liberal Democrat	29	6.9	11	13
Cross-Bench	108	25.6	25	43
Other	23	5.4	10	14
Bishops	26	6.2	26	26
Total	**422**	**100**	**172**	**245**

Source: Analysis derived from information supplied by House of Lords Information Office. All life peers have a Writ of Summons. The figures include those who have yet to take the Oath in this Parliament and the 7 peers (all of whom are in the non-affiliated category) currently on leave of absence. The second and third columns indicate the number of peers who would remain members of the House of Lords on 31 December 1996 assuming a retirement age of 70 and 75 respectively; and no intervening deaths, creations or changes of allegiance. Possible maximum number of Bishops shown.

108 In fact, these figures have already changed slightly since the end of the 1994-95 Session, and will change further between now and the general election, as a result of deaths (recent history suggests the total number of deaths is likely to be between 10 and 20 each year), changes in party affiliation and the creation of new life peerages. For example, six former Cabinet Ministers have to date announced their intention to resign from the House of Commons and might reasonably expect a life peerage, in line with emerging convention.

109 There were also 15 hereditary peers of first creation at the end of the 1994-95 Session, most of them created prior to the Life Peerages Act 1958. It is assumed, although the Labour Party have not been explicit on this point, that any reform of the House of Lords to remove the rights of hereditary peers would not disqualify from attendance the hereditary peers of first creation, as their peerages were awarded in respect of personal merit (and a number of this group are regular contributors to the work of the House of Lords). If it is decided that they should be members, the most effective way to achieve this would be for the legislation to disqualify all hereditary peers, and then for the Prime Minister to recommend life peerages for all those who are the first holders of hereditary peerages as there is nothing to prevent an hereditary peer also holding a life peerage.

110 However, this group of hereditary peers of first creation includes three royal peers - the Prince of Wales, Duke of Edinburgh and Duke of York - whose attendance rates are so limited as to be negligible (since being created they have attended four times, once and once respectively). A Labour Government would therefore need to take an early decision, in consultation with the Queen, about whether it is intended that these three members of the Royal Family are to remain members of the House of Lords. The political affiliations of the 12 non-royal hereditary peers of first creation are as follows: 6 Conservatives, 1 Liberal Democrat, 3 cross-benchers and 2 "other".

Creating New Peers

111 Following the removal of the hereditary peers, the House of Lords would be substantially reduced in size, even though a significant proportion of the hereditary peers are infrequent or non-attenders. For example, in the 1993-94 Session, when the average daily attendance was 378, Dr. Nicholas Baldwin calculated that this number included on average 184 hereditary peers by succession, around 50% of the total, although House of Lords statistics for second reading debates on key bills in that Session suggest that the actual proportion of hereditary peers participating in the business of the House is less significant.[48]

112 No assessment of the total number of peers needed to fulfil the House of Lords' workload has been made in recent times - it inevitably depends not on the theoretical strength of the House, but on the particular interests of members and the extent of their other commitments. Nevertheless, in order to carry out the work of the House without disruption, the creation of a number of new life peers may be advisable. The most obvious candidates for life peerages will be the hereditary peers who currently serve as Conservative front-benchers (12) and Liberal Democrat spokespeople (4). There is nothing in existing law to prevent hereditary peers receiving a life peerage, as previously noted. Alternatively, the party leaders' might be given a quota of life peerages to be awarded to hereditary peers of their own choosing. The Prime Minister might also wish to offer a limited number of life peerages to hereditary peers on the cross-benches.

113 The total number of new peers needed will, however, depend more on the intended party balance for the interim chamber and in particular, whether or not the Labour Party wishes to increase its own representation. It might also depend on whether there is a concern to address regional or socio-economic under-representation as well as party political imbalances.

114 One barrier in the way of the mass creation of life peers is the requirement that every newly created peer must be formally introduced into the House of Lords before taking their seat or voting. The Companion to the Standing Orders of the House of Lords states that usually "not more than two introductions take place on any one day..." and only one part of one day every week is set aside for such purposes. The rate has been raised to four a week in the case of the 1987 and 1992 Dissolution Honours Lists, but any alteration to the timing requires either legislation or a resolution of the House. A predominantly Conservative unreformed House of Lords would find an easy weapon in its ability to delay such legislation, or refuse to alter its procedures. The obvious solution is to begin creating new peers as soon as a new Government comes into power. Such action would not pre-empt the legislation, as any Labour or Liberal Democrat Government would presumably want to see their representation increased even if - indeed, particularly if - the legislation fell.

Who Decides on the Party Balance?

115 Agreement on the party balance might be attempted through informal negotiation between party leaders or more formal inter-party talks (see paragraphs 244-250). Either route presents a particular problem in relation to the cross-benchers, a loose co-operative of individuals united only by their disinclination to affiliate to one of the major party groupings. In most respects, they do not act as a party themselves. Presumably, however, the Convenor of the cross-benchers would be expected to enter into negotiations on behalf of prospective future cross-benchers, and the Prime Minister of the day would be expected to pay special heed to their interests.

What are the Options?

116 To decide on the party balance, the intended functions and powers of the chamber must first be determined.

Simple Majority Scheme

117 If the sole objective of the reforms is to allow a reasonably smooth passage for the legislative programme of the Government of the day, and it was considered that the Salisbury convention could not be relied upon to deliver this, then a majority formula could be adopted. Given that the Conservatives do not currently have an overall majority in the House of Lords, it is highly unlikely that any Labour Government would be able to justify creating such a majority for itself, even if it wished to. However, a Government majority over the nearest Opposition party or the combined Opposition parties, i.e. excluding cross-benchers, might be considered.

118 Using the figures as at the end of the 1994-95 Session, and assuming that the 12 non-royal peers of first creation and 16 Conservative and Liberal Democrat front-bench hereditary peers were given life peerages (but not the three royal peers referred to in paragraph 108), the following figures would result:

Table 4 Effect of Simple Majority Schemes

To give a majority of one over the nearest Opposition party, 63 Labour peers would need to be created.
This would give Labour 159, Conservatives 158, Liberal Democrats 34, Cross-bench 111; and 18 others. Total = 480 (plus the 26 Lords Spiritual)
To secure a majority of one over both Conservatives and Liberal Democrats would require 97 new Labour peers.
This would give Labour 193, Conservatives 158, Liberal Democrats 34, Cross-bench 111; and 18 others. Total = 514 (plus the 26 Lords Spiritual)

119 Political hostility to an increase of this size in the number of Labour peers might make it impracticable, although the Labour Party could argue that it was justified by the need to create "retrospective parity" i.e. to make up for the numbers of peers created by the Conservatives since 1979.

120 Moreover, although either option may be regarded as more democratic than the existing overwhelming Conservative majority, the fundamental assumption of Government supremacy in the House of Lords is open to question. Objections may be made both **in principle** (what is the value of having a constitutional bulwark that is in the hands of the executive - effectively extending Lord Hailsham's "elective dictatorship" to the second chamber) and **in practice** (in these calculations should the cross-benchers be counted as opposition?). Simple majority schemes also do nothing to recognise, or establish a mechanism to address, the current under-representation of minority parties in the House of Lords. Finally, the doctrine "do as you would be done by" applies here: a Government may be keen to secure a substantial majority whilst in office but needs also to contemplate the implications for its party in future periods of opposition.

121 In recognition of these factors, the best simple majority scheme would be one in which Labour would be the single largest party but not have an overall majority. The same principle then might be followed at subsequent general elections - but this could only be a limited term solution as the proportionate influence of the Liberal Democrats and cross-benchers would decrease significantly with every general election.

Proportionate Nomination

122 An alternative approach would be to reflect proportionately the general election results. Peerages could be distributed on the basis either of the number of votes cast for the parties in the general election (creating a distinctive quasi-representative role for the interim chamber) or seats won (which would be subject to the same objections of principle as the simple majority schemes). If a proportionate nomination approach were adopted, the cross-bench representation could be determined in advance, as a fixed quota related to recent percentages. This could be 20% - the proportion of cross-benchers in the current House of Lords, or 25% - approximately the proportion of cross-benchers within the current life peers' ranks.

123 At the 1992 general election, assuming the cross-benchers were given 20% membership of the House of Lords and the remaining 80% was divided between the political parties, the following representation would have been secured under the different schemes (the representation of political parties in the Commons is also given for comparison):

Table 5 Proportional Representation to Reflect House of Commons Strengths: 1992 General Election

Peers allocated on the basis of:	(a) Seats Won	(b) Votes Cast	Representation in the House of Commons
Conservative	41.3%	33.5%	51.6%
Labour	33.3%	27.5%	41.6%
Liberal Democrats	2.5%	14.3%	3.1%
Plaid Cymru	0.5%	0.4%	0.6%
Scot. Nat. Party	0.4%	1.5%	0.5%
Others (GB)	nil	1.0%	nil
Others (NI)	2.0%	1.8%	2.6%
Cross-bench	20.0%	20.0%	N/A

Source: Analysis derived from figures in House of Commons Factsheet No.61: General Election Results 9 April 1992

124 However, there are significant logistical hurdles in establishing a form of nominated chamber that seeks to reflect party balance in the country at large. Assuming that the first proportionate chamber took as a starting point all existing life peers, there would need to be an immediate increase in membership to ensure that the percentage allocations were achieved. With every general election that returned a different Government, the number of peers would need to be increased to reflect the swing. This process could result very quickly (within one or two general elections) in an unmanageable chamber of more than 1,000 members. There are four possible solutions to this problem.

125 First, **fixed term peerages**, with or without the possibility of re-appointment. The least complicated way to achieve this would be to retain the system of giving peerages for life, but separate from the grant of a peerage the duty of attendance at the House of Lords i.e. the Writ of Summons would be issued only for one Parliament in the first instance, with the possibility of renewal. The imposition of fixed term peerages at this first stage of reform may well, however, be regarded as a step too far. Rather than enhancing the system of appointments, it makes the patronage element far more prominent.

126 A fixed term that was renewable with every new Parliament would of course emulate the operation of an elected House, but the decisions on which peers to reappoint and which to lose would be taken either by party leaders or by lottery: resulting in the first case in a chamber that is a party puppet (and whose members would be required to toe the line or face deselection), and in the second case in the potential loss of key members of the House. However, if a detailed plan for moving to an elected chamber were in place, there may be more scope for making fixed term on the basis that the arrangements were in any case only an interim measure.

127 Second, a **two tier system of membership.** For example, a set quota of 450 peers with voting rights, divided proportionally between the parties and the cross-benchers, with non-voting members to have speaking rights. However, two tier systems suffer from an inherent flaw: the right to participate in debate, but not vote, is an artificial distinction. Because the whipping system is less powerful in the House of Lords, a speech can be influential in a way that it could not in the House of Commons. Moreover, a substantial proportion of the work of the House of Lords is undertaken through asking Questions, raising debates or in committee where voting rights are less important. Selecting a voting body from a wider party group also enshrines the party divisions because the selected peers would not be voting as individuals but as party representatives - and how would the cross-benchers, who represent an eclectic mix of views, choose their voting peers?

128 It is likely, in any case, that such a scheme would be too complicated to sell as part of a first stage "clean break" measure. A variant of this would be to select the "top up element" of the first entirely nominated House by the present House of Lords acting as an electoral college and selecting from the existing hereditary peers: this was a tentative recommendation of the 1978 Home Committee whose report rightly added the bleak caveat "we do not underestimate the difficulty of achieving this."[49]

129 A third option would be to introduce a **retirement age.** However, the average age of the current life peers is over 71. Even a retirement age of 80 would remove 25% of the current life peers, and 75 would remove nearly 50% - see **Table 3** above. The 1968 White Paper proposed that the age of retirement for an entirely nominated chamber be set at 72. This came with the caveat that under the two tier system proposed, the retirement would be from voting only, not from attending or speaking. Since then, the Judicial Pensions and Retirement Act 1993 has imposed a retirement age of 70 for members of the judiciary (including Law Lords, although they are still entitled to sit in the Lords as a result of their peerages). This precedent - which is also in line with the retirement age for bishops and archbishops appointed after 1975 - may be useful in making out a case for imposing the same restriction on those making the law as those interpreting it; or at least in establishing the principle of retirement.

130 Introducing a retirement age would do much to improve the manageability of this scheme. This total would not increase significantly as a result of general elections provided that most of the peers retiring were not replaced during the course of the Parliament. To avoid the reversal of party balance as a result of retirements (of which there would be a significant number in each Parliament certainly for the first years of operation) and deaths there might be a threshold level which would trigger the appointment of new members, for example, each party's quota should not drop below 90%. A retirement age would also ensure that the average age of nominees for peerages was rather lower than currently.

131 There will always be examples of people older than the formal retirement age who are both effective and active members of the second chamber, but the same principle applies in other walks of life where the advice of older people may also be useful. The aim is to create a dynamic chamber that by the retirement of members might provide opportunities for new voices to be heard. Objections from existing life peers might be mitigated to some extent by the granting of titles for life, although attendance rights would not be. Alternatively, current members might be permitted to attend indefinitely, and the retirement age would be imposed only on those created after the passage of the legislation, as in Canada where a retirement age of 75 for Senators was introduced in 1965, but not applied to existing members. However, the effects of the mechanism would then be very slow to operate.

132 If a retirement age were decided on, it would be necessary to determine whether the cut off point should be the disqualifying birthday itself as with the Lords of Appeal in Ordinary, or the end of the Parliament in which the disqualifying birthday was reached (as was proposed in the 1968 White Paper). It would also need to be decided whether the Law Lords and bishops - were they to remain members - should be subject to the same retirement age as that decided on for other members of the House of Lords.

133 The fourth option would be to set a ceiling on the number of peers. The maximum size of the interim chamber might be fixed at, say, 450. The initial appointment of new peers to make up the gap between the existing life peers and the "ceiling" would be subject to a rule that the appointments should be composed of party nominees in proportion to the votes at the general election plus a limited number of additional seats reserved for cross-benchers; there might then be an annual creation of peers to replace those members who had died, following the same principle.

Recommendations

134 The only uncontroversial solution would be to do nothing to increase any party's representation immediately, but simply to accept the balance created by removing hereditary peers (perhaps also, as suggested in paragraph 112, offering each party a limited quota of life peerages in proportion to ensure that key hereditary peers were retained as members of the House). An informal agreement might be made between the party leaders on the relative proportion of peerages to be created each year so as to ensure a rough equality between the major parties. This would give a sense of continuity and most closely fulfil Tony Blair's promise to leave the balance of influence with the cross-benchers[50].

135 But if the Commons majority is small, there is bound to be some unease amongst business managers about the fate of a Labour Government's legislative programme at the hands of a reformed House of Lords, with increased credibility and the numerical strength to overturn the Government. There is also the difficult-to-predict question of how many members the House needs in order to function effectively. Most importantly, all parties are likely to recognise the legitimate concern to establish clear guidelines on composition at an early stage to apply in subsequent Parliaments and thus create a benchmark for use in future Parliaments (and protect against possible abuses of the appointments system by a future Government.)

136 If a more formal scheme is preferred, the best immediate option for an limited life nominated chamber might be:

- to create sufficient Labour peers to establish a simple majority of one over the largest single other Opposition party, with no retirement age. At subsequent general elections, same principle to apply. No fixed size of House.

If the nominated chamber is to last for more than one or two Parliaments, the best options might be:

- to create sufficient peers from all parties to establish a proportional representation in the House of Lords based on votes in the general election, with a fixed quota of say 20% of cross-benchers (the percentage of seats reserved for cross-benchers could be determined by assessing the average percentage over the last 30 years, since the introduction of life peerages). The exact distribution of seats would be determined by inter-party talks involving the Party Leaders and the Convenor of the cross-benchers. A retirement age would need to be adopted. Same principle to apply in subsequent general elections. No fixed size of House.

or

- to set a ceiling on the number of peers. The maximum size of the interim chamber might be fixed at, say, 450. The initial appointment of new peers to make up the gap between the remaining life peers and the ceiling would be subject to a rule that the appointments should be composed of party nominees in proportion to the votes at the general election plus a limited number of cross-bench appointments; there might then be an annual creation of peers to replace those members who had died, following the same principle.

Attendance

137 In 1956, a House of Lords Select Committee reported on means of increasing the attendance rates of peers. The opening paragraphs of the report remark dryly:

> *"The problem of attendance is one which has faced the House a great many times in the last few centuries. In 1610, for example, the Lord Chancellor declared from the King: 'That His Majesty hath taken notice of the Slender Appearance here in the House Yesterday: and that He taketh in ill part that His Service in that Behalf is so much neglected.' "* [51]

Since that time, the House authorities have tried variously to impose fines, arrest recalcitrant members, and threaten loss of parliamentary privilege to encourage attendance. All to little avail. The 1956 report itself failed to address this issue directly, instead recommending that reassurance be given to those peers "who for one reason or another were unable to give their services to the House [but] were troubled by their inability to perform their duties" by the establishment of a formal "leave of absence" scheme; although they simultaneously advised that, under existing powers, no sanctions could be attached to failure to abide by the scheme. There have been no attempts since the 1950s to compel or restrict attendance.

138 Although there are no formal rules about attendance in the House of Commons, the Top Salaries Review Body Review of Members Pay and Allowances, published in May 1983, found that MPs spent on average just over 62 hours each week on all forms of parliamentary work[52]. The only sanctions - but effective ones - are the pressure brought to bear by Party Whips and the prospect of losing the electoral mandate. With the former sanction less persuasive in the House of Lords, and the latter non-existent, the average number of hours spent by a peer on House of Lords business every week is considerably less than 62 hours for all except front-benchers, although there are huge variations in the commitment given.

139 In the Labour Party's interim chamber, as previously identified, the total number of peers eligible to attend will be much smaller and there may well be a need to review the capacity of the House of Lords to continue its work without some element of compulsion in attendance. In addition, the failure of a significant number of life peers to actively participate in parliamentary business

reduces further the resources available to the House: 83 of the 389 life peers eligible to vote at the end of the 1994-95 Session attended for fewer than 8 (5%) of the 142 days in that Session. For some, there are rational explanations: health, age, the need to earn a living or to fulfil other important duties. But for others, it is a reflection of the fact that they regard the peerage as an honour rather than as imposing obligations or duties.

140 This in turn prompts the question of whether it is *intended* that peerages should be regarded as honours, with no implicit requirement to attend or participate in the work of the House of Lords, or whether the reformed House of Lords should - even at this first stage - be a "working House" with appointments made on the basis of the likely contribution an individual could make, rather than in recognition of their external status. As a non-remunerated House, which seeks to draw on the outside experience and expertise of its members it is right that the House should remain resolutely part time i.e. it should not prevent taking outside employment altogether. Indeed, without any constituency business, it is difficult to see that membership of the current House of Lords could ever be regarded as a full time job (except for those with responsibilities as party spokespeople). But this is not the same as attendance being, in effect, at the discretion of the individual.

141 The 1968 White Paper on Reform of the House of Lords which preceded the Parliament No. 2 Bill proposed that a member of the House of Lords would be excluded from voting if he or she failed to attend one third of the meetings in a session other than through sick-leave or leave of absence. The measure of 1 in 3 is commonly used to define the "working House" and would probably be adopted as the yardstick. This amounts to only around 60 days each year - in practice around twice a week during parliamentary sessions, which would not be unduly harsh for most of those peers based in or around London, but would present a larger time commitment for those travelling from further afield. Although the average length of a day's sitting is just under 7 hours, there is no practical means of requiring a member to stay for any period of time, nor any legal authority for the House of Lords to enforce such a requirement without specific legislative provision[53]; so honour (and the Party Whips) would need to be relied upon. The Law Lords and bishops might be exempted from any such requirement, as having specific responsibilities relevant to their own spheres of interest.

142 The main practical difficulties are how to enforce the scheme and how it would affect the operation of the House of Lords. The Writ of Summons imposes a duty to attend the House, which the House of Lords cannot restrict by excluding any member. It is one of the reasons why the current Leave of Absence scheme (which is part of Standing Orders) is not particularly effective at controlling or ensuring attendance. Even if the Writ were amended to allow for exclusion as punishment for non-attendance, would this be an absolute veto on attendance or simply a prohibition on voting? If the latter, bearing in mind that the House of Lords power is more in persuasion than in voting, how far would speaking rights extend: the right to move motions and amendments, to sit on committees, or to take Ministerial office? In addition, there would be a number of peers making up their quota of days at the end of every session, leading to unpredictability and unreliability.

143 At present, life peerages are predominantly granted in respect of achievements - and these very achievements mean that a peer is likely to have a fairly busy life, in which unremunerated attendance at the House of Lords may not be a priority. If attendance were required, some prospective peers might be unwilling or unable to accept the honour. There are also individuals whose expertise is so specific that there would be no particular reason for them to attend on more than a few days in each year.

144 The main political difficulty is that any bill whose primary purpose is to remove hereditary peers' rights of attendance had better not include significant changes to the obligations of the life peers (not least because most members will have accepted their peerages without any expectation that attendance would be required). It is perhaps more reasonable to suggest that the question of attendance be considered once again by a select committee of the reformed House with a view to establishing appropriate procedural mechanisms. But this process will inevitably need to be guided by advice from the Government on the criteria they intend to use in appointing future peers.

Appointment System

145 If hereditary peers are disqualified from attendance in the House of Lords, the overwhelming majority of those participating in the chamber's work will do so solely as a result of Prime Ministerial patronage. It is likely that the system of appointment to life peerages will come under close scrutiny and attack, both inside and outside Parliament (the dispute over "cash for knighthoods" following the 1996 New Year Honours is indicative of the likely tenor of the debate). If the Canadian Senate provides any guide, numerous problems are likely to emerge:

> *"Criticisms have been directed at the Senate for some years. They include the partisan nature of some Senate appointments; the poor attendance of some senators; the under-representation of women, aboriginal people and ethnic groups; the numerous Senate vacancies that are allowed to continue unfilled; the lack of balance in the number of Senators affiliated with the different parties; the constraints that party discipline imposes on the independence of senators; and the fact that the present distribution of seats does not reflect the growth of western Canada's population".*[54]

146 The objection is perhaps especially important given the present levels of public disquiet about appointments to quangos and perceived abuses of powers of patronage (and, indeed, the Labour Party's promises of action to stem the growth of quangocracy). An important feature of previous attempts to reform the House of Lords has been the indifference of the population at large. But public disquiet would almost certainly be more significant this time. Particularly if the Labour Party chooses to create a large number of peers to sit on the Government benches, the need for credible and defensible appointments system is likely to be all the greater.

147 Of course, the nature of any democratic input to the selection procedure without elections will necessarily be indirect: the application of the democratic principles of openness, accountability and transparency to the consultation mechanisms, nomination procedures and the actual outcomes. In order to make such changes, it would again be essential to establish whether appointments were intended to be honours or jobs - as this would affect the selection process at every stage.

Changing the System

148 There are three main options for tackling the reform of the appointments procedure:

- ask the Nolan Committee on Standards in Public Life to consider the arrangements for nomination in the same way as its first report sets out a code of conduct for appointments to public bodies. The standing of the Committee is such that its conclusions would command respect, it appears able to respond quickly to such requests whilst consulting widely, and its

already published work on appointments to quangos (which promotes the three themes of transparency, balance and merit) suggests that it would have a solid basis on which to build. Delegating the task to the Nolan Committee would also be symbolic in itself of the willingness to forgo Prime Ministerial power - and should avoid fears that any system of nomination devised by the Government would preserve some potential for behind the scenes manipulation of the outcomes. The main drawback from the Labour Party's perspective is that there would be no detailed plan available in advance of the general election to counter criticisms of quango government, only the promise of future action. There is also a danger of overloading the Nolan Committee, and of creating inadvertently a standing Constitutional Commission.

- appoint a **Royal Commission** to review the procedures and make recommendations. The clearest precedent for this would be the Royal Commission on Honours established in 1922 "to advise on the procedure to be adopted in future to assist the Prime Minister in making recommendations to the Sovereign of names of persons deserving special honour". It was this Royal Commission that recommended the establishment of the Political Honours Scrutiny Committee, and the creation of safeguards to protect against the purchase of honours (the prevalence of which had led the Royal Commission).
- undertake the work **within Government** - indeed, preferably prior to reaching Government - drawing on the principles laid down by Nolan in relation to quango appointments, and the experiences of other nominated or non-directly elected second chambers. This section explores in more detail how this exercise might be approached.

Life Peerages

Nomination

- party leaders' nominations, as now
- nomination of a proportion by the local government associations or local authorities direct
- "corporate" nomination from public, private and voluntary sectors
- public nomination along the lines of the honours system
- public nomination, requiring a minimum number of supporters
- self nomination via the Public Appointments Unit or in response to advertisement
- expert panels to seek applicants and put forward nominations

149 The schemes which envisage seeking the support of individuals or organisations are open to the criticism that they would remove one of the advantages of the current system whereby hereditary peers in particular "are able to render an opinion free of external pressures, since they are beholden to no party or patron." It would also call into question to whom the nominee was ultimately accountable. The more bureaucratic panel system (a variant on the Irish electoral college system) would be overly elaborate and time consuming to establish as an interim measure, is more suited to a chamber whose purpose is to represent the "social partners" and key professions, and is anyway likely to rouse opposition in implementation - what areas of expertise should the panels cover? who should sit on the panels? and so on.

150 Public nomination does already exist to some extent, in that members of the public and others do put forward suggestions for peerages, just as they do for other honours, following the current Prime Minister's 1993 initiative in inviting public representations. (In fact, there was no bar to public nominations prior to the Prime Minister's announcement - when they represented about a

third of all nominations). There is always a danger that in opening up a public invitation that leads to nothing resentment will be fuelled, not least because of the practical restrictions on the number of new peerages that can be created, at least in comparison to other honours. This potential difficulty has been circumvented to date by the protocol that the Prime Minister's office does not disclose how many honours resulted solely from public nomination, preferring to point to the proportion picked for voluntary and community service as representing this element.

151 However, a peerage is offered partly in anticipation of work to be done in the Lords, not only as a reward for past service. There must be a question mark over whether it is right that peerages should continue to be regarded as part of the honours system. The closer analogy is with the many national public bodies whose committee members are appointed by Ministers. The other key distinction between peerages and other honours is that most peers are tied to a political party and are not simply appointed on their merits - the political parties therefore need to have a say in who is selected to be on "their side". Elections to the House of Commons do not offer the public a free vote on whichever local party member they believe should be their MP, but use rigorous selection mechanisms to ensure that candidates put forward by the parties are appropriate representatives. Similarly, in nominations to the House of Lords, it seems reasonable to expect the parties themselves to have a say in who joins their benches.

152 The most effective and sensible measure would therefore be to **allow the party leaders to nominate party representatives, as now - including opportunities for the minority parties to nominate peers. Nominations for cross-bench peers would, however, be invited through public nomination,** making sure that key organisations e.g. trade bodies, charities, universities, women's organisations, CBI, TUC, were alerted to the announcement. The serving Cabinet Secretary might also be invited to put forward candidates from the ranks of former senior civil servants and military personnel. A likely consequence of the public nomination scheme for cross-benchers is that grassroots members of political parties will also suggest names to their own party leadership as worthy of party nomination.

Selection

- the Prime Minister, as now
- joint committee of both Houses
- strengthened Political Honours Scrutiny Committee
- a new Appointments Commission, formally a Joint Committee appointed by Parliament, including a number of Privy Councillors or members of the House of Lords and advised by the independent Commissioner for Public Appointments

153 **Of the four options, the last one has most attractions.** It would be particularly useful in establishing that appointments were to be separate from the honours system, if that were to be the intention. (The Political Honours Scrutiny Comittee might continue to play a role in relation to honours other than peerages). The new Appointments Commission would be composed of one nominee from each party in the House of Commons with more than six seats i.e. 1% of the total number of MPs, and one nominated by the cross-benchers. Nominations would be agreed through the "usual channels", in the same way as for the PHSC. The Commissioner for Public Appointments would act as chief official adviser to the Commission. It would be chaired by one of the Law Lords.

154 It is recommended that the nominees from the parties be senior Privy Councillors and/or members of the House of Lords. First, because the Committee members would themselves be exempt from appointment. Second, because the Commission should be composed of those who have already received high honours as they would be exempt from receiving one for the duration of their term on the Commission, and who are sufficiently advanced in their political careers that they might be regarded as relatively independent of party and other pressures (of course, they cannot be entirely aloof from such matters), to avoid the danger highlighted in the 1968 White Paper that: "the members of a committee which possessed such a power would be open to pressures and representations of a kind which would make it very difficult for them to do their work effectively."[55]

155 **To support the Commission in their deliberations, detailed guidance should be drawn up and published, including the criteria to be used in evaluating candidates for suitability,** so that potential candidates or their nominators could make an assessment of their prospects and monitoring of the outcomes would be facilitated. Responsibility for preparing the guidance would fall to the Appointments Commission as a first task and draft guidance would then be recommended to both Houses of Parliament for agreement before being adopted. The criteria for appointments would apply to all candidates, whether party nominees or prospective cross-benchers. **The role of the Commission might however be different in respect of the party aligned peers and cross-benchers - in the first case, the party leaders might continue to put forward nominations to the Commission for scrutiny on the grounds of propriety (effectively, a standards monitoring role), whereas the Commission would itself recommend cross-bench peers after considering nominations made from the public and organisations.**

156 In terms of devising the criteria, those adopted in relation to judicial appointments might provide a helpful starting point: professional ability, experience, standing and integrity, plus good health. This would help to alleviate fears that life peers might be appointed for services rendered to an individual or party. It may also be helpful to draw again on Lord Nolan's recommendations in relation to quangos:

> *"...selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit i.e. whether members are in any way representative of particular interests or viewpoints, or whether they are appointed purely as individuals. The range of skills and background which are sought should be clearly specified..."*[56]

157 We recommend that **the principle that peers are appointed purely as individuals should continue and be reinforced by the guidance on appointments,** but that their role should be in part to facilitate the representation of wider views in the House, both through their personal associations with outside communities of interest and through the development of procedures which enable the taking of expert evidence and the calling of witnesses in carrying out the House of Lords' parliamentary duties.

158 Another more controversial criterion that might be applied to the selection of life peers would be to provide informally for representation of the regions and nations of the UK through the selection procedure, partly to compensate for the dilution of Scottish representation resulting from the removal of hereditary peers, but also as part of a process of creating a federal consciousness within the central institutions - and entirely in line with the practice of inviting life peers to link their title to a locality. As Ferdinand Mount has argued "to traditionalists it

can be pointed out that this pleasant tinkering represents more of a return to than a break with tradition; initially lords were, after all, of their essence regional."[57] Extending this argument further, it is worth reflecting on the Committee on Standards in Public Life's view that "A board which reflects the community it serves may also enjoy greater public confidence, thereby making the implementation of its work more effective."[58] Again, the notion of social reflection could be readily incorporated into the selection arrangements for the House of Lords - encouraging nominations from women and members of ethnic minorities, for example.

159 As with Nolan's recommendations on quango appointments, it would be appropriate to require any candidate for a cross-bench peerage to declare any significant political activity undertaken in the last five years but also, unlike prospective quango members, to declare membership of any political party and an assurance that the individual does not intend to take the whip of any party, as appointments to the cross-benches would be designed to provide opportunities for those without prospect of party favour.

Decision

- Appointment Commission to recommend names to the Prime Minister for final decision
- Appointment Commission to make final decisions

160 In either case, the decisions would be taken within the framework of a fixed quota of numbers from each party and for the cross-benchers - and would of course be subject to the Queen's approval. The decisions would also be made by reference to guidelines approved by Parliament. The question therefore is whether Prime Ministerial patronage should simply be constrained or removed altogether. In practice, it will make little difference: the existence of an advisory committee would make it rightly difficult for the Prime Minister to retain a significant element of discretion - if he or she rejected the Commission's recommendations too often it would effectively render the whole nominations system worthless.

161 Given that the recommendations to the Queen would need to come from the Prime Minister in any case, it is probably as well to leave the final decisions in the hands of the Prime Minister in the first instance (this might be reviewed if a nominated element were preserved in a mainly elected House). As a further safeguard, the Parliamentary Commissioner on Standards might be required to report annually on the operation of the appointments system and the role of the Appointments Commission.

Peerages Other than those Created under the Life Peerages Act 1958

Special Categories of Hereditary Peers

162 It will be necessary for any legislation to deal with the position of peers who sit by virtue of a Writ in acceleration. This is a procedure by which the eldest son of a peer holding a barony as well as a superior peerage can be summoned in right of his father's barony. This has been done in the case of Lord Cranborne, the present Leader of the Lords, who sits as Baron Cecil of Essendon (a barony held by his father, the Marquess of Salisbury). Legally, he is not a holder of a hereditary peerage. The position is analogous to, but not the same as, a peer of first creation. A special provision might therefore be needed treating such a peer as a life peer for the purposes of the legislation, and prohibiting the issue of future writs. (The calculations in Table 4 assume that Lord Cranborne is counted amongst the hereditary peers who would be retained in a nominated chamber).

The Bishops

163 The Lords Spiritual comprise 5 ex officio bishops - the Archbishops of Canterbury and York, and the Bishops of London, Durham and Winchester - and 21 other diocesan bishops of the Church of England, according to the seniority of their appointment to diocesan sees. At any one time, therefore, 26 of the 44 diocesan bishops of the Provinces of Canterbury and York have seats in the Lords. However, they operate a "duty rota", and most of the bishops attend the House only infrequently. All Lords Spiritual lose their seats on retirement from their posts, although Archbishops are now usually given life peerages. In fact, the bishops do not technically represent the Church of England, each having a personal Writ of Summons from the Sovereign like every other member of the House. Nevertheless, each day's Proceedings of the House begin with prayers said by one of the Lords Spiritual.

164 In summary, a number of reasons have been advanced in support of retaining the bishops: they add to the non-party character of the House of Lords and can bring a regional or "constituency" perspective; they are potentially able to provide a social conscience (although no more so than other religious leaders or representatives of voluntary organisations); they symbolise the existence of the established church in England (although their removal would not of itself disestablish the church); and they deal with a small amount of ecclesiastical business in Parliament each year - the ordination of women priests is the most prominent recent example. None of these factors presents an obstacle to their removal, if that step is thought desirable. The bishops as a body have, for example, been criticised as ineffective and lacking a coherent role - "more spectators than participants[59]. Certainly, no other parliamentary chamber in a democratic state still has a body of members present solely by virtue of the right enjoyed by their religion. In democratic terms, the inequity of the lack of representation of other denominations or faiths is difficult to defend (although there would be practical difficulties in achieving broad representation - Roman Catholics, for example, would not attend). Perhaps most importantly, on those issues where their voices might have been heard to some effect, the bishops had no influence on the outcomes e.g. recent legislation dealing with Sunday trading.

The Law Lords

165 The position of the Law Lords is rather different. The House of Lords is the final court of appeal for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases. This judicial function is very largely separate from its other functions and is now carried out exclusively by the Law Lords: the Lord Chancellor, Lords of Appeal in Ordinary appointed under the Appellate Jurisdiction Act 1876 - a maximum of 12 at any one time, retired Lords of Appeal, retired Lord Chancellors and other past or present holders of senior judicial office: a total of 24 at the end of the 1994-95 session. In practice, the serving Lords of Appeal take the main responsibility for the judicial function, but all Law Lords are additionally entitled to participate as "ordinary but specialist" members of the House of Lords in exercising its other functions. This blurring of the distinction between the legislature and judiciary is perceived by some as an inappropriate breach of the doctrine of the separation of powers (and the further anomaly of the Lord Chancellor's role in the executive, legislature and judiciary even more so).

166 There is no doubt about the continuing need for a final court of appeal within the judicial system, but it need not remain within the House of Lords. The principal objection to the exclusion of the Law Lords from the House of Lords and the creation of a new court of final appeal, which would comprise the Lords of Appeal in Ordinary, (or the transfer of jurisdiction of the Judicial Committee of the House of Lords to the Judicial Committee of the Privy Council) is that it would deprive the House of Lords of the specialist expertise of the Law Lords.

167 In fact, although the Law Lords would henceforth have no right to sit or vote in the second chamber, there would be no shortage of legal expertise remaining in the House, and additional life peers from the legal professions could be created, if it was thought desirable. In addition, the potential adoption of a UK Bill of Rights - and even the incorporation of the European Convention on Human Rights (and potentially the introduction of devolved government for Scotland and Wales) raise questions about the need for reform of the judicial system to provide for some sort of constitutional court and the role of the Law Lords within any such structure. The role of the Law Lords within any such structure will be a central issue and any review of the position of the Law Lords in the House of Lords needs to be informed by this wider debate.

168 Partly because of the limited numbers of Law Lords and bishops, but also because of their role as representatives of wider social and professional interests (and in the case of the Law Lords, their specific judicial responsibilities) neither group presents the same sort of affront to democratic politics that the hereditary peers do. Pragmatically, there is a significant risk of jeopardising the legislative passage of a first stage bill if the entitlements of both these groups are challenged simultaneously. It could well be argued that neither the Law Lords nor the bishops are present in sufficient numbers or have sufficient impact - to make any democratic advantage in removing them at this first stage (even if this is considered the right move in the longer term) worth the additional opportunities this would provide for political opposition to the legislation.

169 If hereditary peers are removed without any clear idea of the final shape of the reformed House of Lords (which could, for example, include an element of social representation as in the Irish Senead), it would be pre-emptive to remove or restrict the role of the Law Lords and bishops at this first stage. However, it would be possible in the interim to create a number of new cross-bench life peers which widened the representation of other religious communities in order to counter the objections to the dominance of one denomination or faith alone (although some, including the Roman Catholic church, may not be permitted to send representatives, thus undermining the intent). Rather than extending the existing anomaly of Church of England representation, the reduced overall size of the House of Lords could provide legitimate grounds for reducing the total number of bishops - perhaps from 26 to 16, as was agreed in 1968 - if it was felt important to make a gesture towards critics of their membership of the partially reformed House.

170 The presence of both groups in the House of Lords in the longer term is closely tied to the wider questions of the function of the second chamber, and the question of representation. If a wholly elected second chamber is preferred, the logic of the democratic argument suggests that neither group deserves a place in the reformed chamber. If a nominated element is included, the answer will depend on the nature of the representation sought.

Powers and Functions

171 It is not the intention of the Labour Party to change any of the powers or functions of the House of Lords in removing the hereditary peers. However, the symbiotic nature of the relationship between composition, powers and functions, together with the absence of any written constitution that establishes the formal role of the second chamber, means that the shift in membership may have unforeseen consequences. Whatever is done to make the House of Lords

more democratically justifiable will mean that it is more likely to want to take powers back from the Commons or exercise powers it has but does not use.

172 Perhaps the most predictable of these changes is the collapse of the Salisbury doctrine. Without the removal of the hereditary peers, and therefore without the current substantial Conservative majority which lead to the creation of the doctrine, there is every likelihood that a reformed House of Lords would feel that it had sufficient credibility to oppose the Government, should members wish to do so. A Labour Government will therefore have a difficult line to tread - convincing the public that a real measure of reform has been effected, whilst convincing the House of Lords itself that nothing is really very different, and that in terms of self-restraint it should "carry on as before". In the early years of a Labour administration, there may be little change; but if opinion polls started to turn against the Government, the House of Lords might feel able to reassert its will - especially on controversial and constitutional matters - in order to force reconsideration.

173 Whilst there may be delay and frustration, there may also be positive outcomes - more genuine and constructive debate and possibly more consensus politics, even if only as the result of hammering out compromise solutions. It has also been suggested that the convention of not voting on statutory instruments (which are not susceptible to amendment and can only be accepted or rejected) might be overturned - potentially leading to better preparation and consultation on delegated legislation, along with greater uncertainty for the Government.

Conclusion

174 Although there is little difficulty in drafting a short bill to remove hereditary peers (a draft bill is at Appendix A) there are likely to be political, public and media pressures to go further than this simple incision - to improve procedures for appointment, to explain how the political strengths will be determined, to provide assurances that the House of Lords will be able to maintain current levels of activity with a reduced membership. In fact, by creating a debate around the issue and instigating a measure of change, the removal of the rights of hereditary peers may both increase the demand, and hasten the need, for more fundamental reform.

Chapter 6

An Elected Chamber

"If I were asked to encapsulate the various functions and the ideal composition of an Upper Chamber, I think I would use the word 'balance'..."

Lord Hailsham of Marylebone 'The Role of an Upper Chamber in a Modern Parliamentary Democracy', *The Parliamentarian*, October 1992

Creating an Elected Chamber

175 Both the Liberal Democrats and the Labour Party are committed to the goal of an elected second chamber. Beyond agreeing to the principle of election, the Labour Party has no specific proposals for its proposed second stage of reform. Before the last general election, the Labour Party's policy review had proposed a regionally based second chamber charged with a special constitutional role, but with restricted powers of delay, which their Working Party on Electoral Systems chaired by Lord Plant subsequently recommended should be elected by regional list proportional representation. The Liberal Democrats, on the other hand, have specific proposals which they nevertheless accept would be subject to review and revision by their proposed Constituent Assembly.

176 But if there were to be a nominated chamber as a prelude to further reform of functions, powers and composition its workings would inevitably influence the policies of all the parties towards that next stage of reform. Its defects and merits would encourage further consideration of (for example) the inclusion of a nominated element in a predominantly elected second chamber.

177 And what would be the position of the Conservative Party were it to regain power after the introduction of a nominated second chamber? Might it return to the recommendations of the 1978 Report of the Conservative Review Committee, chaired by Lord Home of the Hirsel? The intelligent consideration given by that committee to the options for reform produced a set of recommendations on composition which might yet find favour: the size of membership would be limited to some 400, of whom two-thirds would be elected. All members would be salaried and there would be a retirement age of 75. Elections would be by proportional representation and the term of office would be nine years. The nominated element would be appointed (also for nine years) by the monarch on the advice of the Prime Minister, who would however be required to consult a special committee of Privy Councillors representative of all the main parties in the House of Commons. Only very limited consideration, however, was given to the functions that such a chamber might fulfil.

178 The similarity of the main Opposition parties' proposals for reform is in no small part the product of a number of factors that restrict the realistic choices available to reformers:

- as part of the legislature, any second chamber's core function "is to constrain governments, to subject them to scrutiny and criticism...not only to influence but to some extent circumscribe and control their activity".[60]
- there is little value in duplicating effort between the two Houses.
- the rule that the government of the day is drawn from the majority party in the House of Commons.

179 The key issue on which the parties are likely to differ is this: assuming that the second chamber will complement, rather than rival, the elected House of Commons, what interests or communities should the second chamber represent and how should the representation be facilitated? In turn, this question can only be answered by first considering what the second chamber is for - what are its functions? This chapter explores the decisions that need to be taken and the inter-play between them.

Functions

180 Neither the Labour Party not the Liberal Democrats have suggested that the existing functions of the House of Lords are unimportant or inappropriate; save only for the judicial function which - although necessary in itself - might be separated from the other work of the House. There is certainly little spare capacity in the House of Commons, and the rationale for the retention of a second chamber relies heavily on the continuing need for the functions currently exercised by the House of Lords. But what capacity is there for an elected second chamber to take on new functions - or, for that matter, what need? Conversely, what functions might a elected second chamber claim for itself?

181 The ability of a reformed second chamber to take on new functions and more effective ways of carrying out existing functions will depend largely on the number of members it boasts, and whether members are to be subject to any minimum attendance requirements. It will also depend on whether members are to be required to exercise a constituency role in addition to their legislative functions; and whether other constitutional reforms (such as devolution to the nations and regions) impact on the role of the second chamber - for example the second chamber might have a particular responsibility in relation to the financing of devolved assemblies. Moreover, in the absence of a written constitution, the second chamber might be given a far greater responsibility for "constitutional watchdog" functions. The manner in which existing and new functions are fulfilled will also need to be given detailed consideration as part of the Government's policy making process, rather than being left to the House to determine for itself, to avoid conflict between the two chambers.

182 The European Parliament experienced the process of moving from a nominated chamber to one elected by direct universal suffrage - the first elections were held in June 1979. Two points are worth noting here. First, the number of Rules of Procedure necessitated by the elected Parliament was substantially more than in the nominated chamber - there were 54 Rules in 1973 after the enlargement that brought in Britain, Denmark and Ireland, but 115 Rules and 4 Annexes by 1984. Aware of this need, there were attempts by the nominated chamber in the year before the first elections to amend the Rules of Procedure in anticipation of the Parliament's election[61]. Similarly, the existing membership may try to influence the successor to the House of Lords (or an interim nominated chamber) by adopting pre-emptive rules on the basis of "experience knows best". Second, the new legitimacy claimed by some MEPs for the directly-elected chamber led to a wish to extend the Parliament's remit to include the conduct of relations with the Council, Commission and Foreign Ministers and to legislate more efficiently and expeditiously. There is certainly scope for improving the operation of the legislative process in the existing House of Lords, which as the Hansard Society Commission report *Making the Law* concluded, would benefit from extending pre-legislative consultation, the taking of evidence and the timetabling of bills.[62]

183 The Liberal Democrats' proposals are not entirely clear when explaining the new functions of their proposed Senate. First, what is meant by "a central role to play in scrutinising European Community proposals": is this intended to differ from the existing, and much praised, work of the Lords' Select Committee on European Community Legislation? is it to take on this role entirely from the House of Commons? should there be specific joint committees of MPs or MEPs and Senators to consider European matters?

184 Second, it is unclear quite how Senators would "represent national and regional interests". Is representation secured by means of election alone - or by direct links to any assemblies created in the regions and nations? Although entitled to attend and speak at their national parliaments or regional assemblies, Senators would not be members and would not formally be bound to agree with the position taken by the assembly or parliament (unlike the German Bundesrat where members are also members of the Länder governments and vote according to their own Land's policy). Indeed, Senators from any given region or nation could well be of a different political make-up to the assemblies and parliaments. The potential conflicts inherent in this system are therefore clear.

185 And yet a reformed second chamber could have a particular utility in reflecting the views of Scottish, Welsh and Northern Irish assemblies at Westminster. This function could be especially valuable in enabling Senators to vote on policy matters which are not within the assemblies' own legislative remits, but in which they have a strong interest (under the Liberal Democrats proposals, members of the regional assemblies and national parliaments would be allowed to speak in the Senate, but not vote). Any formal mechanisms adopted to foster relationships between Senators and national parliaments - which might be as straightforward as regular meetings or joint committees to consider specific legislative proposals - would need to be given some status and should probably be open to the public.

186 Finally, under the Liberal Democrat proposals, the presence in the second chamber of Cabinet level Ministers responsible for Scottish, Welsh, Northern Irish and English regional affairs would make sense - either through membership of that body or through attendance rights if they are MPs.

Powers

187 Much of the fire has gone out of the debate on powers, but it is crucial to the successful reform of the House of Lords. The question of composition, whilst complex, has many solutions - at least some of which are likely to prove acceptable across the political spectrum. The powers of the second chamber, on the other hand, strike at the core of the ideological debate; it was a stand off on the question of powers that resulted in the collapse of the otherwise productive Party Leaders' Conference in 1948 - and may be the sticking point again. On a pragmatic level, the willingness of the House of Commons to countenance a more democratic, popularly based chamber will depend in significant part on the powers that the new chamber is granted. On the other hand, the ability of an elected second chamber to attract high calibre members is thought by some to depend on the powers the members have (this may or may not be the case - other features might prove attractive e.g. a focus on EU matters, more reasonable working hours, and especially the opportunity for a regional voice).

188 The experience of the European Parliament again sheds light on how the very process of transition to an elected chamber can influence the powers accorded to the elected assembly: David Millar comments that "the European Parliament, in revising its Rules [of Procedure] to provide for the transition from a nominated to an elected status, based itself on the principles of representativity, legitimacy, justice for minorities, efficiency in the legislative process and a lively sense of the need to extend its powers. The success of its efforts can be judged by the

consequential amendments to its Rules of Procedure adopted in 1987, to provide for the co-operation procedure, and in 1993, to provide for the co-decision procedure..."[63]

189 Although the Liberal Democrats propose reverting to a power of two years delay over public bills, increased powers of delay are unlikely to win favour with the House of Commons. Not least because the existing powers of the House of Lords, once transferred to an elected second chamber, would be exercised in a far less diffident manner than at present. This in itself might provoke concern from a House of Commons (and more especially a Government) used to regarding the House of Lords' legislative role as largely ineffectual. The current House of Lords retains significant, though latent, powers of veto in relation to many aspects of parliamentary business e.g. delegated legislation, private bills; and would almost certainly wish to display its muscle by delaying at least some public bills. In this context, the means of reconciling the positions of the two Houses may become more important and some form of Joint Committee of the Houses, similar to that established in Australia, may be desirable. Calls from the House of Commons for reductions in the second chamber's delaying powers, or the forfeit of powers of veto are also likely if not proposed by the Government. Whether or not such changes were accepted would depend upon the scope for increasing powers in other areas; the strength of opposition in the pre-reformed House of Lords during the passage of the legislation; and the Government's majority in the Commons.

190 One area in which powers might be increased would be in relation to constitutional matters. There would certainly be demands for some additional measure ensuring that an elected second chamber had parallel authority with the House of Commons in approving any changes to its own composition, functions and powers. Beyond this, the House of Lords' function as a constitutional safeguard might be enhanced by the grant of a power of veto over constitutional (and possibly human rights) legislation, or the right to call a referendum on such matters before giving approval. Without a written constitution or Bill of Rights, it is difficult to see how these broad powers might be regulated. Opposition from the House of Commons is likely to be particularly fierce if the powers imply some superior moral authority resident in the elected second chamber, as with the Liberal Democrats' proposal that their elected Senate be allowed to challenge the House of Commons on money bills "by a right of appeal to the Supreme Court, where it believed the Commons to be engaged in tacking'."

191 Aside from extensions to powers of a delay, some argue for the need to tidy up the existing provision: to provide for a delay of six months from the date of disagreement (that is, the final vote on the disputed matter in the second chamber) rather than the present 12 months from second reading in the House of Commons - which in practice may be less than three months actual delay.

Composition

192 In many ways, it can appear that the decision to create an elected chamber removes the difficulties posed by a nominated chamber - the balance and membership will be determined by ballot. But in fact, decisions about the design of the elections to a second chamber can have a significant impact on the outcomes. The different issues that require determination in respect of an elected chamber - and the alternatives to an elected chamber - are set out below.

Designing an Elected Chamber

193 The democrat's instinct is to prefer an elected chamber. There are obvious attractions, not least the legitimacy and authority that are derived from the electoral mandate. But there are also manifold difficulties in deciding on the exact form of election. Foremost amongst these difficulties is the counterpart to the principal advantage: by enhancing the democratic legitimacy of the second chamber, it would become a rival to the House of Commons - unless its powers and functions are clearly defined. The creation of a rival chamber may not be considered a negative outcome in itself - but in political terms, any reforms to the House of Lords will need to be agreed to by the House of Commons. This is of course a potential problem in all two chamber parliamentary systems, and as Chapter 3 illustrates, a number of ways have been found to resolve it elsewhere.

194 In the UK, there is a range of factors that could distinguish an elected second chamber from the current House of Commons - although distinctions need not be made in every case.

The Units of Representation

195 The units of representation will depend in part on whether the second chamber is to be constructed in line with what the Plant Committee termed the "microcosmic view of representation" - that Parliament should represent the whole range of political opinion in society; or the "principal-agent concept of representation" - in which an individual acts on the majority view of the constituents which he or she represents, and seeks to act as far as possible in their interests.

196 The Liberal Democrats' proposed elected chamber assumes the use of 15 geographical units of representation - 12 regions of England and the 3 nations of Scotland, Wales and Northern Ireland. Similarly, the Plant Working Group (which took as its starting point the second chamber proposed by the Labour Party prior to the 1992 General Election) recommended a regional list proportional representation as the most appropriate mechanism for election - although the regional boundaries were not specified.

197 A regional basis of representation raises immediate questions: foremost is the question of how this representation can be distinguished from the existing geographical representation in the House of Commons. The "West Lothian Question" (which suggests the need to reduce the number of members of the House of Commons returned from Scottish constituencies after the introduction of a devolved Scottish parliament) arises from the assumption that Scottish MPs have, as at least part of their parliamentary functions, the representation of generic Scottish interests, rather than just constituency interests. So what value would additional Scottish representation in the second chamber have?

198 Even if it is accepted that this presents no objection, the comparative weight of the regions will be open to question - for example, should one English region be seen as equivalent to the whole of Scotland; alternatives would include dividing the nations themselves into regions or reducing the number of seats for the English regions relative to the number of seats for each nation. Such models clearly derive from second chambers in the federal systems, but the analogy is to some extent misleading because neither party proposes the establishment of a federal state. Members from the English regions would have a different relationship with the regional assemblies from that of the Scottish members with their national parliament. The exact relationship between a

regionally representative second chamber and devolved national assemblies or parliaments needs therefore to be further delineated. (These issues will be examined in greater detail in a separate report on the matrix of electoral systems and cycles that will emerge from comprehensive constitutional reform.)

199 However, the only likely alternative basis of election is socio-economic, which brings with it greater problems. A formalisation of the "House of Experts" approach implicit in the appointment of working peers today, by emulating the Irish Senead's electoral college and specialist panels approach, might provide a sound basis for a reformed second chamber that fulfilled a useful parliamentary function without challenging the supremacy of the House of Commons, and would provide some semblance of legitimate authority and democratic input to the appointments. But it would not be well placed to act as a constitutional bulwark; and there can be difficulty in distinguishing between an expert voice and a vested interest. Moreover, it is also a recipe for factionalism, and in a nation as diverse as the UK, it would be very difficult to reach agreement on the corporate interests which should be entitled to representation (as well as the difficulties in representing people who are not members of any official body or grouping, such as unemployed people) quite aside from achieving the most appropriate balance of numbers between them and the inevitable imbalance in resources they would have available.

200 Moreover, the tenor of the current debate about the propriety of peers' outside interests, and paid advocacy in particular, suggests that for the House of Lords to assume officially the role of representing corporate interests, whether those interests are in the private, public or voluntary sectors, would be a difficult transition to accomplish successfully. Finally, a key practical objection to such a scheme was alluded to by Lord Mottistone in the debate on the Griffiths Report in November 1995: "I discovered to my surprise that there was not a proper focused voice for the CBI. I thought that the captains of industry would fill that gap but they did not. The captains of industry are usually too busy. When they are not too busy, they are not inclined to take part in the nitty gritty of going through amendments during the various stages of a Bill. It is not their way of life."[64]

201 Whatever units of representation are decided on, the allocation of seats between the units of representation will also be important - particularly if not proportionate to population size.

The Total Number of Members

202 In a recent survey of 48 countries with second chambers, the overwhelming majority (73%) had a second chamber of 100 members or fewer62, although European states with populations comparable to the UK tended to be larger than this. On average, second chambers are around half the size of the first chamber. The UK has, at present, the largest membership of both lower and upper houses in the world (and even using the average daily attendance of 376, the House of Lords is still the largest second chamber). In most cases, the size of both chambers relates to the population size, although in different ratios. The size will also clearly depend on whether members are expected to attend on a full or part-time basis, and the scope of the chamber's work.

203 The Liberal Democrats propose a total of 225 elected members, with fifteen Senators from each of the fifteen constituencies, plus an additional 60 non-voting nominated members. It is unclear whether the nominated members would be expected to act as full-time members of the House, but the elected members almost certainly would be expected to offer a similar commitment to MPs (with some reduction if no constituency work were involved). The Labour Party has given no

indication of the size of nominated House it would favour; the proposals for an elected chamber before the last general election recommended a House of about 300 members. Certainly a full-time House would be unlikely to contain more than around 400 members, and considerably fewer - between 200 and 300 - might well be more effective.

The Form of Representation

204 The choice between direct or indirect elections is one of the most significant. The attraction of indirect election (by a political constituency made up of people who have themselves already been elected) is that the link between regional and national assemblies could be strengthened if the electorate is made up of local councillors and members of regional and national assemblies, were they to be established. The South African scheme of nominating Senators from each of the provincial legislatures (with each party represented in the nominations in proportion to their local representation) may well be adaptable to the UK in due course.

205 However, the advantages are most obvious in a federal state where the role of a second chamber is to represent interests of the regions as determined by the regional governments. In this situation, conflict between Senators and the regional assemblies should be minimised; and the direct link should assist in knitting together the regions and the centre. The Liberal Democrats advocate direct elections, and Tony Blair has also referred to the Labour Party's goal as being "a directly elected second chamber"[66]. Direct elections would ensure that every citizen had a say in the process, but would also bring nearer the threat of a rival House as each could claim to have the mandate of the population at large. This threat could be reduced by the choice of electoral system, and by ensuring that the units of representation differed (as well as by limiting the powers and functions of the second chamber).

The Electoral System

206 Decisions about the electoral system will necessarily reflect the intended functions and powers of the House, which must be a prior consideration, but the political reality is that the predominant criterion is likely to be party political advantage[67]. The large number of possible electoral systems from which to choose is only slightly reduced by the racing certainty that no new elected body will be chosen by "the first past the post" . The electoral system would need to be different from that chosen for the House of Commons, and would probably not be one member-one constituency based if the House of Commons system continued to be so. 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.

207 The Plant Working Party considered that the chamber should be elected on a more proportional system than the House of Commons, in order to differentiate the two bodies, and that the constituencies should be different for the same reason. It looked first at the additional member system, on the grounds that the Scottish Parliament would be elected by this system and the fewer systems in operation the easier it would be for the public, but the Working Group was unable to determine an AMS system that worked given the intention that it should be regionally representative and have only around 300 members. Instead, they recommended a regional list system. They countered potential criticism of the exercise of party patronage necessitated by regional lists, by advocating that "a democratic basis be used to draw up lists and provisions made for voters to change the order of candidates on lists."[68] But regional lists also remove the

possibility of independent candidates and it is possible that professional politicians who failed to win a seat in the House of Commons would re-emerge on party lists for the second chamber.

208 The Liberal Democrats have recommended the use of a single transferable vote system for both Houses of Parliament. The principal disadvantage of STV is that it removes the link between representative and constituency, and it is this factor that has to date prompted much of the (parliamentary) opposition to proportional representation. Aside from the intrinsic merits of the scheme, however, there must be considerable doubt about the merits of elections to both chambers being on the basis of the same electoral system, albeit relating to different constituencies. The scope for rivalry is immediately increased. Moreover, it is inconceivable that any electoral system based wholly or partly on regional representation would be introduced by Westminster without consultation with the regions and nations themselves. The allocation of seats and the number of seats in each region would be subject to ferocious political argument; quite aside from the technical work of deciding on the possible permutations.

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.

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.

The Likely Party Structure

211 There are two issues here: first, how to deal with the possibility of differing party majorities in the two Houses; and second, whether it is either desirable or feasible to preserve some of the apparent non-partisan atmosphere in the House of Lords or even to reinvigorate the independence of Parliament through reform of the second chamber.

212 It is certain that parties will continue to be the major influence on selection of members and there is almost no chance of any constitutional reforms breaking down the party based system. As John Burnheim argues:

> *"In order to be elected one has to attract votes. In order to attract votes one has to be known and assessed. In most cases, people cannot and do not have enough adequate information to assess a candidate's policies, ability or moral qualities. So they rely on the verdict of a party that endorses candidates"*[69]

What may happen, however, is the emergence of new political parties which are rooted in regional issues rather than conventional party politics. There is a particularly close - if not causal - relationship between first past the post elections and two-party political systems; any proportional system is more likely to produce a multi-party chamber. It may not therefore reflect the majority in the House of Commons, and may be more reliant on coalitions or informal co-operation. Having only a limited power of delay, a chamber thus composed would not be a danger to a coherent government legislative programme, but would clearly be more likely to inflict defeats on the Government than the House of Lords as presently composed.

213 Turning to the second question, there is little doubt that an elected chamber would lose much of what Lord Home's report describes as "the less contentious, less partisan atmosphere in the Lords", which arises:

> *"not in spite of the partisan imbalance, but often because of it. This imbalance allows scope for a degree of independence of judgement which would be diminished if there was a more obviously equitable balance between the parties in the Lords and all its members were more rigidly committed to party discipline."*[70]

The chamber's independence of spirit is also reinforced by the presence of the cross-benchers, effectively independent members. In an entirely elected chamber, there can be little reason to suppose that independent candidates would fare any better than they currently do in elections to the House of Commons. The only effective means of securing the services of the sort of individuals who currently sit on the cross-benches is through an element of nomination. But even then, there would be no guarantee that once nominated an individual would not take a party whip, or form a party of his or her own.

Who Might Seek Election

214 It is likely that the people interested in being elected to the second chamber will not differ much from those wishing to become MPs. If this is considered undesirable, the formal criteria for selection could be used to differentiate between the membership of the two bodies. Most obviously, the age of those entitled to stand may be considered a useful distinguishing factor. Most states with a second chamber stipulate a minimum age that is higher than that for the lower chamber. In most cases, the age is between 30 and 40, with the most common minimum age for the lower house being between 20 and 25. This requirement stems from the perceived function of the second chamber as offering mature and possibly conservative restraint on the lower house.

215 By the same token, the age profile of the House of Commons in practice is certainly older than the formal minimum, and there are few MPs under 35. It may therefore be unnecessary to exclude certain individuals on the fairly arbitrary grounds of age. If a regional basis for an elected second chamber were decided on, it would be reasonable to require residence in the region as a qualification for candidature, in contrast to the position of MPs.

The Possible Retention of a Nominated Element

216 One of the concerns expressed by those opposed to an entirely elected second chamber is that it would, because of the party dominance, remove the element of independent opinion currently represented by the cross-benchers. It might also, as Tony Blair has suggested, lose out on the expertise of distinguished individuals, who may not wish to put themselves forward for election. It has therefore been suggested that a nominated element might be retained for the Prime Minister to award at his or her discretion (as in Ireland and several Commonwealth countries), or subject to some advisory body, in order to ensure that some of those who would not be interested in standing for election, but whose contribution would nevertheless be valuable, could be given a place.

217 They might, for example, be former permanent secretaries, military chiefs and former Cabinet Ministers; alternatively, they might be representatives of professional or social groups. There would be difficulties in making nominated representatives of this sort full-time members, as their representative value would decrease without continuing to have direct involvement in their field of expertise. But the over-riding objection is that any nominated element both by-passes and undermines the democratic process - their accountability would be to specific interest groups, if it existed at all. The objections to nomination would also be particularly marked if the mechanism were used to introduce into the House those who had failed to win an election (whether to the House of Commons or to the second chamber). But by the same token the retention of a nominated element may be the key to securing the support of the House of Commons for such a system, by limiting the legitimacy of the second chamber.

218 The Liberal Democrats' proposals envisage that nearly 20% of their reformed second chamber might be nominated, but these members would not be entitled to vote. Whilst enabling individuals to contribute their specialist knowledge and experience without affecting the voting strengths is attractive in theory, the concept of a two tier chamber has not previously found favour and the ends - the input of independent views - might be better achieved by other means (for example, extending the use of special standing committees and pre-legislative scrutiny that ensured the voices of a wide range of experts and interested parties were heard direct). Moreover, there must be some doubt about whether non-voting members would be motivated to attend.

MEPs as Members of the Second Chamber

219 The Liberal Democrats have recommended that MEPs should be entitled to attend and speak at the Senate, but not vote. Others have suggested the MEPs be full members of a reformed second chamber. Although there are clear advantages in facilitating links between MEPs and domestic politics, there are also practical and political objections. First, MEPs would have only limited time to devote to active participation in domestic politics. Second, in the context of political controversy about the nature of the UK's future membership of the EU, hostility from sections of the public and Parliament might be expected. There is no precedent for full membership or attendance rights. In no EU country do MEPs have the right to membership of domestic parliaments, although in Germany, Belgium and Greece, they are entitled to attend the relevant parliamentary committees on European affairs. It seems inconceivable that MEPs would be full members of a reformed second chamber in the foreseeable future, and if MEPs were to have attendance rights in one chamber of the UK Parliament, it seems unlikely that the House of Commons would countenance the House of Lords being the chosen arena.

An Elected Chamber in Operation

Disqualification from Membership

220 There would be a need to consider the grounds for disqualification. There are four ways of losing the right to membership of the House of Lords at the current time, aside from a positive disclaimer by a hereditary peer: by being or becoming an alien (Act of Settlement 1701 - but not including commonwealth citizens or citizens of the Irish Republic); adjudication of bankruptcy; a conviction of treason; and being aged under 21. There is a case for establishing the same criteria as for the House of Commons: sentence to prison for more than a year; detention in a mental hospital; expulsion by resolution of the House.

221 Under any electoral system, consideration would need to be given to regularising the disqualifications for sitting in the House of Commons (which include clergy, persons subject to certain powers of detention on grounds of mental health, Government contractors, holders of an extensive array of public offices in addition to the grounds listed above) and the House of Lords. A right of resignation would also have to be provided for, in line with that for MPs. Attendance requirements may need to be imposed in respect of any nominated members, but for the elected members the sanction would be the prospect of losing the next election (and in the shorter term, displeasing the Party Whip).

Costs

222 An important factor is the revenue implications for the administration and support of an increasingly professional second chamber. The House of Lords currently costs around £44 million per annum to run, as compared to the House of Commons, which costs around £195 million. The bulk of the cost in the House of Lords relates to administration and accommodation - less than 20% of the total bill derives from peers' expenses. By comparison, MPs salaries and expenses, which include sums allocated for the payment of research and secretarial staff represent 40% of the total House of Commons bill. Peers are entitled to travelling expenses between their homes and the House of Lords, night subsistence up to £74, day subsistence of £33, and secretarial, postage and other costs up to £32 per day of attendance. In an elected second chamber, remuneration and pensions would need to be provided - the exact levels would probably be determined through a Select Committee inquiry or by reference to the Senior Salaries Review Body (the renamed TSRB), but would almost certainly not be greater than MPs' pay.

223 But in a House of between 200 and 300 members, the most significant cost would not be the direct remuneration of the peers themselves, but the support services (office costs and allowances, research staff and facilities, office accommodation and equipment). The House of Commons' Library Department, which includes the Research Division, costs about £8 million per annum to run, and a similar service - probably an extension of the Commons services - would be necessary to meet the needs of a professionalised House of Lords. Finding accommodation sufficient for every member would be a logistical, as much as a financial problem.

224 Even without this cost (and assuming that peers received salaries, expenses and a research service comparable to MPs) the annual running cost of an wholly elected second chamber of between 200 and 300 members would be certainly be greater than the current cost of the House of Lords. Moreover, an active second chamber - especially one in which members had constituents to represent - would impose an additional resource burden on the Ministers and Whitehall officials charged with responding to the increased levels of scrutiny.

Conclusion

225 The creation of an elected second chamber will inevitably involve a process of political negotiation, which establishes shared goals. However, it seems probable that, save for the judicial role of the Law Lords, the current functions of the House of Lords will persist, and be supplemented rather than completely revised. Fundamentally, it will remain a second chamber responsible for checking, delaying and resisting but not preventing the actions of the Government of the day. It will also maintain a possibly enhanced role of constitutional surveillance. The principal additional function will be to provide an additional voice for the regions at the centre of the political system. In order to do this, there will need to be some form of election to the new second chamber from the regions. But in order to fulfil the residual functions, there will be a continuing need for non-partisan expertise and great advantage in maintaining the independence of the House from short-term political priorities.

226 For these reasons, and in order to avoid the prospect of the Commons and a new second chamber becoming rivals (and thus reducing the efficiency of the system) by creating dual sources of democratic legitimacy, the functions and nature of elections to the second chamber will need to be clearly distinguished from the Commons - particularly in terms of the units of representation and the electoral system. The complementary nature of the reformed chamber will thus be manifested in both function and membership. The credibility of the new chamber will also depend on its powers, which should therefore include the power to delay non-financial legislation for at least as long as the one year currently permitted.

In the end, their recommendations were a set of options for devolution, with a minority report tagged on for good measure.) Moreover, whoever is asked to consider the way forward is not starting with a blank sheet of paper - the history of the House of Lords and previous attempts at its reform will inform the deliberations. But as importantly, the very fact that a Government wishes to promote reform means that it has already identified deficiencies that it wants to remedy, and these should be clearly stated.

237 Even if agreement does appear to have been reached, there is no guarantee that the proposals made will secure a smooth legislative passage. The Labour Government's 1967-69 reform attempt was conceived as a cross-party initiative, but the proposed legislation was eventually defeated by the refusal of the official Opposition and some Government backbenchers to support the Bill, in some cases actively filibustering to prevent its progress.

238 The following analysis identifies some of the previous mechanisms used for consideration of reform of the House of Lords and other constitutional measures, and evaluates their advantages and disadvantages.

Cabinet Committee

239 If the political will and party unity can be sustained, policy development by a Cabinet Committee remains the most efficient route to determining the nature of a reformed House of Lords. A Cabinet Committee was established by the Asquith Government in accordance with the preamble to the Parliament Act 1911 - which promised reform of the composition of the House of Lords - but the Committee never reported as the First World War intervened. In 1948, after the collapse of the conference of Party Leaders, the development of what became the Parliament Act 1949 was the responsibility of a Cabinet Committee. Twenty years later, when the 1968 inter-party talks broke down, the work on the Reform of the House of Lords White Paper and the Parliament No. 2 Bill was also progressed by a Cabinet Committee.

240 The key disadvantages of this approach are that it may be perceived to lack the openness of some other methods - although a good idea may be legitimate even if the process that produced it was not - and it fails to overtly engage the other political parties. (Although in the context of the Labour Party's two stage approach, the first concern could be remedied in some measure by putting the Government's policy clearly to the electorate at the general election, with the intention of implementing the second stage reform in a second term of government following another electoral mandate.) On both these counts, a Cabinet Committee might be ruled out as the sole means of policy making. However, one clear lesson from the experience of 1967-69 is that debate and agreement within the Cabinet on the Government's own stance - and open communication thereafter - is crucial to the success of negotiations with the other parties in any cross-party forum.

Royal Commission

241 Although there is no technical reason why a Royal Commission should not be deployed to consider House of Lords reform, one has never previously been the vehicle for consideration of reform of the House of Lords. Although the House of Lords could have been considered by the 1969-1973 Kilbrandon Royal Commission on the Constitution, on a broad interpretation of its terms of reference, the failed attempt at legislative reform through the Parliament No. 2 Bill in 1968-69 effectively pre-empted any constructive discussion of this subject.

includes representatives from, say, regional assemblies or devolved parliaments will inevitably be delayed until the broader structural changes are made. Limited changes in the meanwhile might therefore be reasonable.

232 The great danger of multi-stage reform is of losing momentum, or being overtaken by events that push the later staged down the list of political priorities. The conservatism of British politics is such that an second or third stage of a reform programme may ever happen. Multi-stage reform also has inherent potential for undermining the stability of the political system in the transitionary phase. For example, for the duration of a Labour Government's first term of office, legislation would be considered by a transitional second chamber which was in uncertain about, and inevitably preoccupied by, its own future.

233 In the end, whether one, two or more stages are involved may be irrelevant. What is more important is that a clear set of goals is established and each stage of reform is directed towards achieving them. For the Labour Party, the specific challenge is whether their first stage proposals for reform can be convincing enough to secure support on their own merits, given that the absence of any detailed plans (and perhaps even a timetable) for further reform may unite in opposition both the hereditary peers and members of both chambers unconvinced about the promise of future action being fulfilled. For the Liberal Democrats, the key questions are whether the reforms they propose will prove acceptable to the House of Commons and, if introduced, will be adaptable to changing political needs in the context of wider constitutional reform.

Advisory and Consultative Mechanisms for Reform Proposals

234 If the party of Government wishes to consult on proposals for reform of the House of Lords, there is a range of fora which might be used for policy development. The consultation mechanism chosen will need to reflect the importance of bringing the members of the House of Commons and the House of Lords along with whatever solution is proposed, and will also be influenced by the signals that the Government wants to send to the public, other parties and its own backbenchers. Devising mechanisms that link the constitutional and political agendas is the crucial task.

235 Past experience suggests that there is no guaranteed route to success using existing consultative mechanisms. The first hurdle is reaching agreement on the best way forward. The pitfalls of committee work in this regard are amply demonstrated by the experience of the Constitutional Reform Committee of the Society of Conservative Lawyers, which in 1981 produced both a majority and minority report: the majority report favoured a Senate, elected by proportional representation, whilst the minority report proposed no change at all in the present composition and powers of the House of Lords. Of all the commissions, committees and conferences this century, none has instigated thorough reform of the House of Lords: the Parliament Acts of 1911 and 1949 were Government imposed, and the Life Peerages Act 1958 and Peerage Act 1963 were the product of abortive attempts at more wide ranging reforms.

236 Crucial to the progress of further reform will be clear political direction and terms of reference, not least because it is clear that the answer depends on the question that is set. (The Kilbrandon Commission on the Constitution, for example, complained that "the width and diversity of our terms of reference... have made the mere identification of our task a major preoccupation."[72]

Chapter 7

When and How?

"..however admirably conceived plans for the reform of the House of Lords may be, their fate must depend, as previous attempts at reform amply demonstrate, on how opinions are distributed in both Houses and particularly in the Commons whenever proposals are drawn up."

The House of Lords: The Report of the Conservative Review Committee, 1978

Evolutionary Reform or The Big Bang?

227 Edward McWhinney has identified in the history of the development of second chambers in modern democracies a common pattern of progression from "aristocratic" hereditary or nominated houses, through to "oligarchic" indirectly selected houses, and then to popularly elected legislatures[71]. In this sense, a staged approach such as that proposed by the Labour Party may be regarded as consistent with international practice. (Although, following McWhinney's thesis, the removal of hereditary peers to create an entirely nominated chamber is simply replacing one form of "aristocratic" house with another, the Labour Party would argue that it is also a step towards a more democratic system of government.)

228 But historical determinism is not the only factor to influence decisions about the phasing of reform. There are legitimate fears that moving in one step from the present day hereditary-nominated chamber to a directly elected chamber would be destabilising. Most previous schemes of reform for the House of Lords have assumed the need for transitional arrangements that preserve some elements of the existing organisational structure, in the interests of continuity and stability. The Labour Party's staged proposals are therefore in keeping with this gradualist approach - although the eventual goal is unclear.

229 Some also argue that of the many constitutional reforms jostling for a place in a Government's legislative programme (which under existing arrangements is likely to be able to accommodate at most two major constitutional reforms in a session) wholesale reform of the House of Lords might not warrant priority consideration - either on the grounds that it creates considerable difficulties for government business management, or because reform for the second chamber, however radical, would have a minimal impact on better governance compared to, say devolution to the nations and regions.

230 Finally, it may be impossible in the last years of the twentieth century to create a second chamber that will last for even another 50 years without further substantial change, given the external factors which may shape its further development - the role of the UK in Europe, the development of federal states and regional government, the relationship between the church and the state, and possible reforms of the electoral system for the Commons (quite aside from the developments in technology which may prompt the creation of new more participative forms of democracy). Any "big bang" reform now will not necessarily be guaranteed a long term future. A more realistic approach might be to admit that whilst the House of Lords requires reform now, it will continue to change over the next century to enable it to adapt to the demands of politics and society - as it has proved itself capable of doing over the last century.

231 Other constitutional changes will influence the possible options for a reformed House of Lords. For example, on the basis that the House of Lords' role is to compensate for the "imperfect and immoderate" House of Commons, there is also a strong argument to be made in favour of reforming the legislative process and the House of Commons - including any change to the electoral system - before considering what to do about the House of Lords. Similarly, the need for a Constitutional or Supreme Court to deal with conflicts arising from a Bill of Rights could usefully be considered in advance of a discussion about the future role of the Law Lords within a reformed House of Lords. Perhaps most importantly, the UK currently lacks the organisational infrastructure to facilitate the most obvious alternative basis for indirect or direct election: a regional-national tier of government. The option of a second chamber whose composition

242 The principal advantage of a Royal Commission is that it is a public body which is expected to invite evidence from a wide range of bodies and individuals. In considering the merits of a Royal Commission, however, several factors suggest that this course of action is unlikely to be the most effective in resolving the particular question of reform of the House of Lords[73]:

- the views of parliamentarians and political parties in negotiating a settlement are likely to be more important than the views of the sort of external advisers (academics, business leaders, "experts in the field") who are normally asked to make up Royal Commissions. There is no shortage of options for reform which might prove attractive - but practical politics means that successful implementation of reform will depend on bringing the various vested interests along; and resolving the tension between the political and constitutional agendas identified earlier in the report.
- Royal Commissions do not necessarily provide straightforward solutions to problems. There is a tendency to go for the lowest common denominator - the baseline that everyone can agree to - marginalising potentially more attractive proposals if they do not have sufficient support amongst Commission members. There is also a strong likelihood of any report not being unanimous, as happened with the Kilbrandon Commission on the Constitution and has not been uncommon with other Royal Commissions. Indeed, whatever the recommendations, a further stage of deliberation would be required within Government.
- the need is primarily for political direction rather than objective analysis: there is certainly a case for carrying out some comparative and analytical research (exploring the implications of different models on size, etc.) but this work need not be done under the auspices of a Royal Commission.
- there is always the possibility that the recommendations would not reflect the Government's political interests, however tightly the terms of reference are drafted, and there may be substantial public relations disadvantages in disagreeing with a Royal Commission on this subject. At the very least, time would have been wasted.

Electoral Commission

243 For decisions on the nature of elections to a second chamber, subject as they are to so many permutations, it would be invaluable to have recourse to an expert commission of some sort, but only after decisions had already been reached on the functions of the chamber. Indeed, given the wide range of electoral issues that are likely to emerge under either the Labour Party's or the Liberal Democrats' plans for constitutional reform, there may well be advantage in the establishment of a standing Electoral Commission that might encompass the functions of the existing Boundary Commissions, but also take on new responsibilities for research into and advice on electoral systems, monitoring the conduct of elections and handling referendums. The relationships between the proposed elected bodies, and proposed changes to existing elected bodies, as well as the need for new official machinery such as an Electoral Commission, will be examined in a later Constitution Unit report.

Inter-Party Conference

244 The second reading of what became the Parliament Act 1949 was adjourned in February 1948 for inter-party talks on functions, powers and composition; officially a conference of party leaders, but also involving senior representatives of all the main parties. The talks broke down within two months (after seven meetings) but produced a set of principles relating to composition where agreement had been reached[74]. The Conservative Government tried to resuscitate the talks after the 1951 general election, but the Labour Party refused to participate.

The Life Peerages Act 1958 built on the agreement on composition reached in the 1948 talks, but because it ignored other aspects of the discussion was opposed by the Labour Party at second reading.

245 The 1968 inter-party conference was preceded by a year of discussion in which Conservative Opposition peers acknowledged the need to consider reform, specifically directed at the question of hereditary peers, and promised to be ready to discuss proposals for improving the House of Lords and the way it worked, as they feared gradual reduction of their credibility or a catastrophic clash with the Commons. Nevertheless, the Government's objectives of reducing the powers of the House of Lords and eliminating its hereditary basis were announced in the Queen's Speech, before entering into consultation with the Opposition parties.

246 Tactical manoeuvring by some on the Conservative side meant that the progress of talks was frustrated and they were eventually ended by the Prime Minister, annoyed at the response of Conservative peers to the Southern Rhodesia Order. The 1968 White Paper, *House of Lords Reform*,[75] claimed to draw credibility from the "agreement" that had been reached prior to the ending of the conference, and this was reasserted by the Prime Minister in explaining the reasons for the Government's actions to Parliament, but the Conservative leadership contested the claims of cross-party support and failed to offer any support in the parliamentary passage of the subsequent Bill.

Joint Committee or Conference of the Houses

247 As with Bryce in 1918 and the development of the Peerage Act 1963, this enables consultation within Parliament, as in effect a formalisation of the procedure described above, with the positive inclusion of members of the House of Lords. Following debate on a Bill to introduce life peers in 1907, Lord Rosebery was asked to chair a Select Committee to look at "the suggestions that have from time to time been made for increasing the efficiency of the House of Lords in matters affecting legislation", which in due course reported in favour of life peerages, but was overtaken by the events leading to the 1911 Parliament Act which dealt with the issue by tackling powers and ignoring the wider issues of functions and composition.

248 The history of cross-party conferences, whether formal (as with Bryce in 1918 and the Joint Committee of the Houses that led to the Peerage Act 1963) or informal (the 1968 Inter-Party Conference or the 1948 Party Leaders Conference), illustrates both the advantages and disadvantages that can be drawn from securing cross-party agreement on constitutional measures of this sort. Whatever title is chosen, the success of such an approach requires the politics of consensus to prevail. If it does not, the consequential reforms are likely to be either piecemeal - introduced on the basis of whatever agreement was reached, not the comprehensive reforms originally intended - or rejected by the Opposition parties. There is significant scope for tactical manoeuvering by Opposition parties during the talks, or even for frustrating the very establishment of talks by non-participation.

249 There is also a danger that the party leaders may not be representative of the party at large, and may not be willing or able to whip their back-benchers into line during subsequent parliamentary proceedings. These difficulties may be avoided by ensuring sufficiently high level political engagement and a carefully managed degree of openness in the process (to avoid the danger of establishing an inward looking clique, over immersed in the detail of the issues and unconcerned with the wider political ramifications, as happened in 1969).

250 The principal advantages are that the concerns and preferences of the parties can be teased out in negotiations which enable suitable solutions to be developed at an early stage - especially if the conference is focused on principles rather than the detail. Moreover, if successful in reaching a conclusion, it should smooth the passage of legislation. This approach does not preclude the commissioning of research to assist in deliberations nor the publication of consultative papers (or the use of other consultative mechanisms e.g. polling) to discover public opinion.

Speaker's Conference

251 Speaker's Conferences are called on the invitation of the Prime Minister and their members (usually around 30 in total) are appointed by the Speaker on the basis of nominations from the parties. They consider and recommend changes in electoral law and are concerned principally with technical aspects. Speaker's Conferences sit in private and do not publish proceedings. A Speaker's Conference was last used in 1977-78 to recommend the level of representation Northern Ireland MPs should have in the House of Commons. Since then the role of a Speaker's Conference appears to have been taken over by select committees e.g. the Home Affairs Committee reported on the redistribution of Commons seats in 1987.

252 The use of a Speaker's Conference to decide on levels of Scottish representation in Westminster was raised during attempts at devolution in the 1970s, and met with opposition on the grounds that the involvement of the Speaker in such a potentially controversial debate would considerably weaken the position of the Speaker. It would be an inappropriate mechanism for consideration of further reform of the House of Lords.

Recommendations

253 The most productive way forward for a Government seeking to build consensus around long term reform of the House of Lords would first be to convene a Party Leaders' Conference on the principles of reform. The terms of reference might be as follows:
To determine -
- *the functions appropriate to the second chamber.*
- *the powers appropriate to the second chamber.*
- *the role of the second chamber in relation to the House of Commons and other tiers of government - local, regional, and international.*
- *the basis on which to select members of the second chamber.*
- *the balance of party power, if not predetermined by the basis of selection.*

The agreed principles would then be remitted to the Government for further development of the scheme, to be published for wider consultation before introduction as legislation.

254 For a Government that wishes to consult on its own proposals, or on one specific aspect of reform, it is recommended that the same practice be employed, adopting more specific terms of reference.

Preparing for Legislation

255 Whenever legislation is brought forward, and whether it is the result of consultation or not, there are a number of key practical questions that will need resolution. Each of these is discussed at greater length in the separate Constitution Unit report *Delivering Constitutional Reform.*

256 **Which Government department should take lead responsibility for policy development and the introduction of legislation?** This would of course depend on the extent of any wider programme of constitutional reform, but perhaps the most important (if obvious) criteria are to ensure that the Minister responsible for the policy fully supports any proposals for reform and is able to put them high on his or her departmental agenda. This latter requirement may be difficult for a Home Secretary in particular to meet, given the breadth of additional responsibilities and the political pressure for action on other fronts within the Home Office. Alternatives might be the Chancellor of the Duchy of Lancaster, the Lord President or Lord Privy Seal - or another senior Minister specially charged with responsibility for constitutional reform. In the late 1960s, the policy on reform of the House of Lords and the Parliament (No.2) Bill were formally the responsibility of the Home Secretary. But in practice Richard Crossman (initially as Leader of the House of Commons, and then in a more limited capacity as Secretary of State at the DSS) was more closely involved in the development of the policy, alongside the Leader of the Lords. When Richard Crossman's involvement waned, James Callaghan as Home Secretary felt no strong commitment to the policy - perhaps one of the reasons for the bill's eventual withdrawal from Parliament.

257 The difficulties engendered in 1967-69 by creating a Bill team outside the mainstream Whitehall departments suggests that any unit of civil servants charged with policy responsibility for reform of the House of Lords should be housed within one of the central departments and have clear links with their staff, even if secondees were also brought in. There would also be a number of interested departments (Cabinet Office, Home Office, Lord Chancellor's Department, etc.) with a watching brief whose official representatives would need to meet regularly. A parallel group of Cabinet Ministers, chaired by the lead Minister, would also need to be established. This need for co-ordination would be all the greater if reform of the House of Lords were to take place as part of a wider programme of constitutional reform.

258 **In which House would the Bill begin its Parliamentary passage?** Following the example of the Parliament (No.2) Bill in 1968 and the Peerage Act 1963, it would commence in the House of Commons. The key influence in this decision is that the House of Lords can veto any bill that starts its parliamentary passage in that House. The Life Peerages Act 1958 had followed on from foreshortened inter-party talks, but unlike the 1968 attempt only aimed to implement change where agreement had been reached. It was introduced in the House of Lords by the Leader of the House, and was steered through the Commons by the Home Secretary, Leader of the Commons and Attorney General.

259 The question of where bill should be introduced also has wider implications. For example, Lord Rees Mogg has contended that the House of Commons has no authority to intervene at all in such matters, citing Blackstone: "whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere".[76] Lord Rees Mogg further argues that if the House of Commons can decide on the sitting and voting rights of the Lords, the same could apply in reverse, with the House of Lords

sitting as a court deciding which MPs are entitled to vote. If so, it is arguable that this situation has already been reached with the Life Peerages Act 1958 - although it could be countered that it was only the approval of the House of Lords that gave the legislation validity. But these points illustrate the likely procedural objections that may arise during the passage of the Bill. A clear manifesto commitment and the publication of a White Paper and/or draft Bill would of course make a difference to the acceptability and legitimacy of such a measure, but there will always be scope for argument on the details. It will also be important to spot constitutional challenges ahead of time, to avoid delays arising from judicial review: for example, how to reconcile with the requirements of the European Convention on Human Rights the position of the hereditary peers who, under the Labour Party's proposals, will be excluded from the second chamber, but will have had no opportunity to participate in the election of a Government (the most obvious parallel with prisoners released from custody is not especially useful). Although a minor point, it would certainly be a rallying cry for hereditary peers opposed to the Government's plans and one that would require answering.

Conclusion

260 Whether one, two or more stages are involved in reform is less important than establishing a clear set of goals at the outset and ensuring that each stage of reform is directed towards achieving them. In developing reform proposals for the House of Lords that will secure parliamentary support, more traditional consultation fora may not be appropriate. In particular, a Royal Commission is unlikely to prove an effective mechanism for resolving the tension between political and constitutional goals that is implicit in finding a long term solution for the House of Lords. A conference of party leaders would be a more effective way to give detailed consideration to specific aspects of a reform plan; or to establish the principles of further reform where no blueprint exists and political consesnsus building is considered desirable.

261 If legislation to reform of the House of Lords is part of a wider programme of constitutional reform, such as those advanced by both the Labour Party and the Liberal Democrats, co-ordination between Government Ministers responsible for different elements will be essential; this co-ordination might be effected by means of committees. But one senior Cabinet Minister needs to be clearly responsible for co-ordinating the such a constitutional reform programme, if reform is not to be dissipated, side-tracked or derailed as it has been in the past. These issues are considered in greater detail in the Constitution Unit report *Delivering Constitutional Reform.*

Chapter 8

Three Routes to Reform

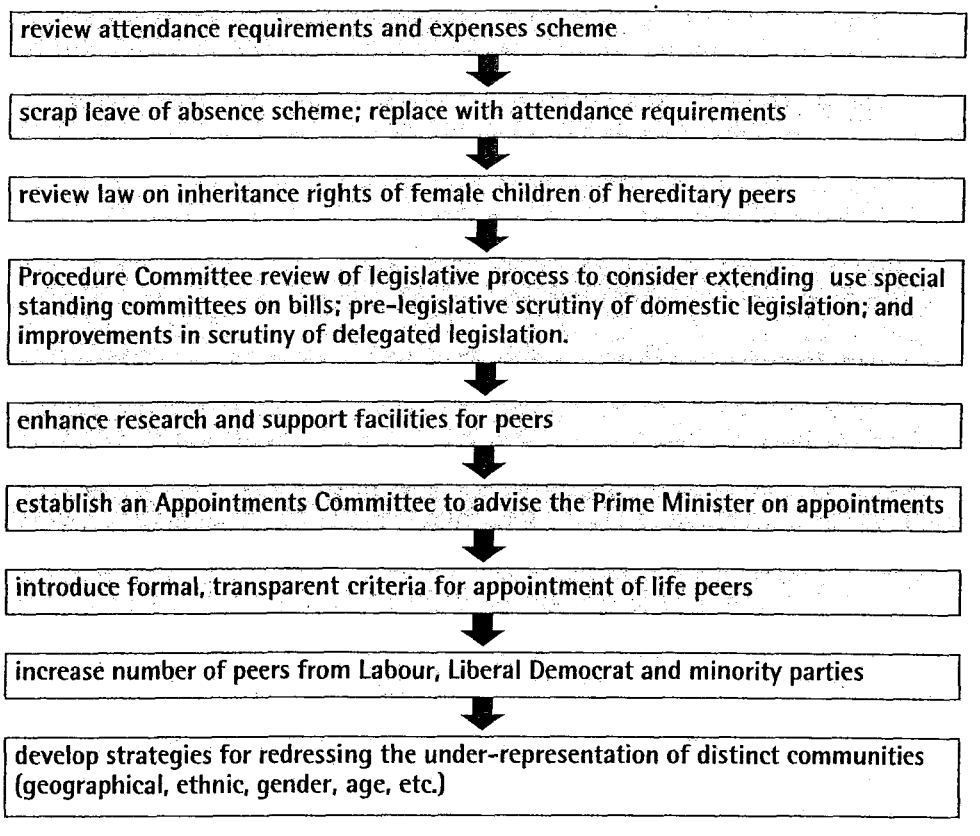
"...the course of events with regard to the House of Lords question resembles nothing so much as a State Ball at Buckingham Palace with its quadrilles....we took dignified steps this way and that; we would advance and retire...It was a performance, a charming performance; but nothing was done. Nothing ever happened; no one ever went anywhere."

Viscount Samuel, commenting in 1953 on progress since the Parliament Act 1911

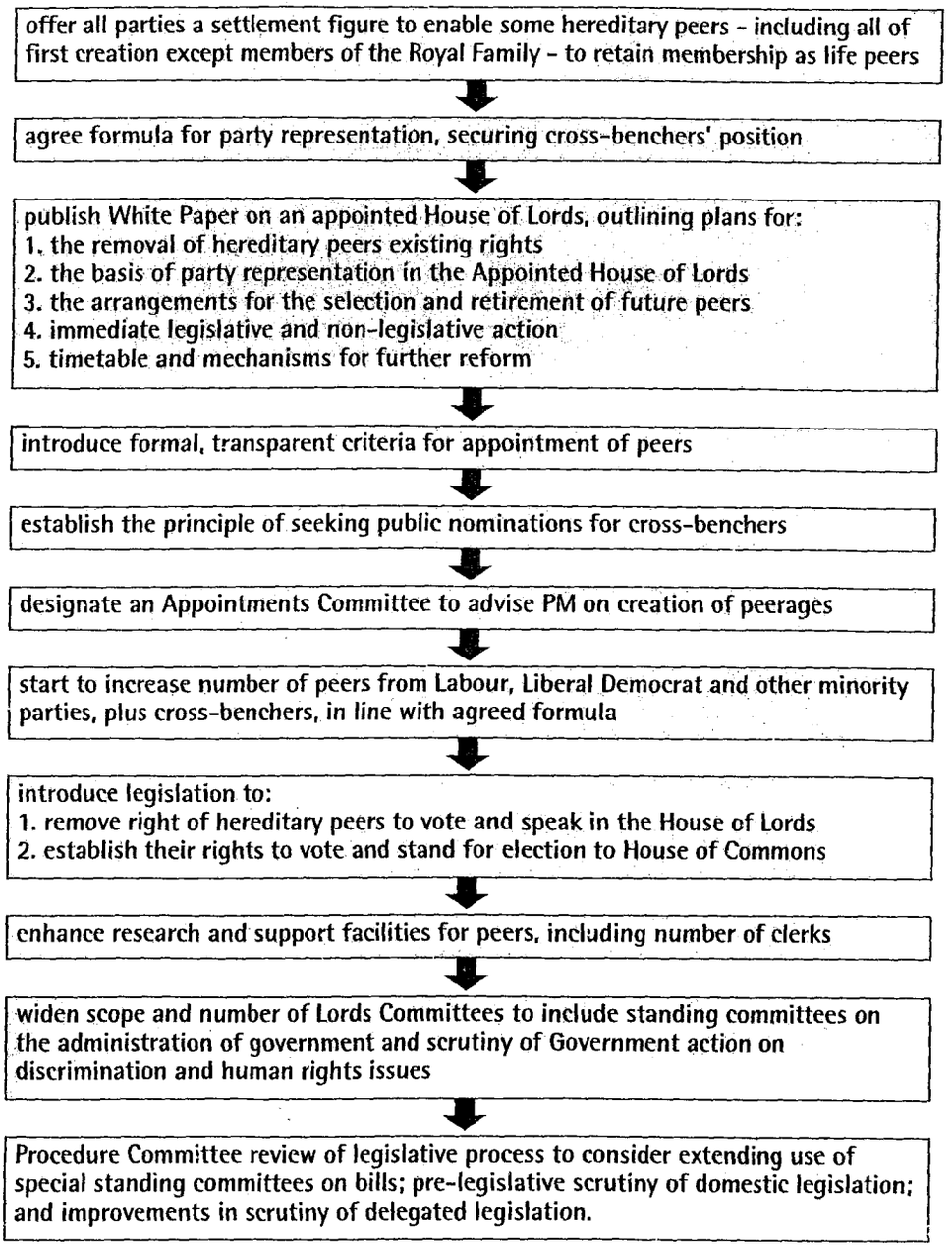
Steps to the Implementation of Reform

262 This concluding chapter illustrates three possible paths to reform of the House of Lords, with different goals in mind. The first chart illustrates the non-legislative improvements that could be made. These steps include some that the Conservatives might be interested in taking this side of the election or promise to take on the other side. The second chart illustrates the approach that the Labour Party might take to fulfil its commitment to remove the rights of hereditary peers - and establish a credible nominated chamber. The third chart suggests the next steps for the Labour Party towards a wholly or partly elected chamber; which (except for the first two) are also the steps that the Liberal Democrats would need to take towards their goal. What cannot be known at this stage, of course, is the extent to which popular and parliamentary pressures will affect - and they undoubtedly will - the best laid plans.

Route 1: Non-Legislative Improvements

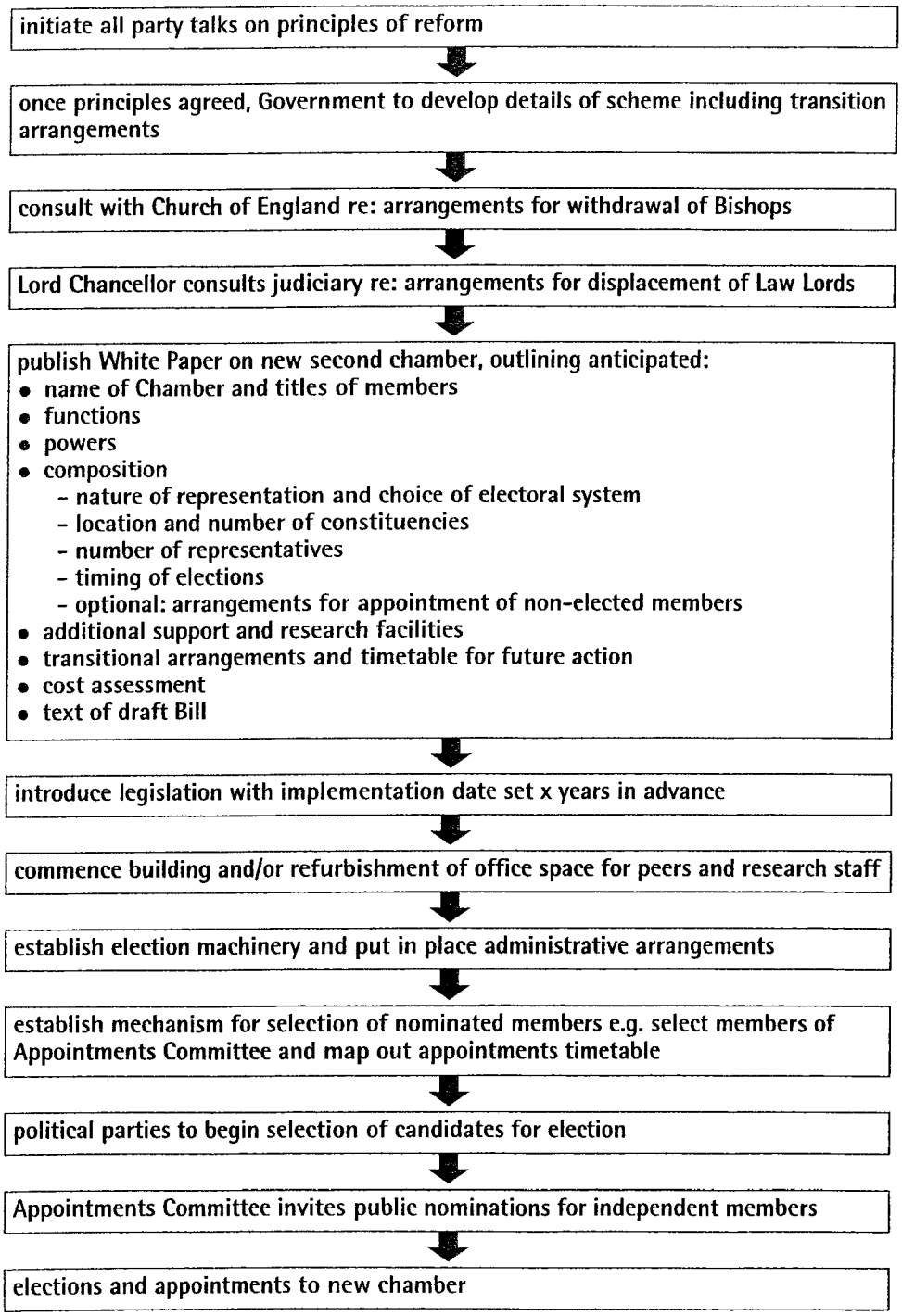


Route 2: Move from Status Quo to Nominated Chamber



Route 3: Move from Status Quo or Nominated Chamber to Elected Chamber

First two steps unnecessary under Liberal Democrats



Appendix A

Draft Parliament Bill

Draft
Parliament Bill

ARRANGEMENT OF CLAUSES

Clause

A

BILL

TO

Amend the law relating to the composition of the House of Lords; to make related provision as to the parliamentary franchise and qualification; and for purposes connected therewith. A.D. 1996

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of right of persons succeeding to a peerage to receive writ of summons.

1. The holder by succession of a hereditary peerage shall not in right of that peerage—

(a) sit or vote in the House of Lords in any Session of Parliament after that in which this Act is passed;

(b) receive a writ of summons to attend any future Parliament.

Writs in acceleration

2.— (1) The holder of a peerage by virtue of a writ in acceleration shall be regarded for the purposes of this Act as the holder of a life peerage.

(2) No writ in acceleration shall be issued after the commencement of this Act.

Entitlement of peers to vote in Parliamentary elections.

3. A person shall not be disqualified for voting at elections to the House of Commons as being the holder of a peerage who is not entitled to receive a writ of summons to attend the House of Lords.

EXPLANATORY NOTES

Clause 1 prevents hereditary peers by succession from voting or sitting in the House of Lords. Hereditary peers of first creation remain entitled to a writ of summons. Subsection 1 (a) is included to avoid the need for the monarch to withdraw writs of summons from hereditary peers currently sitting in the House of Lords. If all holders of hereditary peerages were to be excluded, the words "by succession" should be deleted, and the Schedule should include the repeal of s.6 of the Peerage Act 1963.

Clause 2 clarifies the position of holders of peerages by virtue of a writ in acceleration (who cannot properly be described as hereditary peers). Those who are already members of the House of Lords as a result of receiving a writ of acceleration before the Act takes effect will remain entitled to receive a writ of summons. This will enable Viscount Cranborne, current Leader of the House of Lords, to retain his membership of the House. (Alternatively, of course, Viscount Cranborne could simply be given a life peerage). It also ensures that no further writs of acceleration are issued.

Clause 3 permits hereditary peers by succession to vote in elections to the House of Commons.

This restriction on the voting rights of members of the House of Lords reflects the facts that (a) Members of the House of Commons are unable to affect the composition of the House of Lords, and (b) as members of the legislature themselves have no need to elect someone else to represent them. However, the Parliament No.2 Bill, introduced by the Labour Government in 1968, proposed to allow all peers to vote in elections to the House of Commons. If it is desired to replicate this policy, the following text should be substituted for clause 3:

> *"A person shall not be disqualified for voting at elections to the House of Commons -*
> *(a) as being the holder of a peerage, whether or not he is entitled to receive writs of summons to attend the House of Lords as such; or*
> *(b) as being one of the Lords Spiritual."*

and the following repeals added to the Schedule:

1963 c.48	The Peerage Act 1963	In section 6 the words "and elections to that House".
1978 c. 10	The European Assembly Elections Act 1978	In Schedule1, paragraph 2(1)(b)
1983 c.2	The Representation of the People Act 1983	In section 15, in subsection (5), the words from "but—" to "declarations". In section 34, in subsection (1), the words from "Except" to "elections" where it first occurs; and subsections (2) and (3)(a).

Entitlement of peers not entitled to receive a writ of summons to sit in the House of Commons.

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

Short title, commencement and repeals.

5.—(1) This Act may be cited as the Parliament Act 1996.

(2) This Act shall come into force at the end of the Session of Parliament in which it is passed.

(3) The enactments described in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Clause 4 enables all hereditary peers except those of first creation to stand as MPs.

Clause 5 deals with the short title and commencement date and gives effect to the repeals set out in the Schedule.

SCHEDULE

Section 5(3)

REPEALS

Chapter	Short Title	Extent of repeal
1963 c.48	The Peerage Act 1963	Section 2. In section 3(1) (b), the words from "including" to "that House". Sections 4 and 5.

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