

Constitution Unit Lecture

**Wakeham in the Long
Grass: Can the Lords
Guard Democracy?**

Lord Alexander of Weedon

28 June 2000

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Executive Summary

In a public lecture given on 28 June 2000 at University College London, Lord Alexander called for the House of Lords to be a more efficient guardian of our democracy, and a more effective check against the elective dictatorship of the House of Commons. He urged the House of Lords to start implementing the Wakeham report on Lords reforms immediately, and not wait until after the general election.

The lecture questions the effectiveness of the current House of Lords, particularly its role in amending public bills. The House of Lords approves several thousand amendments each session, but the vast majority of these are tabled by the Government, which often reduces the role of the House of Lords to an expensive rubber stamp.

Lord Alexander argues that refocusing the work of the House of Lords to concentrate more on its much-hailed Committee activity could result in its becoming more effective as a guardian of democracy.

He recommends accelerating the second stage of House of Lords reform proposed by the Royal Commission chaired by Lord Wakeham to include:

- more pre-legislative scrutiny of draft bills
- improved scrutiny mechanisms to reduce the current “democratic deficit” in Parliament’s scrutiny of secondary legislation, including Committee inquiries for the most important or controversial items;
- the increased use of Committees generally in the House of Lords, including a Human Rights Committee and a Constitutional Committee;
- replacing the current ineffective “long hours culture” with more targeted work which calls the executive more effectively to account.

None of those changes would require legislation, which means that they could be speedily implemented, starting before the general election. In addition, Lord Alexander recommends:

- a half-elected, half-appointed second Chamber;
- a statutory appointments Commission;
- formal powers for the Lords to amend or delay secondary legislation;
- amending the Statutory Instruments Act 1946 to extend the statutory ‘praying time’ in respect of negative resolution instruments from 40 days to 60 days.

Lord Alexander of Weedon QC is Chairman of the House of Lords Delegated Powers and Deregulation Committee, and was a member of the Independent Commission on Voting Reform (the Jenkins Commission), which reported in 1998. In *The Voice of the People: A Constitution for Tomorrow* (1997) he argued that the British people have little control over government, and argued for constitutional reforms to enable the electorate to participate fully in the decisions which shape our society. He is a visiting Professor of Law at UCL, and a member of the Council of the Constitution Unit.

WAKEHAM IN THE LONG GRASS: CAN THE LORDS GUARD DEMOCRACY?

CONSTITUTION UNIT LECTURE BY LORD ALEXANDER OF WEEDON QC

28 JUNE 2000

“With a perfect lower House” said Walter Bagehot “it is certain that an upper House would be of scarcely any value”.¹ Perhaps. But the issue is academic as the House of Commons makes no claim to perfection. What is clear and sacrosanct, as the preamble to the terms of reference of the Wakeham Royal Commission emphasises, is that it has long been “the pre-eminent chamber of parliament”.² In other words, supreme. There is none of the sharing of powers with a second chamber which is a characteristic of the United States or Australian federal constitutions. So our second chamber is inevitably subordinate. It is principally seeking to complement the work of the Commons without ultimately challenging its power. Can such a limited role ever be made really worthwhile?

Complementing the work of the Commons includes compensating for its shortcomings. What are these shortcomings? The Report of the Independent Commission on the Voting System chaired by Lord Jenkins saw a four-fold role for MPs: “to represent their constituencies; to provide a pool from which most of the holders of ministerial office are chosen; to shape and enact legislation; and to enable the party in power to sustain the central planks of its legislative programme whilst yet being held to account for its executive action”.³ I was a member of that Commission, and by and large, we thought that the first two functions were discharged well. We were, however, far from impressed by the Commons as a legislature. We observed that many backbench MPs lacked the incentive or the expertise to concentrate on the painstaking, low profile, often specialist and generally unnoticed job of improving the quality of our laws. We did not consider the Commons effective in holding the government to account. Nor has this yet changed.⁴ The Commons Liaison Committee itself recently complained that the government “has been too ready –

¹ *The Collected Works of Walter Bagehot*, ed. Norman St John-Stevan, vol. v (London, 1974), 273.

² That preamble ran: “Having regard to the need to maintain the position of the House of Commons as the pre-eminent chamber of Parliament and taking particular account of the present nature of the constitutional settlement, including the newly devolved institutions, the impact of the Human Rights Act 1998 and developing relations with the European Union”. See Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534 (January 2000).

³ *The Report of the Independent Commission on the Voting System* (Cm 4090-1, October 1998), 3.

⁴ The Leader of the House of Commons, the Rt. Hon Margaret Beckett MP, said in *The House Magazine* on 29 May 2000 that she “would like to go down as a reforming Leader of the House of Commons. The biggest single reform, but the most difficult to achieve, would be to transform the way we scrutinise legislation so that the House can work more efficiently and effectively and put better legislation on the statute book.”

and has found it too easy" to block the attempts of its own specialist Select Committees to hold the government to account.

We have now the all-too-familiar pattern of a government elected by a minority of voters which nonetheless commands a juggernaut majority. Baroness Thatcher did so in her time, Mr. Blair does so today. The government can push almost any legislation through at will, with the loyal backing of its foot soldiers trudging through the division lobbies to sustain what Lord Hailsham aptly called "the elective dictatorship". In the first three years of this Parliament, there were 933 divisions in the Commons.⁵ Unsurprisingly,⁶ the government won all of them with a majority which has never fallen below 40.⁷ Rarely can so much have been done by so many, to so little effect. Some backbench MPs clearly wonder whether there might be a better form of exercise – and use of their evenings – than tramping through the division lobbies night after night. In the Lords, by contrast, the results of divisions sometimes really matter. The Government has already been defeated in the Lords 87 times this Parliament.⁸ But because of the dominant power of the House of Commons we effectively live, like the French under Napoleon III, under a plebiscitary rather than a parliamentary democracy. The only real sanction on government, apart from our independent and outspoken press, is the need for a government to seek re-election at any time of their own choice within the maximum term of five years. I think this makes the United Kingdom constitutionally dysfunctional.

The Jenkins Commission sought to redress this balance somewhat with a modest move towards proportional representation. It suggested that about 20% of members should be elected on a regional list system along the lines designed for elections to the Scottish Parliament and the Welsh Assembly. Hardly earth-shattering. To have followed the logic that votes in the election should be fairly reflected in seats in the Commons and so have recommended greater proportionality would have fed the fears of those who dislike the risk of a government consisting almost invariably of coalitions. The commitment of politicians to the so-called "smack of firm government" goes deep. The Jenkins proposal was blocked by a cross-party alliance of existing MPs who find it easy to contemplate radical constitutional reform except when it might disturb the traditional system which brought them to Westminster. So the Government has backed off from holding, and will not hold in this Parliament, the referendum which it promised the electorate so clearly in its last election

⁵ There were 380 divisions in the Commons in 1997-98, 323 in 1998-99 and, up to 13 June 2000, 230 in 1999-2000, a total of 933 divisions (Information supplied by the House of Lords Library).

⁶ There were 16 Government defeats on the floor of the House of Commons during the Conservative administrations in the period 1979-1997. In addition, there were 16 Government defeats in House of Commons Standing Committees in the same period (Information supplied by the House of Commons Library).

⁷ The smallest Government majority in the House of Commons so far this Parliament (up to 13 June 2000) was 40 during a division on the Welfare Reform and Pensions Bill on 20 May 1999 (Information supplied by the House of Commons Information Office).

manifesto. The Jenkins Report undoubtedly lies deep in the long grass, although there are rumours that the government are seeking to tempt the Liberal Democrats by a different commitment to AV without any proportional top-up. If so, this would be flat contrary to the Jenkins report.⁹

What the Prime Minister has promised for the Labour Party's next election manifesto is its proposals for the second stage of House of Lords reform.¹⁰ This clearly raises the question of what the role of the further reformed second chamber should be.

It is far from easy to find an effective role for a second chamber which is at the same time real but subordinate, and whose formal powers could only increase in the unlikely event that the Commons were prepared to accept some diminution in its own powers. So it has not been surprising that the issue has been around ever since the watershed of the 1832 Reform Act. The Lords came, as Bagehot said, "to be what it now is the Chamber with (in most cases) a veto of delay with (in most cases) the power of revision, with no other rights and powers." This power of delay was formally both recognised and limited in the Parliament Act 1911 after the Lords had rejected Lloyd George's "people's budget". The Salisbury/Addison convention of 1945 restrained their power even further.¹¹ In the years which followed all sorts of permutations of reform were proposed. Underpinning and indeed inspiring a debate which would not go away was the recognition that change must eventually come. A system based on heredity, and ensuring a permanent majority for one political party, even where it had been clobbered out of office by the electorate, was long rightly seen as grotesque.

None of very many commentators or indeed fiction writers anticipated the way in which reform would begin to come. Labour came to office in 1997 with a clear manifesto

⁸ As at 27 June 2000 (Information supplied by the House of Lords Information Office).

⁹ *Report of the Independent Commission on the Voting System*, especially paragraphs 82 and 85. The Commission said in paragraph 82: "Beyond this AV on its own suffers from a stark objection. It offers little prospect of a move towards greater proportionality, and in some circumstances, and those the ones which certainly prevailed at the last election and may well do so for at least the next one, it is even less proportional than [i.e. than] FPTP." Again, in paragraph 85 the Commission said: "The Commission's conclusions ... about the operation of AV are threefold. First, it does not address one of our most important terms of reference. So far from doing much to relieve disproportionality, it is capable of substantially adding to it. Second, its effects (on its own without any corrective mechanism) are disturbingly unpredictable. Third, it would in the circumstances of the last election, which even if untypical is necessarily the one most vivid in the recollection of the public, and very likely in the circumstances of the next one too, be unacceptably unfair to the Conservatives ... We therefore reject the AV as *on its own* a solution despite what many see as its very considerable advantage of ensuring that every constituency member gains majority acquiescence."

¹⁰ On the floor of the House of Commons on 14 June 2000 the Prime Minister said that "the Labour party will of course make its position at the next election clear in its manifesto"; see *House of Commons Hansard*, col. 940.

¹¹ This Convention means, in practice, that the Lords do not try to vote down at Second Reading a government bill mentioned in an election manifesto. It emerged from the working arrangements

commitment to the abolition of the rights of all hereditary peers, following which the more enduring structure of the Second Chamber would be considered. The Conservatives riposted with the seductive but, in the light of history, deceptively simplistic plea that all reform should take place at a single go. The battle lines were drawn - or so we thought. We reckoned without the deal by which each party bought a temporary truce by jettisoning its former principled stance, and the present interim House is the result. All political parties say that they are committed to further reform.

At the same time all parties also say that the so-called interim House is stronger than its predecessors. Baroness Jay, Leader of the Lords, has described it as "more legitimate, more authoritative, more worthy of respect". Conservatives see a window of opportunity to enhance the authority of the Lords. They have been using the opening vigorously, and already this session there have been 17 Government defeats,¹² including two yesterday evening. Examples include rejection of the Criminal Justice (Mode of Trial) Bill, the voting down of a statutory instrument contrary to the practice of recent decades,¹³ and the controversial challenge to the Government's approach to the socially sensitive issue of homosexuality, in which they have rejected the repeal of Section 28 of the Local Government Act 1988.

The Lords are more overtly political and probably more polemical than they were before. Professor Vernon Bogdanor believes there is a danger that the Lords may prove over-assertive to the detriment of the task of a chamber of real experts. It is surely right of him to warn that the Lords should take considerable care when and how far they flex their muscles. But apart from a few set pieces, at the dawn of the 21st century the House of Lords flexes its muscles comparatively rarely. And the reality is - as I discovered myself when earlier this month I proposed an amendment to the Financial Services and Markets Bill - that if all parties exercise a three-line whip and the Liberal Democrats choose to vote with the Government, then the Government has a small majority even if the independent Cross-Bench peers elect overwhelmingly to vote with the Official Opposition. My amendment was defeated by 188 votes to 183 - a tantalisingly close defeat, but nonetheless a majority for the Government, thanks to the Liberal Democrat support.¹⁴

Let us look a little more at what the House of Lords actually does. In the time since I joined the House of Lords, in 1988, the tempo of its activity has increased noticeably. There are more active members, sitting longer hours, asking more questions and tabling more

reached during the Labour Government of 1945-1951, when the Marquess of Salisbury was Leader of the Conservative Opposition in the Lords.

¹² As at 27 June 2000.

¹³ On 22 February 2000 the House of Lords declined to approve the draft Greater London Authority (Election Expenses) Order 2000 by 215 votes to 150. On the same day, the motion for the annulment of the Greater London Authority Elections Rules 2000 was carried by 206 votes to 143.

¹⁴ The vote took place on 12 June 2000. For the division lists see *House of Lords Hansard* cols. 1389-1392.

amendments. First, attendance: the average daily attendance more than trebled over the last forty years, from 136 in 1959-60 to 446 in 1998-99. Second, level of activity: the number of questions for written answer tabled each session increased 80-fold over the last forty years, from 72 in 1961-62 to 5,729 in 1997-98. Third, sitting hours: the number of sitting hours per session almost doubled between 1970 and 1998.¹⁵ The House of Lords has for some years sat for longer than any other parliamentary chamber in the world apart from the House of Commons.¹⁶ No-one should accuse the House of Lords of lack of dedication to duty.

But is all this effort worthwhile, or could the House of Lords be more effective if its work were better focused? General debates and questions occupy more than a third of the time of the House.¹⁷ But how many of them significantly affect either ministerial thinking or public opinion? Of course there are exceptions: the Countess of Mar's campaign on organophosphates is one. Strict work measurement techniques simply do not apply. But the question of effectiveness is a crucial one in the context of House of Lords Reform, and must be answered somehow. The House of Lords spends more than half its time revising legislation,¹⁸ and therefore the most important measurement of its effectiveness is its role in amending public bills. The role of the House of Lords as a revising chamber is much vaunted and, again, the time which it has devoted to this role has increased. Since the 1970s the time spent by the whole House on public Bills has more than trebled, to a peak of over 714 hours in 1998.

714 hours is a long time for an institution to have at its disposal to challenge the elected dictatorship of the executive and the juggernaut majority in the House of Commons. Was it well spent? In 1997-98 almost 4,000 amendments were made to public bills by the House of Lords, although getting on for 9,000 amendments were tabled. Almost all the amendments which were made were tabled by the Government, although the Government was defeated on divisions on public bills 36 times that session. For 1998-99 the picture is similar. Getting

¹⁵ Royal Commission on House of Lords Reform, *A House for the Future*, 19-21. This increase does not take account of the introduction of the Grand Committee procedure, whereby uncontroversial bills may receive their Committee stage in the Moses Room, rather than in Committee of the Whole House, thus enabling a limited amount of "double-banking" of the time of the House.

¹⁶ The comparison with the House of Commons is not straightforward because of the recent procedural changes in that House, including the introduction of Thursday morning sittings and the Westminster Hall procedure. Unusually, in the 1998-99 session the House of Lords sat for more days (154) than the House of Commons (which sat for 149 days). But the length of the average sitting day is also relevant. In 1998-99 the average House of Lords sitting day, including Fridays (when both Houses usually sit for a shorter time) was 7 hours 36 minutes. In the House of Commons the average sitting day in 1998-99 was 9 hours 15 minutes. More detailed information is available in the House of Commons Library factsheet on sittings of the House, and in the House of Lords Information Office Internet Frequently Asked Questions, which are updated regularly (www.parliament.uk).

¹⁷ In the period 1995-99 22% of the time of the House was spent on debates, 13% on questions and 3% on statements. (Information supplied by the House of Lords Information Office).

¹⁸ On average 54% of the time of the House of Lords in the period 1995-99 was spent on public bills, which account for by far the biggest proportion of its time. (Information supplied by the House of Lords Information Office).

on for 8,000 amendments were tabled, and 3,287 amendments were made, most of which had been tabled by the Government, with 29 Government defeats on public bills.¹⁹

A similar point may be made by reference to an individual bill. 675 amendments²⁰ were made in the House of Lords to the Financial Services and Markets Bill this session. Only fifteen of these were non-Government amendments – one at Committee stage, five at report and nine at Third Reading.²¹ So in the case of the vast majority of amendments the wish of the executive has prevailed. And in many cases the Government has used the legislative process to tidy up bills which were defective because the hard-pressed Parliamentary draftsmen and women had had insufficient time to do their highly skilled and increasingly complex work.

I suppose there is, for some, a sense of macho satisfaction in clocking up all those late night sittings in the hope of influencing the Government's thinking. But this has resulted in the Mother of Parliaments becoming what must be one of the least family-friendly working environments in the world. Other institutions are seeking to change, to “work smarter not longer”, as the jargon goes. There is an obvious fear about doing this in Parliament, that the executive would be held even less to account.²² But I believe that refocusing the work of the House of Lords to concentrate more on its much-hailed Committee activity could result in its becoming more effective, not less so.

This is where the Wakeham report comes in. One of the most important proposals of the Royal Commission was that the second chamber should considerably enhance its committee work. It suggested that the Lords should concentrate on those areas where it could shape its own future without the need for legislation, and, importantly, without treading on the toes of the House of Commons. The report may have been short on sound bites and it lacked clear answers to the two questions to which the press wanted answers – membership and the title of the reformed House. But it wisely recognised that the Lords should concentrate on extending their influence by focusing on the work they do really well. Wise advice for individuals, companies, and a second Chamber.

¹⁹ Statistics supplied by the House of Lords Public Bill Office. In any session there are government amendments which incorporate the views of opposition or back-bench members. But these are comparatively few in number and unlikely to have a significant effect on the statistics.

²⁰ Excluding the tidying up amendments made on consideration of the Commons amendments.

²¹ Statistics supplied by the House of Lords Public Bill Office. Two of these amendments were carried against the government on division. In addition, there was a second government defeat on the third reading of the bill on an amendment to insert a new clause. Almost 1,500 Government amendments were made to the Bill by the two Houses, but only 25 non-Government amendments – 10 in the House of Commons and 15 in the House of Lords.

²² This fear was raised by several speakers in the debate on a motion by Lord Peston “to call attention to the case for a review of the workings of the House of Lords in the 21st century”; see *House of Lords Hansard* 10 May 2000, cols. 1574-1657.

The Lords has a good track record in committee work. The European Union Committee has the task of considering European Union documents and other matters relating to the EU – a broad remit. It scrutinises proposals under all three pillars of the EU. Some 1,000 documents, a number which would no doubt be grist to the mill of euro-sceptics, come forward annually. Most are routine, and in practice each of the six Sub-Committees chooses a few each year on which to conduct a substantial enquiry and report. An outstanding recent example was the enquiry chaired by the law lord Lord Hope of Craighead on the EU Charter of Fundamental Rights, and the subsequent debate in the House of Lords earlier this month.²³ The Committee also gives to Ministers views on other proposals where there is no need for extensive evidence. The government has undertaken, and the Lords have now resolved, that no proposal will be agreed to in the Council of Ministers, except in special circumstances, unless it has been cleared by the EU Committee. This so-called “Scrutiny Reserve” gives the House the opportunity to influence the stance which the Government adopts on any proposal under negotiation with other member states. This is a really valuable example of the increasingly approved process of pre-legislative scrutiny in action.

The Science and Technology Committee also has a wide-ranging task: no less indeed than “to consider science and technology”. This may include public policy areas which need to be informed about scientific research: for example global warming, world fish stocks, and the legal status of cannabis. In common with much of the House of Lords Committee work, and in distinction to the Departmental Select Committees of the House of Commons, its enquiries often cut across the artificial boundaries of government departmental responsibilities.²⁴ They embrace the technological challenges and opportunities which the government faces, such as vehicle emissions, management of nuclear waste and the information super-highway. Its influence is to stimulate debate, force government to defend policies and address issues, and then table reports which can become part of the political debate.

To state the task of these committees is to illustrate at once that they could not work without the involvement of great, wide-ranging and above all specialist expertise. They depend for their influence on no formal constitutional nor indeed statutory role, but on the will of the second chamber to support and resource the work and the quality of their output.

²³ 8th report of the European Union Committee, session 1999-2000, *EU Charter of Fundamental Rights* (HL Paper 67). The report was debated on 16 June 2000, see *House of Lords Hansard*, cols. 1849-1910.

²⁴ The Performance and Innovation Unit Report *Wiring it up: Whitehall's Management of Cross-Cutting Policies and Services* (January 2000), 52, drew attention to the fact that “the Parliamentary Select Committee structure [in the House of Commons] generally follows departmental lines and Select Committees, in the main, call Ministers and officials to account for their performance against departmental targets and objectives”. It saw this as one of the “perceived disincentives to cross-cutting working”. This issue was addressed in the House of Commons Liaison Committee’s recent report (1st report session 1999-2000, *Select Committees and the Executive: Shifting the Balance*). It is currently being considered as part of the Hansard Society’s Commission on the Scrutiny Role of Parliament, which is due to report in the spring of 2001.

A striking example of the support of the Lords for its Committees is the growth in influence of the Delegated Powers and Deregulation Committee. This Committee has two functions. Its first and primary task is to scrutinise proposed primary legislation so as to advise whether powers of secondary or delegated legislation which a Bill seeks to create can be properly conferred on Ministers, and how they should be circumscribed and controlled. The Committee also considers proposed orders under the Deregulation and Contracting Out Act 1994 which are intended to reduce regulatory burdens by means of a statutory instrument even although the existing controls were created by primary legislation.

The role of secondary legislation has been a steadily and irreversibly growing phenomenon. It has increased, is increasing and there is no prospect that it will diminish.²⁵ The number of instruments subject to parliamentary procedure grew by around 50 per cent in the 15 years to 1996, from under 1,000 a year to around 1,500 a year. In the same period the number of negative instruments almost doubled, from around 700 in the early 1980s to over 1,300 in 1994-95. Since then the overall number of instruments laid before Parliament has remained about 1,500 a year. This heavy volume of secondary legislation has resulted in a serious gap in Parliament's scrutiny arrangements - there are simply too many statutory instruments to be scrutinised in too little time. The Royal Commission recognised this, and proposed the amendment of the Statutory Instruments Act 1946 in order to improve the scrutiny arrangements for secondary legislation.²⁶ As a legislative reform this would be much less controversial, and thus much easier to achieve, than reform of the Parliament Acts. It is one which in my view should remain at the forefront of the proposals for parliamentary reform in both Houses.

The Delegated Powers and Deregulation Committee, which I currently chair, does not scrutinise statutory instruments themselves. Our task is to consider every bill after it has been introduced in the Lords in time to give guidance at the committee stage as to whether the nature of the powers proposed is a proper subject for secondary rather than primary legislation; to advise whether the proposed powers are sufficiently circumscribed by criteria which properly define and delimit their potential use; whether there should be consultation before use of any particular power; and whether they should be subject to the affirmative or negative procedure. The last requirement is regarded as an important safeguard because it theoretically increases the prospect of greater parliamentary scrutiny. But the distinction is often in practice somewhat unreal. In the House of Lords the opportunity has to be given to debate all affirmative instruments on the floor of the House, but negative instruments are only debated if a prayer is raised against them. In practice, however debates on affirmative

²⁵ The role of the House of Lords in scrutinising secondary legislation was discussed in greater detail in Philippa Tudor's Statute Law Society Lecture earlier this year.

²⁶ The Royal Commission's recommendation 39 ran as follows: "Neither chamber should consider a Statutory Instrument until the JCSI has reported on it. The Statutory Instruments Act 1946 should be amended to extend the statutory 'praying time' in respect of negative resolution instruments from 40 days to 60 days."

instruments are often short and ill-attended, not least because they are regarded as routine and so are put down for unpopular hours for debate in the House, such as “dinner-hour business”. They occupy little time in either chamber. In the Lords they currently take up no more than 2.9 % of debating time.²⁷ Add to this that until recently the views of the Lords were potentially of no effect since in any event they did not in practice vote down statutory instruments.

The Committee publishes around 30 reports each session, and it is inevitably invidious to pick examples, as every piece of legislation is important to those immediately affected by it. But, as a measure of the Committee’s work, on four occasions we have considered that a bill required fundamental re-drafting because it contained insufficient detail – what we call a “skeleton” bill. As a result of our reports major Government Bills have been substantially rewritten, including the Jobseekers Bill under the previous Government²⁸, and the Pollution Prevention and Control Bill last session.²⁹ Some of the powers on which we have commented, and on which the Government has subsequently amended its policy, have affected fundamental issues touching the rights of the individual, as was the case with the Access to Justice Bill last session. And increasingly we have found it necessary to comment on the human rights implications of proposed powers. In this connection one of the Committee’s recent achievements has been to secure the Government’s acceptance at the beginning of this session that for all affirmative instruments and for certain other instruments³⁰ ministers should always inform the House whether they are satisfied that the instrument is compatible with Convention rights. This goes significantly further than the requirement of section 19 of the Human Rights Act, which applies only to primary legislation sponsored by the Government, and we see it as a substantial and necessary step forward.

One of the most satisfying aspects of our work is that our recommendations are generally accepted by the Government. Why is this when it can sometimes be inconvenient for them to do so? In part it reflects the influence of successive leaders of the Lords who have followed the approach initially set by Viscount Cranborne of strongly supporting the work of the Committee. We in our turn seek to select important issues, and do not nit-pick. The Lords as a whole generally accept our advice and knowledge of this tendency is obviously an additional incentive for the government to accept our recommendations in advance of debate.

²⁷ In the Commons the figure is 2.6 %. These statistics are for the 1998-99 session, the last complete session for which statistics are available. See figures in *House of Lords Hansard* for 13 April 2000, col. WA 65-66.

²⁸ In session 1994-95; see the Committee’s 5th report for that session, HL Paper 50 and its 6th report, HL Paper 54.

²⁹ See the Committee’s 3rd report for session 1998-99, HL Paper 12.

³⁰ “Henry VIII instruments” – i.e. secondary legislation which amends primary legislation.

It has not, and should not, become a strict convention of the Lords that our recommendations will be accepted automatically since our role is solely advisory. But several government ministers have expressed the view in debate that they would rarely seek to go against our advice. I mention this not simply for reasons of pride, let alone hubris, but as a live example of how the committee work of the House can evolve so as to enhance its legislative scrutiny. The Commons, incidentally, have no committee which performs a similar role of guarding the gateway against excessive or inadequately controlled secondary legislative powers.

Our task in regard to deregulation orders is significantly different, but it carries particular interest because of its procedures for pre-legislative scrutiny. When the Deregulation legislation was introduced there were Opposition concerns that it was inappropriate to allow statutory instruments to amend a regulatory regime imposed by statute. To meet these anxieties a detailed and rigorous formal procedure for considering such orders was put in place. It is prescribed by the legislation and works as follows. The Minister contemplating a deregulation order has first to consult all interested parties. Then a proposal has to be laid before committees of both Houses of Parliament, detailing the outcome of consultation. These Committees must receive evidence submitted to them, and can initiate the taking of evidence. We then report separately on the acceptability or otherwise of the initial proposals or the need for amendment to meet anxieties or objection raised in the consultation process. Then, and only then, will the government lay an order for Parliament to consider. This procedure was used 42 times by the last Government for individual orders achieving changes, often comparatively small, in regulations governing areas as diverse as permitting the electronic presentation of cheques – a measure which was estimated to save the banking industry £30 million a year³¹ – and allowing pools betting on midweek football matches.³² The present government have not used the existing procedure much, but has recently published a draft Regulatory Reform Bill³³ under which it would seek more wide-ranging powers to achieve what it describes as “better regulation” through statutory instruments which would replace existing laws enacted through primary legislation.

This proposal would, in areas to which it applies, effect a fundamental shift in the balance between primary and secondary legislation. The controversial issues raised by the draft Bill should certainly be debated fully, both by Parliament and the press. The proposal would retain, and indeed, strengthen, the existing procedures for scrutiny. It does have some merit in that it realistically recognises two truths: the inadequacy of current legislative scrutiny, and the need to recognise that within a proper statutory framework much more could be done by statutory instruments if they were properly considered and consulted on. It would

³¹ The Deregulation (Bills of Exchange) Order 1996 (SI no 1996/2993).

³² The Deregulation (Football Pools) Order 1997 (SI no 1997/1073).

³³ Cm 4713, *Publication of the draft Regulatory Reform Bill* (April 2000).

also extend the direct link between public consultation and the parliamentary legislative process, which currently only exists in the case of deregulation orders.

The fate of the Government's proposals is far from certain. But, setting aside the draft Regulatory Reform Bill, it is increasingly recognised generally that pre-legislative scrutiny of important draft bills is a valuable discipline. This session the Financial Services and Markets Bill has been rightly criticised for the introduction of a vast number of amendments by the Government in both the Commons and the Lords. But pre-legislative consideration by a Joint Committee of both Houses last session at least made certain of fundamental amendments without which the Bill would have been impossibly controversial and probably too weighty to be handled at all.

Pre-legislative scrutiny at present only takes place haphazardly. This is particularly so in the House of Lords where, unlike the House of Commons there are no Departmental Select Committees, and so pre-legislative scrutiny usually involves setting up an *ad hoc* Committee, which by definition requires both political will and time. But pre-legislative scrutiny has now been used for four bills in the Lords, including the draft Local Government (Organisation and Standards) Bill and the draft Freedom of Information Bill. There is absolutely no reason – other than the wish to legislate in a hurry – why other draft Bills and also major statutory instruments should not be considered in the same way as deregulation orders. In such pre-legislative scrutiny the Lords could – in my view should – play a full part. This would help to improve primary legislation. In secondary legislation not all powers would merit pre-legislative scrutiny. But the Delegated Powers Committee could identify, as was suggested by Wakeham, those secondary powers which when they come to be exercised through statutory instruments would be important enough to require prior consultation and scrutiny. Ad hoc committees of the House could then be appointed swiftly to perform these scrutiny tasks. The only remaining question which is central to my argument that the Lords should essentially reform itself in order to scrutinise primary and secondary legislation more effectively is whether the Lords should have formal powers of amending or delaying secondary legislation.

The task of line by line legislative scrutiny by specialist House of Lords committees may sound thoroughly prosaic, but the prize is the great one of the significant improvement of our legislative process and so of our laws. More thorough, consultative procedures would make for a more orderly, regular, focused process which should do a great deal to enhance the quality of our law. In terms of efficiency, of fairness and of sheer decency, the quality of our laws is crucial. A great opportunity exists for the Lords, provided it will take the initiative and is properly resourced, to shape new laws in a much more pro-active way than the term “revising” chamber implies. Yet in doing so the Lords would be in no way challenging the ultimate supremacy of the Commons.

There is another great advantage of Parliamentary Committee work. In describing the work of the Delegated Powers and Deregulation Committee I have already mentioned the Committee's effectiveness, since for the most part the Government accepts our recommendations. But, almost as important, Committee work is an efficient use of time. I do not intend to speculate here whether the parliamentary long hours culture puts off some people from even applying to become members of either House of Parliament – indeed whether this is in part the reason why only 18% of MPs,³⁴ and around 16% of Members of the House of Lords,³⁵ are women. For any busy person, whether female or male, the twin problems of long parliamentary hours and the late timetabling of legislative business make it very difficult to programme parliamentary work into the diary. I would agree with the Wakeham Commission that, for the most part, we do not want the House of Lords to turn into another chamber of mostly full-time politicians. From my own personal experience as a member of the House since 1988, and working in the City for the first 10 years of that time, I found Committee work to be something which I could timetable into my diary, involving as it does at most one meeting a week fixed with good advance notice, with extensive preparatory reading which can usually be done at weekends. This work is effective, efficient and constructive. I would recommend it to any busy member of the House. And, I would suggest, we do not want to recruit new members of the House unless they are sought after elsewhere, which inevitably means that they will be busy.

The Wakeham Committee itself encouragingly stressed the potential for even wider committee work by the Lords. Before the Human Rights Act 1998 comes into force in October this year a Joint Committee on Human Rights will be established. In addition, the House of Lords Liaison Committee agreed last month³⁶ to recommend the appointment of a Constitutional Committee along the lines recommended by the Wakeham Commission. The Royal Commission envisaged the Constitutional Committee being modelled along the lines of the Delegated Powers and Deregulation Committee, and considering the constitutional implications of public bills, as well as keeping “the operation of the constitution under review”.³⁷ It is very heartening that these two new Committees are likely to start work by the beginning of the next parliamentary session, and I believe that they can make a real contribution to helping the Lords develop its role as a guardian of our democracy.³⁸

³⁴ Equal Opportunities Commission press release 10 May 2000, “EOC Challenges London Assembly to Show Westminster the Way”.

³⁵ On 5 June 2000 there were 691 members of the House of Lords, of whom 111 were women (107 life peers and 4 elected hereditary peers). Information supplied by the House of Lords Information Office.

³⁶ 2nd report, session 1999-2000, ordered to be printed on 8 May 2000.

³⁷ Cm 4534, Royal Commission on the Reform of the House of Lords, *A House for the Future* (January 2000), paragraph 5.22.

³⁸ I developed the idea of a Constitutional Commission – to which the new House of Lords Constitutional Committee would be an equivalent – in R. Alexander, *The Voice of the People: a Constitution for Tomorrow* (London, 1997), esp. 33-35, 104-105, 209-211.

Committees to improve legislative scrutiny and to deal robustly where appropriate on issues with constitutional implications will give the Lords both the competence and backing to exercise its existing powers. The ability to delay legislation, if properly used, is a valuable safeguard against what James Madison called “the sudden and violent passions” that humans could otherwise fall prey to. It would, in my view, be particularly valuable on constitutional issues where a second chamber should be alert to protect democracy. Such enhanced committee work would also enable the Lords to fulfil even better its acknowledged role of improving legislation. No new statutory powers, but simply the will of the Lords, are needed.

There is one other crucially important ingredient for legitimacy of our work: respect for the way in which its members are chosen. Despite the apparent unanimity of the Wakeham report it is obvious that the degree of consensus on this issue was underwhelming. The Government now supports the Wakeham Commission’s recommendation that “the second Chamber should be largely nominated, with a minority elected element with a particular remit to represent the regions.”³⁹ There has been strong support in the past for the proposition that the second chamber should have a majority of elected members or, as the Liberal Democrats currently argue, that all its members should be elected. The voting system and staggered timing of elections could be framed so as to ensure that a second chamber did not necessarily simply clone the membership of the Commons. What would be lost, however, would be the quality of much of the specialist expertise which is currently made available, voluntarily, in the time of non-professional politicians with true expertise. This is certainly true of the European Union Committee, the Science and Technology Committee, and our Delegated Powers Committee, and ad hoc Select Committees are now also regularly appointed.

Most of those who pursue their own professional and business interests and who are nevertheless experts are temperamentally unattracted to representing constituents and probably unable to give the time to doing so anyway. To lose their input would devastatingly erode the quality of the second chamber and make it far more political. Moreover, the development in recent years of the typical back-bench MP’s role as a cross between a social worker and a local government official has, in my view, increased, rather than diminished, the need for members of the House of Lords to specialise in the detailed legislative scrutiny which is increasingly squeezed out of MP’s busy diaries. Only if part of the Lords is appointed will we continue to attract this knowledge and wisdom. My own personal preference is for a half-elected, half-appointed second Chamber. Although this would result in a far more democratic Chamber than the Wakeham report proposed, I take comfort from the fact that successive opinion polls have indicated a strong popular support for at least a partly elected second chamber. The Conservative and Liberal Democrat parties

³⁹ The quote is from the Leader of the House of Commons, Mrs Margaret Beckett MP. *House of Commons Hansard* 19 June 2000, col. 49.

officially favour an elected second chamber, and over two thirds of the Labour MPs who responded to the Charter 88 survey favoured a majority elected House of Lords.⁴⁰

That said, it is pointless to pretend that the present means of appointment to the Lords commands much public confidence. The Ashcroft saga was a knock to confidence in the system. So, even more, has been the perception that the Prime Minister is pressing ahead with the appointment of large numbers of not always especially impressive supporters to enhance his party numbers. When Harold Macmillan introduced life peerages, the annual average number of peers created by him was 16. It has risen to an annual average of 61 over the first three years of this government.⁴¹ In three years Mr. Blair has already appointed approaching 200 Peers, whilst Mrs. Thatcher appointed 205 life peerages over her decade in power.⁴² Mr. Blair cannot be blamed for wanting to redress the party political imbalance which has unfairly existed for so long. But the large number of new creations inevitably risks dilution of quality, particularly if the new members have to make such a strong political commitment as to preclude what has traditionally been the healthy understanding that they can retain independent judgement on issues where they feel strongly. There is also a real doubt as to how quickly so many new peers can be found a worthwhile role which involves more than regular mandated attendance at debates and trooping through the division lobbies. There are few other Parliamentary Chambers in the world – Italy springs to mind as an exception – where there is an influx of new members every few months. What needs to be restored is the belief that entry to the second chamber is a badge of real quality.

The Royal Commission recognised the need to abolish unbridled patronage in the way appointed peers are chosen. It proposed that there should be a statutory independent Appointments Commission which should be the only route for appointments to the second chamber. They should vet party political appointments as well as those of independent members. There is as yet no statutory commission, although the Leader of the House of Commons has accepted that there should be one “in stage 2”.⁴³ But at least the government is in practice establishing a non-statutory appointments commission to consider nominations for independent or cross-bench membership.

⁴⁰ Charter 88 press briefing 20 January 2000. Of the 103 MPs who responded to this survey of backbench Labour MPs, well over two thirds favoured a majority elected House, with over half of these opting for a fully directly elected second chamber.

⁴¹ 188 life peerages have been announced since Mr Blair became Prime Minister on 2 May 1997. This means that the annual average number of new peerages is about 61. These figures exclude the creation of the hereditary Earldom of Wessex, but include the announcement of a life peerage to be conferred on Mr Michael Ashcroft, who (on 15 June 2000) is not yet in receipt of a writ of summons.

⁴² 205 life peerages were announced while Mrs Thatcher was Prime Minister, an average of about 18 a year. In addition 11 peerages under the Appellate Jurisdiction Act 1876 (Law Lords) were created while Mrs Thatcher was Prime Minister and 4 have so far been created since Mr Blair became Prime Minister.

⁴³ *House of Commons Hansard* 19 June 2000, col. 54. See also col. 49.

The government has also made a number of pledges as to the shape and structure which will exist for the lifetime of the transitional House. Perhaps the most important of these pledges is that the Government will not seek for itself more than broad parity with the main opposition party. It has also promised that there will be creations for other parties proportionate to their share of the vote at the prior general Election. They also intend that the independent peers will form a fairly constant percentage, around the present level of 25%, of the transitional House. This is a start. But I believe that the case for a statutory commission vetting political as well as cross-bench appointments is overwhelming, and will in due course be accepted by all who see the second chamber as one in which arguments have to be won, where the outcome is not determined solely by political muscle.⁴⁴

It must be obvious from what I have said this evening that I see real opportunity in the Wakeham report. There are inevitably some other issues for the House to work through. But it is important that stage 2 reform should not degenerate into the time-wasting farce which dogged some of the debates on the House of Lords Bill, with members earnestly debating whether or not a commemorative medal should be struck to mark the departure of most of the hereditary peers, or whether the legislation should refer to “a” hereditary peer or “an” hereditary peer.

In my view many of the Wakeham report’s critics have missed the essential point that it was carefully crafted to achieve – a realistic compromise for House of Lords reform which could be agreed without undue delay. We should never forget that it took almost 90 years, from 1911 until the dawn of the new millennium, to secure “Stage 1” of House of Lords reform. By focusing on the very real improvements which can be made to the scrutiny of primary and secondary legislation and to our constitutional role the House of Lords could be substantially strengthened by the Wakeham recommendations - now. The opportunity is there for the more legitimate House of Lords to stand, in Lord Strathclyde’s words “for common sense, choice, natural justice and constitutional propriety”.

For months the House of Lords has been in a state of limbo, known in the trade as “waiting for Wakeham”. Wakeham reported five months ago and there is apparently a degree of consensus in both Houses of Parliament that many of the report’s recommendations should go forward. There is a danger that if we wait for this process to start until after the general election we will be waiting for Godot. In last week’s House of Commons debate the shadow Leader of the House said that he could “see the long grass opening up to embrace the

⁴⁴ Gerald Kaufman MP, a member of the Royal Commission, said in the recent debate in the House of Commons: “the royal commission agreed on the crucial point that the second Chamber’s link with the peerage should be ended. We also proposed that, in parallel with that change, the Prime Minister’s patronage should be ended totally ... the royal commission believes, and proposes, that a very much wider spectrum of the population should be eligible to be appointed by the independent Appointments Commission – which will be statutory, appointed under the Nolan rules and open to

[Wakeham] report.”⁴⁵ But this need not be so if all those who believe in the democratic process unite to put their collective willpower behind House of Lords reform. The time for waiting has passed. The House of Lords has a real opportunity to become a more effective, expert and efficient guardian against the elected dictatorship. I believe it should grasp that opportunity firmly, and do so now.

ALEXANDER OF WEEDON

28 June 2000

applications from members of the general public, and which will scrutinise every single application.”
House of Commons Hansard 19 June 2000, col. 64.

⁴⁵ *House of Commons Hansard* 19 June 2000, col. 58.

APPENDIX

| Session | Amendments tabled to public bills in HL | Amendments made to public bills by HL | Government defeats on divisions on public bills in HL | Amendments rejected by other House |
|---------|---|---------------------------------------|---|------------------------------------|
| 1998-99 | 7,711 | 3,287 | 29 | 25 |
| 1997-98 | 8,974 | 3,997 | 36 | 3 |
| 1996-97 | N/A | 963 | 10 | 6 |
| 1995-96 | N/A | 1,705 | 8 | 7 |
| 1994-95 | N/A | 2,357 | 6 | 9 |
| 1993-94 | N/A | 1,405 | 16 | 45 |
| 1992-93 | N/A | 2,097 | 16 | 18 |
| 1991-92 | N/A | 635 | 11 | 0 |
| 1990-91 | N/A | 1,600 | 17 | 27 |
| 1989-90 | N/A | 2,628 | 17 | 33 |

Table 1: Amendments to public bills in the House of Lords 1989-1999

Source: information derived from the sessional statistics kept by the House of Lords Public Bill Office.

| Session | Amendments tabled to public bills in the House of Commons at Committee and Report stage |
|---------|---|
| 1998-99 | 6,732 amendments + 493 New Clauses + 29 New Schedules |
| 1997-98 | 8,299 amendments + 721 New Clauses + 24 New Schedules |
| 1996-97 | 2,953 amendments + 263 New Clauses |
| 1995-96 | 4,093 amendments + 545 New Clauses + 5 New Schedules |

Table 2: Amendments tabled to public bills in the House of Commons 1995-1999

Source: information supplied by the House of Commons Public Bill Office.

| | Amendments tabled | Amendments made |
|---------------------------|-------------------|-----------------|
| Government amendments | 1,469 | 1,468 |
| Non-government amendments | 1,309 | 25 |

Table 3: Amendments to the Financial Services and Markets Bill (both Houses of Parliament)

Source: House of Lords written answer 7 June 2000 (*HL Hansard*, col. WA 159).

Differences between the proposed new Order-Making Power in the Draft Regulatory Reform Bill⁴⁶ and the power under the Deregulation and Contracting Out Act 1994

| Deregulation Orders under the 1994 Act are capable of: | Regulatory reform orders under the draft Bill would be capable of: |
|--|--|
| N/A | imposing additional burdens where necessary, provided they are proportionate and they strike a fair balance between the public interest and the interests of those affected by the new burden; |
| N/A | removing inconsistencies and anomalies in legislation; |
| N/A | dealing with burdensome situations caused by a lack of statutory provision to do something; |
| applying only to legislation passed before the Deregulation and Contracting Out Act 1994; | applying to legislation passed after the Bill if it is at least two years old when the order is made and has not been amended in substance during the previous two years; |
| removing or reducing burdens 'affecting any person in the carrying on of any trade, business or profession or otherwise' | relieving burdens from anyone except Ministers and government departments (where only they would benefit); |
| N/A | allowing administrative and minor detail to be further amended by subordinate provisions orders, subject to negative resolution procedure. |

⁴⁶ Proposed in Cm 4713, *Publication of the draft Regulatory Reform Bill* (April 2000). Details of the background to the proposals in the Bill are on the Cabinet Office website at **Error! Bookmark not defined.**

The Command paper is available on the Internet at <http://www.official-documents.co.uk/document/cm47/4713/4713.htm>. Column 2 of this Table is taken from paragraph 10 of the explanatory notes to the draft bill.

The Constitution Unit and the House of Lords

The Constitution Unit is a specialist think tank working on the implementation of constitutional reform. It is independent and non-partisan, based in the School of Public Policy at University College London. (www.ucl.ac.uk/constitution-unit)

The Unit has carried out a wide range of research into the House of Lords and its reform, and published a number of briefings in this area. Meg Russell, Senior Research Fellow at the Constitution Unit, has also published a book, *Reforming the House of Lords: Lessons from Overseas*, available from Oxford University Press. The Constitution Unit acted as advisers to the Royal Commission, providing eight out of the twelve research papers which they commissioned. These publications are amongst those listed below:

- *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, January 2000 (£16).
- *Commentary on the Wakeham Report on Reform of the House of Lords*, Feb 2000 (£5).
- *Representing the Nations and Regions in a New Upper House*, July 1999 (£5).
- *Second Chambers Overseas: A Summary*, May 1999 (£8).
- *Second Chambers: Resolving Deadlock*, May 1999 (£5).
- *Second Chambers as Constitutional Guardians and Protectors of Human Rights*, May 1999 (£5).
- *Reforming the Lords: The Role of the Law Lords*, June 1999 (£5).
- *Reforming the Lords: The Role of the Bishops*, June 1999 (£5).
- *A Transitional House of Lords: Rebalancing the Numbers*, May 1999 (£5).
- *A Directly Elected Upper House: Lessons from Italy and Australia*, May 1999 (£5).
- *'Democracy Day': Planning for Referendums on PR and Lords Reform*, March 1999 (£5).
- *A Vocational Upper House?: Lessons from Ireland*, February 1999 (£5).
- *An Appointed Upper House: Lessons from Canada*, November 1998 (£5).
- *Reforming the Lords: A Step by Step Guide*, January 1998 (£5).
- *Reform of the House of Lords*, April 1996 (£15).

To order any of these documents, request a publication list, or be put on the Constitution Unit mailing list for publications and events, please contact the Unit using the details given on the cover of this document.