



The **Constitution** Unit

## Commentary on the White Paper

### The House of Lords - Completing the Reform

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## Summary of key points

The White Paper got a very bad press. It does not (in the words of its title) ‘complete’ reform of the House of Lords. But there are many good things in the White Paper which got lost amidst the press hostility:

- curbing the Prime Minister’s powers of patronage
- putting the Appointments Commission on a statutory basis
- introducing an elected element to represent the nations and regions
- breaking the link between the peerage and membership of the Lords
- removing the remaining 92 hereditary peers.

The government deserves credit for maintaining the momentum on Lords reform. But the major departures from the Wakeham recommendations call into question the government’s claim that it is implementing the Wakeham report. To fulfil its wish for a House which is ‘sufficiently authoritative and confident’ the government should

- retain long terms of appointment and election, to bolster independence
- strengthen the role of the Appointments Commission, so that it selects not just the independent members but also the party nominees
- increase the elected element.

**Longer terms.** In place of Wakeham’s 15 year terms, basically non-renewable, the government now proposes 5 or 10 year terms, which would be renewable. 5 year terms would fatally undermine members’ independence, because they would constantly have an eye to their re-selection or re-appointment. Ironically – given the government’s concern about maintaining the primacy of the House of Commons – they would also create a breed of elected politician with a term rivalling MPs. The government should accept 10 year terms, for elected and appointed members, renewable only once.

**The Appointments Commission** will not be able to ensure overall gender and other forms of balance if it is responsible for appointing only the cross benchers, who comprise 20 per cent of the House. As Wakeham proposed, the Commission should be given final responsibility for appointing the party nominees as well (who will comprise the bulk of the House, at 55 per cent). This should strengthen public confidence that nominees are not just party hacks. But to give the parties confidence in the process, the Commission should work from shortlists supplied by the parties.

**The elected element.** At the least, the government should consider raising the elected element to Wakeham’s proposed maximum of 35%. An elected element of one third might bring the balance in terms of attendance to around 50:50, because elected members are likely to attend full time and appointed members to continue to be part time. Election by a party list system, and appointment from party lists in practice lead to much the same result. The government could concede a higher proportion of elected members without the parties losing control of who sits on ‘their’ benches.

Election should be by fully ‘open’ lists, in which voters can express effective preferences between candidates, and not by ‘closed’ or ‘limited open’ lists. The latter present an illusion of choice, but almost never result in any re-ordering of the party list. Lists should also use quotas or ‘zipping’ to encourage female candidates.

Elections to the Lords should be held on the same cycle as elections to the European Parliament. Distancing them from general elections would help to emphasise the

subordinate nature of the Lords. Lords elections should be held on a staggered basis, with only one third or one half of members elected each time. This would ensure the Commons always has a fresher mandate; help to provide continuity of experience (especially desirable if there is a bar on re-election); and make the task of rebalancing easier for the Appointments Commission.

The government is right to propose a statutory cap on the size of the House, which otherwise would risk ratcheting up with each rebalancing exercise. 600 is huge by international standards, but can be justified so long as most members are part time. The pressures are growing for more full time attendance. The House could probably be 300 if all members were full time.

The Appointments Commission is going to have a hard enough task, in terms of rebalancing the House to reflect vote share at the previous general election. It should not have an additional duty to create a lead for the governing party over its main opposition. Sometimes the governing party will not have a bigger share of the vote; and the principle of rebalancing to reflect vote share should come first.

The Lords should have a recognised role as a 'constitutional longstop'. In bicameral systems the upper chamber often has a specific role in approving constitutional amendments. This need not be a veto: the Lords could have the right to insist upon a referendum.

The Lords should also become the guardian of the devolution settlement. The members elected to represent the nations and regions may wish to establish a Devolution Committee. To build links with the devolved institutions, they could be required to make regular reports to their devolved assemblies and parliaments.

The government has rejected the Wakeham recommendation that Commons Ministers should be allowed to make statements and answer questions in the Lords. The government should be willing to allow some limited experiment in this area, with reciprocity so that Lords Ministers could appear before the Commons.

The Lords should not lose their power of veto over subordinate legislation. The government's proposal to reduce this to a 3 month delaying power will not "increase the influence of the Lords over secondary legislation", and is not needed now that the Lords have shown their willingness to vote down statutory instruments. The House of Lords should also have a veto over any future proposals to change their own powers.

Wakeham and the government have failed to grasp the nettle on the bishops and the law lords. No other democratic parliament includes religious representatives, or judges. The bishops should be removed, especially now the government has decided (rightly) not to include representatives of other faiths. The law lords should sit in an independent supreme court, as the senior law lord has himself proposed.

Elected members will expect a salary. It would be wrong to pay them a salary and not pay an equivalent sum to other regular attenders. Both appointed and elected members should receive daily payments of £250 or £300 a day.

## Brief history of Lords reform since 1997

The House of Lords is being reformed in stages. The first of these was completed in November 1999, when the House of Lords Act removed the majority of hereditary peers from the chamber.<sup>1</sup> The second stage of reform was given for consideration to a Royal Commission, chaired by Lord Wakeham. The Commission reported in January 2000.<sup>2</sup> The government then sought to establish a Joint Committee of both Houses to consider the parliamentary aspects of the Wakeham proposals, but failed in the last Parliament to gain agreement of the opposition parties to the terms of reference or composition of the committee.

To break out of this impasse the government announced in the Queen's Speech in June 2001 that it intended, following consultation, to introduce legislation to implement the final stage of Lords reform. This was in fulfilment of the government's commitment in the 2001 manifesto:

“We are committed to completing House of Lords reform, including removal of the remaining hereditary peers, to make it more representative and democratic, while maintaining the House of Commons' traditional primacy. We have given our support to the report and conclusions to the report of the Wakeham Commission, and will seek to implement them in the most effective way possible. Labour supports modernisation of the House of Lords' procedures to improve its effectiveness. We will put the independent Appointments Commission on a statutory footing”.

In November the government published a consultative White Paper, *The House of Lords - Completing the Reform* (Cm 5291). The government invited responses by 31 January 2002. It then intends to introduce legislation, possibly later in 2002. The government has particularly sought consultation on the following:

- the balance between elected and nominated, and political and independent members
- timing of elections: should they be linked to European Parliamentary elections, general elections or regional elections?
- length of terms for elected and appointed members: 15 years as recommended by Wakeham, or 5 or 10 years to give more accountability but less independence?
- introduction of daily payments as well as expenses
- rules for disqualifying members.

The White Paper was roundly criticised on publication, in the press and in the responses on all sides in both Houses of Parliament. It deserved a better response, because although it does not complete reform of the House of Lords, it does contain a number of steps which carry reform in the right direction. It introduces an elected element for the first time; removes the remaining hereditary peers; puts the Appointments Commission on a statutory basis; and breaks the link with the peerage, making it clear that membership of the Lords is a job and not an honour.

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<sup>1</sup> The 'transitional' House of Lords currently has 704 members comprising some 560 life peers, 28 law lords and 26 bishops, along with 92 remaining hereditaries.

<sup>2</sup> A House for the Future, Royal Commission on the Reform of the House of Lords, Cm 4534, 2000.

But the White Paper fails to implement the Wakeham proposals in key respects, which led Lord Wakeham himself to join its critics.<sup>3</sup> In place of Wakeham's 15 year terms, designed to buttress members' independence, the White Paper proposes 10 or even 5 year terms. And instead of the Appointments Commission deciding on all the appointed members, the White Paper gives complete control over political nominees (who will constitute the majority of the House) to the political parties themselves. These major departures from the Wakeham recommendations call into question the government's claim that it is implementing the Wakeham report.

This briefing summarises the key recommendations of the White Paper, and provides comments on these recommendations. In each section the key recommendations are listed first, with reference to the relevant paragraphs in the White Paper (and in some cases to the 'supporting documents' which accompanied the White Paper). The commentary refers to the recommendations in the original Wakeham report, and is influenced by experience both from the UK and from second chambers overseas. At the end of the briefing is a list of further reading on Lords reform and second chambers. But first we explode some myths and fallacies which continuously dog the Lords reform debate.

### **Myths and fallacies: (1) 'Representative and democratic' means directly elected**

For many reformers it is axiomatic that for the House of Lords to be 'representative and democratic' (in the words of the Labour manifesto) it must be directly elected, like the American Senate and second chambers in other advanced democracies. In fact only about a quarter of overseas second chambers are wholly directly elected. A full breakdown of the composition of overseas second chambers is given in Appendix A. Just over half of all second chambers are wholly elected, but many use some form of 'indirect election', usually by members of local or regional government.<sup>4</sup> In addition, mixed chambers are relatively common. A total of three quarters of second chambers are predominantly elected in some form, but many of these contain some appointed members. Of the main categories used in Appendix A, one quarter of overseas second chambers are wholly directly elected; one quarter are wholly indirectly elected; one quarter are mixed elected/appointed; and one quarter are wholly appointed. Advanced democracies are to be found amongst all four categories.

### **Myths and fallacies: (2) The search for consensus**

Constitutions create the institutions and the rules of the political game. It is understandable that proponents of constitutional change should seek to base their proposals upon cross-party consensus, to avoid the charge of changing the rules to their advantage. In fact consensus has rarely been achieved at the time, but constitutional change in the UK comes to be accepted after the event by the opposition parties. Devolution affords a recent example. The same is true of all the other major constitutional changes of the twentieth century.<sup>5</sup>

Consensus is particularly elusive in relation to second chambers, which are controversial institutions in many political systems. In most bicameral systems upper house reform is never far from the agenda. A recent international survey described senates as 'contested'

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<sup>3</sup> Guardian, 12 November, House Magazine 19 November 2001.

<sup>4</sup> For examples, see M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, 2000, chapter 2.

<sup>5</sup> For an analysis of all the constitutional changes of the twentieth century, see *Delivering Constitutional Reform*, The Constitution Unit, 1996.

institutions, or even ‘essentially contested’, in the sense that their very existence is a matter of dispute (as it still is for abolitionists like Dennis Skinner MP); or because there are conflicting and irreconcilable interpretations about their role.<sup>6</sup>

This underlies much of the debate about Lords reform in the UK. It is one thing to agree, in terms of the rationale for the House of Lords, that it is a revising chamber. It is another, when it comes to the crunch, to judge at what point revision becomes obstruction or interference. We have become used to a very weak second chamber, which almost invariably defers to the House of Commons. When it dares to challenge government proposals, it is attacked by ministers as being illegitimate and unelected (as happened during the recent debates on the Anti-Terrorism Bill). Its role and legitimacy are still contested. What is at issue between the government and its critics is how often, and how effectively, the House of Lords should operate as a check and balance on the ‘elected dictatorship’ in the House of Commons. This is an issue on which there will never be consensus.

### **Myths and Fallacies: (3) The fragile pre-eminence of the House of Commons**

- *Within Parliament, the House of Commons is the pre-eminent chamber. Governments take their authority from the support of the House of Commons, as the representatives of the people (White Paper, para 16)*
- *Reform of the House of Lords must not obscure the line of authority and accountability that flows between the people and those they elect to form the government and act as their individual representatives (para 18)*

The government refers almost obsessively to the need to maintain the position of the House of Commons as the pre-eminent chamber of Parliament. This requirement was written into the first line of the Wakeham Commission’s terms of reference. It is the heading of the first chapter of the White Paper, and it appears repeatedly in the text and in ministerial statements.<sup>7</sup> But the concern is overdone. The basic role of each chamber is accepted and well understood; none of the proposals for Lords reform would overturn their respective roles, or undermine the pre-eminence of the Commons.

Second chambers in parliamentary systems of government on the Westminster model are invariably subordinate to the first chamber. It is in the first chamber that the government is formed, where the prime minister and all important ministers sit, where the government is primarily held to account, and where governments are tested on votes of confidence. This is the case whether the second chamber is elected, appointed or some mixture of the two. In all these respects the Commons is and will remain the pre-eminent chamber, whatever the composition of the House of Lords. Its pre-eminence is reinforced by the Parliament Acts, which enable the Commons to have the last word on legislation and on all money bills; and by the Salisbury convention, under which the House of Lords will not block or obstruct a manifesto bill.

The Wakeham Commission recommended, and the government and opposition parties agree, that there should be no change to this basic relationship between the two chambers. The Parliament Acts and the Commons’ traditional control over supply will continue to

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<sup>6</sup> Patterson and Mughan eds, *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, 1999 at p 338.

<sup>7</sup> Eg Tony Blair’s foreword to the White Paper: “Parliament does not require, and would be ill served by, a new second chamber seeking to challenge the role of the House of Commons as the pre-eminent voice and representative of the people”.

ensure the pre-eminence of the House of Commons. Its constitutional pre-eminence is not in any doubt. What may be in doubt is the government's will to create a second chamber which is a more effective check and balance on the first.

#### **Myths and Fallacies: (4) An elected chamber would be too legitimate**

Another myth introduced by the Wakeham commission, and perpetuated in the White Paper, is that a wholly or largely elected second chamber would consider itself equally legitimate to the House of Commons and would therefore be too activist and too powerful. This demonstrates a rather parochial Anglo-centric view. As already noted, three quarters of bicameral democracies have largely or wholly elected second chambers, and few suffer from such difficulties. The obvious exception is the US, which has an unusually powerful second chamber and is, in any case, not a parliamentary system. The US is not an appropriate comparator, but its experience has unduly coloured the UK debate.

There are many reasons why elected or largely elected second chambers do not challenge the legitimacy of their respective lower houses. These are largely built into the design of these chambers' composition (as well as through their powers being restricted). Many of these design features are available to us when considering the reform of the House of Lords, though many of them were rejected by the Wakeham commission and, ironically, the White Paper proposes that others be dropped. Such design features include:

- a number of appointed members in the chamber
- all or some elected members to be chosen by indirect, rather than direct, election
- elected members to serve longer terms of office than lower house members do
- only a portion (typically half or a third) of upper house members to be elected at any election, so that lower house members always have a fresher mandate
- some regions (typically rural or geographically peripheral areas) to be over-represented in the upper house
- no ministers to sit in the upper house, to emphasise the government's stronger link to the lower house.

If the government responds to the pressure to increase the proportion of elected members in the chamber, it should return to these options in order to safeguard the legitimacy of the Commons. In particular it should not, as it has suggested, drop Wakeham's proposals for long terms of office and staggered elections for the elected element.

## Composition of the second chamber

### ***Summary of composition***

*The government propose a House of 600 members comprised as follows:*

- *330 political members nominated by the political parties*
- *120 elected members to represent the nations and regions*
- *120 independent members appointed by the Appointments Commission*
- *16 bishops*
- *12 serving law lords, plus retired law lords aged 70-75 (para 64).*

### ***Principles of composition***

- *The House's membership should be distinctive from that of the Commons. It should be attractive to those who are not full-time career politicians*
- *The majority of members should continue to represent the political parties, but there should also be an independent, non-party element*
- *The House should not be dominated by any one political party. Its party membership should reflect party strengths in the country, as expressed in their share of the votes at the previous general election*
- *The House should be more representative in terms of gender, faith and ethnicity*
- *The House should be sufficiently authoritative and confident to fulfil its constitutional role (para 35).*

### ***Nominees of the political parties***

At around 330 of the total of 600, party nominees would comprise the majority of members. The Wakeham Commission recommended that the Appointments Commission should have the final say over their selection, and should be able to appoint people with party affiliations, whether or not they had the support of their political party (R 98). The government has rejected this recommendation, asserting that parties must be able to decide who will serve on their behalf. The role of the Appointments Commission will be limited to conducting propriety checks on those nominated by the political parties.

This is to clip the wings of the Appointments Commission too far. Wakeham may have been unrealistic in proposing that the Commission could nominate someone not supported by their own party. But the Commission could work from a list of nominees supplied by each party, and require each party to submit more names than there are vacancies. This would have two advantages. First, it would boost the credibility of those appointed to sit on the party benches. A second sift by the Commission working from the party shortlist would help to ensure the appointment of people of distinction and an independent cast of mind, and discourage the parties from nominating party hacks. Second, it would enable the Commission to ensure the overall balance which it is expected to achieve in terms of gender, regional balance, faith and ethnic minority representation. The Commission will find that it has only limited purchase if it is responsible for appointing just 20 per cent of the members (the 120 independents). It will be much easier for the Commission to achieve overall balance if it has final responsibility for appointing 75 per cent of the whole (the 20 per cent who are independents, and the 55 per cent party nominees).

### ***The balance between elected and appointed***

The Wakeham Commission and the government propose a second chamber which is predominantly appointed, but with a minority elected element. Wakeham offered three options of 12, 16 or 35 per cent elected. The government propose 20 per cent elected members. This modest proportion attracted widespread criticism, from the press and opposition parties, and also from the government back benches. By end November 165 MPs (mostly Labour) had signed an Early Day Motion backing a wholly or largely elected house. On this issue there was hardly a voice raised in support when Robin Cook presented the proposals to the House of Commons on 7 November. An NOP poll in the *Evening Standard* has found public concern also high, with 71 per cent backing a largely elected house and 91 per cent thinking 120 elected members too few. The Constitution Unit has previously commented that Wakeham's proposal for the elected element was too modest, both in terms of building popular support for the chamber and in terms of ensuring that the nations and regions are fully represented.<sup>8</sup>

The critics want at least half the house to be elected. The government must be willing to move on this, if its proposals are to get through the House of Commons. But it need not necessarily go as high as 50 per cent, if the aim is to have a 50:50 balance between elected and appointed members in terms of attendance and voting. Elected members are likely to be more full time attenders than the appointed members, only half of whom currently attend more than half of the time).<sup>9</sup> In the future attendance rates amongst appointed members – who will be appointed for fixed terms – are likely to be higher than that for the current life peers, many of whom are very elderly. However, some differential is likely to remain if appointed members continue to include 'experts' who are active outside the House. If this is the case, then a ratio of less than half elected could translate into a more equal balance of around 50:50 on any one day.<sup>10</sup>

Another consideration for both government and the critics to bear in mind is that election by a party list system, and a system of appointment from party lists may in practice lead to much the same result. In both cases the parties control the names on the list and the order in which they are presented. With a party list electoral system, the government could concede a higher proportion of elected members without the parties losing anything in terms of controlling who sits on 'their' benches. However, a greater elected element is more likely to win popular support and approval. So long as this element remains below 100%, and other precautions such as long terms of office are employed, this public confidence could not turn into a serious challenge to the Commons' legitimacy.

At the very least, the government should consider raising the elected element to Wakeham's proposed maximum of 35%. This would be entirely consistent with their previous position of accepting the main principles of the Wakeham report. An elected element of 35% might bring the proportion attending to around 50% elected, though that may not be sufficient to see off the government's critics.

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<sup>8</sup> *Commentary on the Wakeham Report*, Constitution Unit, February 2000.

<sup>9</sup> Average daily attendance was 346 in 2000, and some 330 peers attended more than half the sittings, out of a house of just under 700 - House of Lords Annual Report 2000-01, para 47. The House of Lords Information Office compiles voting and attendance records for each peer in each session.

<sup>10</sup> A comparison from the recent past was when the hereditary peers outnumbered the life peers, but in terms of daily attendance the balance was about equal, or even favoured the life peers, because they were more frequent attenders.

## **Electoral system, timing of elections, electoral terms**

- *Elections should be by proportional representation based on regional lists, using the same multi-member constituencies based on the nations and the English regions as are used for elections to the European Parliament (para 48)*
- *Elections could be held at the same time as European Parliament elections, general elections, or regional and local elections. The government is attracted to holding elections on the same day as general elections (paras 49-53)*
- *The electoral term could be 5, 10 or 15 years (para 54)*

### ***The electoral system***

There is general agreement that the elected element should be elected to represent the nations and regions, and should be elected by PR. It makes sense to use the new regional constituencies created for the European Parliament elections, in which Scotland, Wales and Northern Ireland each form one constituency, alongside the standard English regions (which in time will provide the boundaries for any elected Regional Assemblies in England). The electoral system will be the same regional list system used for EP elections, in which parties present a slate of candidates on a single list. The White Paper is silent on whether these will be 'open' lists, in which voters can express preferences between candidates, or 'closed' lists in which they simply vote for the slate. Wakeham recommended open lists.

This issue caused considerable controversy during the passage of the European Parliamentary Elections Bill in 1998, when the government insisted on closed lists against repeated objections from the House of Lords. It is to be hoped that this time the government will agree to open lists, and that these will be fully open (as in Finland) rather than limited open lists of the kind used in Belgium. Limited open lists present only an illusion of choice to voters, because they almost never result in any re-ordering of the lists drawn up by the parties (see Appendix B for a full explanation). From initial responses to the White Paper, it appears that the government will be under considerable pressure from all sides of Parliament to accept the principle of open lists.

### ***Timing of elections***

In terms of timing of elections, the Wakeham Commission's favoured option would have had these held every five years alongside those for the European Parliament. The government is attracted to the alternative of holding elections to the Lords on the same day as general elections. It would help to ensure higher turnout; it would mean the issues taken into account were national ones; and it would make it easier to manage the political balance of the Lords as a whole, since the Appointments Commission would not be faced with a shifting balance within the elected element during the course of each parliament.

On balance we still support combining the Lords elections with the European elections. Reserving general elections just for the House of Commons helps to underline its pre-eminence. The two elections for the Lords and Europe use the same constituencies and electoral system, and help to reinforce the creation of a regional demos. The European electoral cycle creates a fixed term, while terms based on general elections would be variable, depending on the life of a parliament. And the lower profile given to European elections might help voters to focus on the special needs of the Lords, which would risk being eclipsed in the clash of arms of a general election. Either way it is important that elections to the Lords be staggered, to help provide continuity of experience (especially if

terms are non-renewable), and to ensure that the Commons always has a fresher mandate. This mechanism of staggered terms is commonly used in second chambers overseas.

In time the third option proposed in the White Paper, to use regional elections, could be better still. They also provide fixed terms (but four years not five), staggered elections and a really clear regional link. But at present only 15 per cent of the population vote in such elections, in Scotland, Wales and Northern Ireland. Only when a majority of the population of England are also voting for voting regional assemblies should consideration be given to shifting the Lords elections to coincide with the regional electoral cycle.

### ***Electoral terms***

The Wakeham Commission proposed 15 year terms for the elected and the appointed members, to provide sufficient tenure to encourage a strong degree of independence. In the same spirit, Wakeham proposed that there be no provision for re-election, so that elected members need not look over their shoulders for party endorsement of their actions (Wakeham then slightly undermined this by allowing for appointment of previously elected members). The government suggests that 15 year terms may be too long, in terms of accountability and flexibility, and floats the idea of 5 or 10 years, with no bar on re-election.

Wakeham was right to argue for a longer term, to try to ensure that members of the Lords (as now) are beholden to no one and devoid of further ambition. It would be an extraordinary departure from the Wakeham proposals to allow the term go as low as 5 years. This would not only threaten the independence of members of the upper house, but would also increasingly put them in conflict for legitimacy with members of the Commons. We would still prefer to see a bar on re-election, or at most a maximum of two long terms. If there is no bar, the elected members will become professional politicians like their counterparts in the Commons, seeking election again and again. The government has said, and others agree, that it wants the Lords to attract people with different expertise and experience: in particular, people with experience which goes wider than politics. This purpose will be frustrated if there is no bar on re-election.

The White Paper is not explicit on whether elections would be staggered, as Wakeham proposed, or whether all elected members would be chosen at once. It is very important that the principle of staggered elections is maintained. If elected members enter the chamber all at one time, this will be far more likely to put them into conflict with MPs. Staggered elections also make the political balance of the chamber less subject to sudden swings, which makes the task of rebalancing easier for the Appointments Commission; and help to ensure a continuity of experience, which is the more important if there is a bar on re-election. Staggered elections are one of the distinguishing features of second chambers overseas, and there are many good reasons for using this model.

### ***Terms of office for appointed members***

Wakeham proposed 15 year terms for both appointed and elected members. The government do not believe that the two categories of members need necessarily serve terms of equivalent length. We believe that they should, to underline the equivalent status of each category, and to ensure parity of esteem between them. Three quarters of the total members (450 out of the 600) will get into the Lords because they have been nominated by their party, whether for appointment or for election. The same considerations about buttressing their

independence from their party apply in each case. If elected members are allowed a maximum of two 10 year terms, then we believe the same limits should apply to appointed members; with no possibility of exceeding the maximum by switching categories.

### **The Appointments Commission**

- *There will be a statutory Appointments Commission, accountable to Parliament rather than to Ministers*
- *The Commission will determine the overall size and political balance of the House, within parameters laid down by statute; will appoint the 120 cross-benchers; and will conduct propriety checks on the 330 political nominees*
- *The Commission will be required to ensure that the appointed members are broadly representative of British society, working towards gender balance in the chamber as a whole, and fair overall representation for the nations and regions and ethnic minority communities (paras 65-66).*

The Appointments Commission will have eight members, four nominated by the parties and crossbenchers, and three members and the chairman recruited through an open and independent selection process. The latter would be expected to be politically neutral in their dealings on the Commission. The Commission would be appointed by The Queen in response to an address from the House of Lords. Its status and method of appointment would be very similar to those of the Electoral Commission.

The recruitment of the first members of the Electoral Commission in late 2000 was organised by the Home Office, in part because the House of Commons was not at that stage geared up to do so. If the recruitment of the Appointments Commission is not similarly to fall by default into the hands of the executive, the House of Lords will need to develop the capacity to organise a major recruitment exercise: a task for which it may initially need some assistance and advice, to ensure the smooth running of what will be a high profile and politically sensitive process.

The Commission will be required to ensure that the balance of the parties in the House reflects their share of the votes at the preceding general election. We agree with the government's suggestion of a threshold of 5 per cent of vote share. Although the House of Lords should afford greater representation to minor parties, thanks to the proportional principle, it should not provide a platform for fringe or extremist parties, and a threshold is the best way of excluding them. If the chamber is properly to reflect the politics of the nations and regions, it is however important that any national threshold does not exclude genuine regional parties.

The White Paper is not always clear whether the Commission's responsibilities for ensuring overall balance apply simply to the independent members, to all the appointed members, or to the House as a whole. We believe that they should apply to the House as a whole. If there is an imbalance amongst the elected members, for example by gender or ethnic minority representation, the Commission should be able to use the appointments process to redress that imbalance. And its powers of appointment should not be confined to the 120 independent members, which will not give it sufficient purchase, and could seriously skew its selection of independents if they afford the only means of redressing imbalances amongst the remaining 80 per cent. To this end the Commission should have the final say in the appointment of the political nominees, to enable it (say) to appoint more women, more Moslems, or more people from the North West; but in each case selecting from

shortlists supplied by the parties. Having to put their shortlists to the Commission will force the parties to focus much more on the needs of the House rather than their own immediate concerns. In practice the parties will probably learn to engage in an informal dialogue with the Commission to ascertain their priorities before preparing their shortlists.

The Commission will need to develop a stronger vision and sharper priorities than the interim Appointments Commission chaired by Lord Stevenson. The government says in the supporting documents to the White Paper that 'the Appointments Commission has considered more what the peer can contribute to the work of the House of Lords, and less the idea that the peerage is an honour for past achievements' (p 36). This was not the general perception when the first list was announced in April 2001. It remains to be seen what is the attendance record of the 'Stevenson peers', and their contribution to the House. The disastrous press for the 2001 appointments was not wholly the fault of the Commission (which did not coin the phrase 'People's Peers'); but it missed a trick in not articulating more clearly its vision and objectives. In particular the Commission could have set out more vigorously to redress the imbalance of women, who are more seriously under-represented on the cross benches (11 per cent) than elsewhere in the House of Lords. If Stevenson had appointed a majority of women, and announced his intention of continuing to do so until the imbalance was redressed, his initial list might have had a stronger rationale and been greeted with a little more respect.<sup>11</sup> As it is, the Appointments Commission has got off to a shaky start, from which its statutory successor may find it hard to recover.

### **Breaking the link with the peerage**

- *The government proposes that membership of the House of Lords should cease to be connected to the peerage (para 78)*

It should be easier to focus on the requirements of the job once the link is broken between the peerage and the upper house, as Wakeham recommended and the government has now agreed. This would enable peerages to continue to be awarded in recognition of past service and merit, without creating any expectation that the holder should fulfil any parliamentary duties. It would also acknowledge the reality that many life peers treat their peerages as honorary and seldom attend parliament. With the link broken, members of the new second chamber should be appointed or elected on the basis of the contribution they could make in parliament, and not on the basis of services rendered or past distinction.

### **Size of the House**

- *There should be a statutory cap on the total size of the House of 600 members, to come into force after 10 years (para 91)*
- *The maximum target size during the transition should be 750, declining to 600*
- *In any rebalancing, the first duty of the Appointments Commission should be to achieve a lead for the governing party over its main opposition (para 93)*
- *The current life peers should remain for life, but with provision to retire (para 95).*

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<sup>11</sup> If the statutory Appointments Commission sets out to create a House of Lords half of whose members are women it would achieve something unique, and something the Lords could be rightly proud of. No elected chamber has more than 43 per cent women: see Meg Russell, Women's Representation in UK Politics, Constitution Unit, June 2000, Table 7.

### ***Limiting the size of the House***

The government is right to propose a statutory cap. We expressed concern at Wakeham's proposal that the overall size should be left at large. Without the discipline of a statutory ceiling, there is a risk of the numbers ratcheting up with each rebalancing exercise. We have no objection at this stage to a total of 600 in place of Wakeham's target of 550. By international standards either figure is extraordinarily large: a reformed upper house of 600 would exceed by over 250 the next largest second chamber in the world. At some time in the future the total size of the House should be looked at again, when we have a better sense of the balance between full time and part time membership.

The only justification for retaining a House of this size is to enable its members to be part-time. That can help to widen the expertise available in the House; and enable people to combine membership of the Lords with a continuing professional career. However the political and parliamentary pressures on part-timers are growing, with tighter whipping in the party groups, more committee work (six new committees were created in 2001, three permanent and three *ad hoc*), and the procedural changes which may come from the Leader's Group on Working Practices.<sup>12</sup> The introduction of elected members will be one more source of pressure for membership of the House to be increasingly viewed as a full-time occupation.

The impact of these pressures needs to be monitored, and reported in the House's annual reports and statistics, to get a better sense of how many members of the Lords are effectively full time, and how many still manage to combine membership with another occupation. It would help not just to report on changes in attendance, but to do some surveys to find out how much time members devote to Lords business on top of their daily attendance. This would also help to inform decisions about payment and allowances. But its primary purpose would be to get a sense of whether membership can continue to be part time for most of the members. If a point is reached when it cannot, that has major implications for the size of the House, which could probably be 300 if all the members were full time. It also has implications for the House's recruitment strategy, in terms of continuing to attract people with expertise from outside politics. Instead of combining membership with another career, full time members would be invited to take a career break while they were members of the House, or to join the House at the end of their professional careers.

### ***Rebalancing the numbers***

In November 2001 Labour had 200 peers in the Lords, compared with 223 Conservatives. If the government were to engage in further rebalancing to reflect their vote share in the 2001 general election (when Labour gained 41 per cent of the votes, and the Conservatives 32 per cent), they should create around 75 more Labour peers. The government is rightly reluctant to do so, since this would make the transition to a smaller House even more difficult. But the White Paper adds that the government "is inclined to add a rider to the general requirement to achieve balance so that the first duty on the Appointments Commission would be to achieve a lead for the governing Party over its main Opposition" (para 93).

We would be opposed to such a rider. The Appointments Commission must be left with a reasonable amount of discretion in terms of how much rebalancing it can sensibly achieve.

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<sup>12</sup> Eg morning sittings, which would make it harder for members of the Lords to hold down a 'day job' and then attend the Lords (as many do now) in the evenings.

And the principle of rebalancing to reflect vote share should come first. For there may be occasions when the governing party in the House of Commons does not have the biggest vote share, because of the biases inherent in the first-past-the-post system. In these circumstances the governing party should not expect to be the largest party in the Lords. In two elections since the War (1951 and February 1974) the party that won most seats and formed the government gained 1 per cent fewer votes than the main opposition party. In recent years the likelihood of such a perverse result has increased. The anti-Conservative bias in the system is now such that one of the UK's leading electoral experts estimates that "After the 1992 election Labour would have had 38 more seats than the Conservatives if the two parties had the same share of the overall vote. In 1997 that figure grew to 80 seats. Now ... it is no less than 140".<sup>13</sup> In any of these circumstances, if the parties had gained the same share of the votes, they should enjoy equal party strengths in the House of Lords. The governing party should not expect some kind of bonus simply because it is the government. Proportionality according to vote share is the principle that the government has repeatedly enunciated, and it should not now seek to undermine it.

### ***The problem of the current life peers***

- *The government accepts the Wakeham recommendation that current life peers should retain their membership of the House for life (para 94)*

In October 2001 there were 587 such members, including the law lords, of whom 422 sat on the party benches. They do present an obstacle to reducing the overall size of the House, because their current natural wastage rate averages 18 a year. The number of life peers is perceived to be a major problem in the Lords. The options facing the government are:

- to introduce a retiring age for life peers
- to have them elect a proportion of their number, like the hereditary peers
- to offer them a financial incentive to retire
- to leave them be, and hope that some choose to retire.

In terms of easing passage of the legislation through the Lords, it probably makes sense to leave the life peers where they are, and to hope that some choose to retire when there is formal provision enabling them to do so. There can be little justification for offering them a resettlement grant (as suggested in para 95 of the White Paper), when none was offered to the hereditary peers in similar circumstances.

### **The Role of the House of Lords**

- *The Lords' most important function will continue to be as a revising chamber for legislation (White Paper, para 21)*
- *It also has a role in holding Ministers to account, and in debating public issues (paras 20, 22)*
- *Ministers should continue to be appointed from the Lords in broadly their present numbers (para 23)*
- *There is no case for giving specific new functions to the House of Lords (para 24).*

This is a very short chapter of the White Paper of just one page, because the government proposes little change. In this it is broadly following the Wakeham recommendations. But the Wakeham Commission itself was relatively timid in thinking about the role of the upper house in the context of the new constitutional settlement. In particular the failure to give

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<sup>13</sup> J Curtice, 'The Electoral System: Biased to Blair?' in *Parliamentary Affairs*, October 2001 pp 803-814.

the chamber a specific role as a constitutional longstop, or to link the chamber more strongly to devolution, would leave Britain out of step with many advanced democracies.

### **A constitutional longstop**

The Wakeham Commission stated that ‘One of the most important functions of the reformed second chamber should be to act as a “constitutional long-stop”’.<sup>14</sup> However, it did not propose that the upper house be given significant new constitutional powers. Instead it would exercise its constitutional watchdog role primarily through a new set of scrutiny committees, on the constitution, devolution, human rights, and treaties.

The Wakeham Commission did propose that the upper house be given one additional constitutional power – that is a veto over future proposals which would change its own powers. This recommendation has been rejected by the government. This seems regrettable, as it would potentially allow a future government with a large Commons majority to enfeeble the upper house by changing its powers. Wakeham was right to seek to entrench the UK’s bicameral arrangements in this way.

The UK is one of only three Western democracies without a written constitution.<sup>15</sup> Therefore in most countries a change to the constitution requires an amendment to a defined constitutional text. This generally requires a special procedure more rigorous than that for ordinary legislation. In some cases, for example, a referendum is required to change the constitution. An alternative in bicameral countries is for the upper chamber to play a specific role in approving constitutional amendments, and this is quite common.<sup>16</sup> For example the upper house may have a veto, or the right to insist that a referendum is held. This ensures that there is broad support for constitutional change.

As part of the new constitutional settlement there would be benefits in building stronger mechanisms to protect the constitution. One objection which is often advanced is that in the absence of a written constitution, it is more difficult in the UK to define what is a constitutional amendment. But the Speaker of the House of Commons might designate constitutional bills (as ‘money’ bills are designated now); if the upper house did not approve any such bills, the government would have the option to refer their terms to a referendum. Alternatively the upper house itself might be responsible for identifying constitutional bills, and entitled to require a referendum on constitutional changes which it considered undesirable or needing the extra legitimacy which a referendum can provide.

Further developments now rest with the new House of Lords Committee on the Constitution, established in February 2001 in response to the Wakeham recommendations and chaired by Lord Norton of Louth. Its first substantive inquiry is into the process of constitutional change, and it is exploring just these issues: how to identify constitutional bills, and whether they should be subject to special safeguards. The Constitution Committee has the potential to grow into a constitutional longstop, rather as the Delegated Powers Committee has become in the narrow (but important) task of policing the dividing line between primary and secondary legislation. The government has never gone against a

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<sup>14</sup> *A House for the Future*, Royal Commission on the Reform of the House of Lords, Cm 4534, 2000 (Recommendation 15).

<sup>15</sup> The other two are Israel and New Zealand, both of which have single chamber parliaments.

<sup>16</sup> See M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, 2000, chapters 2 and 8.

recommendation of the Delegated Powers Committee.<sup>17</sup> It is to be hoped that the Constitution Committee establishes a similar authority.

Another way in which the Lords could develop their 'constitutional longstop' role is by taking a protective interest in other bodies which have a constitutional watchdog function. These include the Comptroller and Auditor General, the parliamentary Ombudsman, the local government Ombudsmen, the Information Commissioner, the Civil Service Commissioners, the Commissioner for Public Appointments, the Judicial Appointments Commissioner, the Parliamentary Standards Commissioner, the Electoral Commission. In terms of their operations most of these bodies are linked to Select Committees in the House of Commons. But no committee guards their independence or thinks systematically about the procedures for their appointment and dismissal, or for determining their resources. In developing its role as the ultimate constitutional watchdog the Lords could become the guardian of these specific constitutional watchdogs.

### **Links with devolution**

The supporting documents to the White Paper (Lord Chancellor's Dept, December 2001) explain that

"The second chamber should be a place where the nations and regions feel that they are represented. The Government's proposals are framed to respond to that need. Nevertheless ... the House of Lords should not become, in any sense, the 'federal' chamber of Parliament. Devolution has not created any need for one ... The House of Lords through its Constitution Committee clearly have a means of reviewing the impact of the devolution settlement and other constitutional changes. However, in the present state of the settlement, it would not be right to ask the House of Lords to develop a special relationship with the devolved institutions ..." (para 19).

At this early stage in the development of the devolution settlement in the UK, there is much that can be learnt from overseas about the potentially important role of the upper house in relation to devolution. Some of the lessons are negative, as chambers which have not taken full account of devolution (in, for example, Spain and Italy) are subject to calls for reform to rectify this.<sup>18</sup> The second chamber could play a valuable role in binding the UK's nations and regions together post-devolution, and linking the devolved institutions more meaningfully with Westminster. This does not require solutions rejected by the government and the Wakeham Commission, such as indirect election, but could potentially be achieved in other ways. The House of Lords Constitution Committee provides a start, and its second inquiry in early 2002 is to be into inter-institutional relations in the newly devolved UK.

Once the Lords contains members specifically elected to represent the nations and regions, they may want to establish a separate Devolution Committee as recommended by the Wakeham Commission. It is to be hoped that such a committee would take a wide view of its role, and look not only at the technicalities of devolution itself, but also at the impact of Westminster bills on the different parts of the UK, including the English regions. The upper

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<sup>17</sup> Lord Alexander, 'Wakeham in the long grass: can the Lords guard democracy?', Constitution Unit lecture, June 2000.

<sup>18</sup> A commissioned briefing by the Constitution Unit for the Royal Commission looked specifically at *The Spanish Senate: A Cautionary Lesson for Britain*. This is available on the CD-ROM version of the Royal Commission's report. See also M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, 2000, chapter 10.

house might also become the site of wider debates on devolution issues and the 'state of the union', and help to lead the debate on the consequences of devolution for the centre, in Westminster, Whitehall and the courts. That is something the Commons territorial Select Committees cannot do because they are fragmented into three committees representing the separate interests of Scotland, Wales and Northern Ireland.

The Wakeham Commission and the White Paper rejected proposals that members of the upper house should represent devolved institutions rather than citizens. They feared that members elected in this way would become 'delegates of the bodies that elected them, voting according to instructions rather than conscience'.<sup>19</sup> However, another danger is that elected members to represent the nations and regions - such as those proposed in the White Paper - will become delegates of their parties, with no real link to the institutions in their nations and regions. This is seen in many federal second chambers, such as those in Australia and Canada.<sup>20</sup> A possible solution would be to require members representing the nations and regions to make regular reports to their respective assemblies or parliaments - answering questions in the chamber or accounting to its committees. Such arrangements could start in Scotland, Wales and Northern Ireland, spreading to England if regional assemblies are established. This would build in a degree of accountability, and foster links between the institutions which would be unlikely to develop without such a requirement.

### **Ministerial accountability in the Lords**

The Wakeham Commission recommended that Ministers should continue to be drawn from the upper house, but suggested that procedures might be changed to allow Commons Ministers to make statements and answer questions there. The government has accepted the first recommendation, but rejected the second. In the supporting documents to the White Paper the government explains that it would require a change to the rules of the House of Commons to compel Ministers to attend before the House of Lords (they can already appear before Lords Committees voluntarily); that it would increase the demands on senior Ministers' time; and it would undermine the position of those junior Ministers who are in the House of Lords, who would no longer be regarded as speaking authoritatively on behalf of their departments.

In practice the Lords often get short changed, by having a Minister respond for the government who has no background knowledge or responsibility for the subject. The real reason for the government's reluctance is likely to be the increased demands on senior Ministers' time. It seems a pity not to allow some limited experiment in this area, with reciprocity so that Lords Ministers (such as the Lord Chancellor) could appear before the Commons. Other bicameral parliaments do allow Ministers from either House to appear before the other; Westminster should be capable of doing the same.

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<sup>19</sup> *A House for the Future*, Royal Commission on the Reform of the House of Lords, Cm 4534, 2000, para. 6.17.

<sup>20</sup> See M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, 2000, chapter 10.

## **The powers of the House of Lords**

- *There is no need to change the statutory basis of the second chamber's powers in relation to primary legislation (para 30)*
- *The House of Lords should lose its power of veto in relation to subordinate legislation, instead gaining a power to delay a Statutory Instrument for up to 3 months (paras 31-32).*

The government argues that although this latter change constitutes a reduction in the nominal power of the Lords, in practice it will render the Lords more effective, because they will be able to propose changes to a Statutory Instrument without rejecting it outright (para 33 of the White Paper). The reasoning here may be a little disingenuous. On the one recent occasion when the Lords did veto an SI, about free mailshots for election literature for the London mayoral elections, it was quite apparent what changes the Lords wanted to make; and the government made those changes in order to get approval to a revised instrument.

The policy context has changed since the Wakeham Commission proposed replacing the upper house's veto over secondary legislation with a power to delay by up to 3 months. When Wakeham considered this, it appeared to be a convention that the Lords did not vote down SIs: the Lords had not exercised its power to reject a Statutory Instrument since 1968. Wakeham hoped to give the Lords a weapon they might be willing to use, and so regain some influence over secondary legislation. But just one month after Wakeham reported, the Lords had struck down the GLA elections order.

It is highly debatable whether the proposed reduction in powers will really "increase the influence of the Lords in relation to secondary legislation". The three months would only elapse before the relevant SI came into operation if the Commons did nothing. Under the proposed new arrangements the Commons could immediately vote to reject the Lords' objections, and the SI would then come into effect. Describing this as a 3 month delaying power is misleading. The Liberal Democrats indicated in the debates on 7 November that they will reject any proposal to reduce the chamber's powers over subordinate legislation. The government does need to justify afresh why it wishes to reduce the Lords' powers in this way. Relying on the Wakeham recommendation is not enough, because that recommendation was based upon an assumption which has since been proved false.

The Lords' political will to disapprove subordinate legislation may no longer be an issue. What could still be an issue is their willingness to scrutinise hundreds of subordinate instruments. The Wakeham Commission was right to propose a stronger role here for the second chamber. This is largely technical scrutiny, out of the public eye, which the Lords has already made its own through the work of the Delegated Powers and Regulatory Reform Committee, as well as its input into the Joint Committee on Statutory Instruments. But as the Delegated Powers Committee pointed out in their evidence to the Commission, extending scrutiny to sift through all SIs would be a very considerable task, which would require strengthening their slender staff and increasing the sittings of the Committee.

## **The law lords**

- *The government is committed to maintaining judicial membership within the House of Lords (para 81)*

The Wakeham Commission acknowledged that no one writing a new constitution would assign the judicial function to a second chamber. But they preferred to defer the question of

whether there should be a separate Supreme Court to another Royal Commission or similar inquiry, and not to settle it as a by-product of reform of the House of Lords. In the interim the Commission saw no reason why the law lords should not remain in the second chamber.

The government has fewer reservations, arguing that the law lords represent a significant body of expertise and experience, which can benefit the House beyond the period when they can sit judicially. The government propose that the law lords should continue to be members of the House until age 75. A number of the law lords will be relieved; but not all. The senior law lord, Lord Bingham, sounded a significant note of dissent in a lecture last October. After quoting the interim conclusion of the Wakeham Commission he commented:

“.. it does not address a more fundamental question, whether it is desirable that the House of Lords or a second chamber should address judicial functions at all.

“... Those who favour change ... do so for two main reasons. The first is that the institutional structure should reflect the practical reality. If the appellate committee of the House of Lords is, as for all practical purposes it is, a court acting as the Supreme Court of the United Kingdom and as such entirely independent of the legislature, it should be so established as to make clear both its purely judicial role and its independence. The present position can mislead the ill-informed. When, for example, the Pinochet case was appealed to the House of Lords some foreign observers mistakenly thought that the issue had ceased to be a judicial and had become a political one.

“The second is a practical reason. As a committee of the House, the accommodation, resources and facilities made available to the law lords are determined by the House authorities ... I doubt if any supreme court anywhere in the developed world is as cramped as our own. This ... is the result of an acute shortage of space available to the House of Lords in the Palace of Westminster and a wholly understandable precedence given by the House authorities to those who manage and work in the legislative chamber ... In the end it seems likely that the pressure on space will be decisive: not for the first time, constitutional reform may be the child of administrative necessity”.<sup>21</sup>

## **The Bishops**

The Church of England should continue to be represented formally in the House, but by 16 instead of 26 Bishops (para 83)

The practical obstacles are too great to allow for formal representation of other denominations and religions; but the Appointments Commission should give proper recognition to faith communities as they seek greater representativeness in the independent members of the House (paras 84-5)

The government is following the lead of the Wakeham Commission, which recommended a reduction in the number of Bishops to allow for the representation of other faiths. This is another issue on which the Wakeham Commission should have taken a firmer constitutional stand. The presence of the Bishops in parliament is a hangover from the middle ages. Like the hereditary peers, they sat as feudal landowners, not for their advice on matters spiritual. Other European parliaments have also had representatives of the

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<sup>21</sup> JUSTICE Annual Lecture, 4 October 2001.

clergy, as one of the Estates of the Realm (eg in France, Ireland, Spain and Sweden); but that representation has long since disappeared with the modernisation of their constitutions.<sup>22</sup>

It is time to modernise this aspect of our constitution too, and to bring to an end formal representation of the church in Parliament. This need not lead to disestablishment: the Commission acknowledged there was no necessary connection between the establishment of the Church of England and places for its Bishops in the second chamber.<sup>23</sup> A minority on the Commission wanted to end the representation of the church in Parliament (paras 15.7-9). The Commission's own soundings suggested this might command more support than preserving the status quo. In terms of functions, only 27% of the 600 people responding to the Commission's questionnaires favoured maintaining or developing the role in the house of organised religion, while 53% wanted this role reduced.

The argument for excluding formalised Church of England representation is only strengthened by the government's rejection of formal representation of other faiths. It is justified to argue that it is difficult to find methods of representing many faiths, which are non-hierarchical. Representation of multiple faiths also opens up difficult questions about relative strengths of representation. However, if other faiths are not to gain representation, this increases the pressure for Church of England representation to be ended.

### **Payment, allowances and office support**

- *The government would prefer to maintain expenses-based allowances rather than move to full-time salaries (para 86)*
- *But absence of payment may be a barrier to broadening the Lords. The government seeks views on whether payment should exceed the current daily rate of £111; whether regular attenders should be able to commute these daily payments to an annual sum; and whether different considerations apply to the elected members (para 87)*

At present members of the Lords are entitled to a daily attendance allowance of £60; £51 secretarial allowance per day of attendance; and accommodation expenses for those based outside London. It is little compensation for what is an increasingly demanding job. The House of Lords is one of the busiest parliamentary chambers in the world. Its sitting hours have doubled in the last 20 years, from under 600 hours in 1979 to 1200 hours in 1999. In 2000 it sat during more weeks (40) and more days (169) than in any previous year, and more than the House of Commons (which sat for 36 weeks and 160 days).<sup>24</sup>

London-based peers who attend half the sitting days (as about half of them do) would receive annual allowances totalling around £10,000. It would make sense to allow regular attenders to commute the daily allowances into an annual payment, and it might encourage more members to commit to attending at least half the sessions. But it is also time to review the level of payments. The elected members of the new House will expect to be paid a

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<sup>22</sup> See M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, 2000, chapter 2.

<sup>23</sup> The Church of Scotland is also established but has no representation in the House of Lords. For more information about establishment of the Church see the Annex to the Constitution Unit's Briefing for the Commission, *Reforming the Lords: The Role of the Bishops* (June 1999).

<sup>24</sup> House of Lords Annual Report 2000-01, para 1.

salary, because many will give up jobs to represent their nation or region at Westminster. But it would be quite wrong to pay them a salary and not pay an equivalent sum to other regular attenders. Members of the Lords should be paid in accordance with their contribution to the work of the House, not depending on whether they are elected or appointed. The way to square the circle is to increase the daily payments to a level commensurate with other senior public appointments, eg £250 or £300 a day. A regular attender who attended 100 sitting days would still receive only £25,000 or £30,000 a year: considerably less than the £47,000 a year received by MPs (regardless of their level of attendance).

As important as levels of payment is to increase the level of office support, in particular for regular attenders. Most members of the House of Lords now have desks in shared offices.<sup>25</sup> Regular attenders should be allowed to consolidate the secretarial allowance so that they can share a secretary between three or four of them. More research and administrative support also needs to be given to the party groups, in particular the minority groups (the Liberal Democrats and the cross-benchers) who hold the balance of power. Hard pressed peers in the minor parties and on the cross benches need staff support to assist them in scrutinising the large numbers of amendments to legislation put down in the Lords, many of them at short notice.

## **Conclusion**

The Constitution Unit has long argued for a step by step approach to reform of the House of Lords. The government's White Paper should not be regarded as 'Completing the Reform' (in the words of its title), but as the next step. The government deserves support for maintaining the momentum on Lords reform, and for important elements in its proposals. These would significantly reduce the Prime Minister's powers of patronage; establish a statutory Appointments Commission; introduce an elected element; and remove the remaining hereditary peers.

But in three respects the proposals are seriously flawed. Wakeham placed great emphasis on lengthy terms of membership for both elected and appointed members to ensure their independence. In place of Wakeham's 15 year terms, basically non-renewable, the government now proposes 5 or 10 year terms, which would be renewable. 5 year terms in particular would fatally undermine members' independence, because they would constantly have an eye to their re-selection or re-appointment. Ironically – given the government's (overstated) concern about maintaining the primacy of the House of Commons – they would also create a breed of elected politician almost indistinguishable from MPs. The government should accept 10 year terms, renewable only once. Elections should be held on a staggered basis, with only one third or one half of elected members chosen each time.

The second flaw is the limited role given to the Appointments Commission. It will not be able to ensure overall gender and other forms of balance if it is responsible for appointing only the cross benchers, who comprise 20 per cent of the House. As Wakeham proposed, the Commission should be given final responsibility for appointing the party nominees as well (who will comprise the bulk of the House, at 55 per cent). But to give the parties

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<sup>25</sup> Desks for 622 members were to be available by end 2001: Annual Report para 59.

confidence in the process, the Commission should work from shortlists supplied by the parties.

The third difficulty is the elected element. There is a large body of support in the Commons for a second chamber which is at least half elected. In response, the government should consider raising the elected element to Wakeham's proposed maximum of 35%. An elected element of one third might bring the balance in terms of attendance to around 50:50, because elected members are likely to attend full time and appointed members to continue to be part time. The government should also agree to open and not closed lists for the electoral system.

With these three changes the government's proposals would deserve support. It would be a historic missed opportunity if Lords reform at this point were allowed to fail.

## APPENDIX A

### Composition of second chambers in all two-chamber parliaments

<b>Mode of Composition</b>	<b>No.</b>
Wholly directly elected	16
Wholly indirectly elected	14
Mixed directly/indirectly elected	1
Mixed elected/appointed (largely elected)	10
Mixed elected/appointed (largely appointed)	2
Wholly appointed	13
Mixed hereditary/appointed	2
<b>TOTAL</b>	<b>58</b>

#### **Wholly directly elected (16)**

Argentina, Australia, Bolivia, Brazil, Colombia, Dominican Republic, Haiti, Japan, Kyrgyzstan, Mexico, Palau, Paraguay, Philippines, Poland, Romania, USA

#### **Wholly indirectly elected (14)**

Austria, Bosnia and Herzegovina, Congo, Ethiopia, France, Germany, Mauritania, Namibia, Netherlands, Pakistan, Russian Federation, South Africa, Switzerland, Yugoslavia

#### **Mixed directly/indirectly elected (1)**

Spain

#### **Mixed elected/appointed (majority elected) (10)**

Belgium, Chile, Croatia, India, Ireland, Italy, Kazakstan, Nepal, Uruguay, Venezuela

#### **Mixed elected/appointed (majority appointed) (2)**

Malaysia, Swaziland

#### **Wholly appointed (13)**

Antigua, Bahamas, Barbados, Belize, Burkina Faso, Canada, Fiji, Grenada, Jamaica, Jordan, St Lucia, Thailand, Trinidad and Tobago

#### **Mixed hereditary/appointed (2)**

Lesotho, UK

Source: J. Coakley, and M. Laver, 'Options for the Future of Seanad Éireann', in The All-Party Oireachtas Committee on the Constitution, Second Progress Report: Seanad Éireann, Government of Ireland, 1997. Derived from Inter-Parliamentary Union database: [www.ipu.org](http://www.ipu.org).

## **APPENDIX B - Open versus Closed Lists**

*This is an extract from the Constitution Unit briefing, 'Elections under Regional Lists', January 1998. Copies of the full briefing are available, price £5.*

The extract starts with an executive summary.

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## **Executive summary**

### **Closed and open lists**

The government has chosen a closed list system for the European Parliament elections, whereby electors can vote only for a party. The alternative would be open lists, which enable voters to express a preference for individual candidates.

Under the most open form of lists, seats are allocated to candidates according to the number of their individual preference votes (Denmark and Italy), and the lists are not ordered by the parties (Finland and Luxembourg). This maximises voter power; but the parties fear that it would force candidates from the same party to compete too openly against each other.

### **The use and impact of preference votes**

If the government moves to open lists, it is likely to opt for a more limited variant (that used in Belgium) that gives relatively little power to voters. Lists will be ordered by the parties, and party votes will go to support the candidates at the head of the list: preference votes will make relatively little difference to the list order.

### **Candidate selection by the parties**

To get elected candidates will need to appear high on the party list. Candidate selection will thus be crucial. Lists could be produced by the national party executive or by local party members. In other EU countries the parties generally use local and regional bodies to draw up a list of candidates, which is submitted to a national executive body for amendment or approval.

A number of European parties also use quotas to encourage female candidates (at 20% to 50% of the list); or 'zipping', whereby male and female candidates are ordered alternately.

### **The position of independent candidates and minor parties**

Independent candidates in European Parliament elections are rare, and when they do stand, usually unsuccessful.

The UK will allocate seats at the regional level, which will produce high and variable thresholds. This will discriminate against minor parties (such as the Greens) which lack a strong regional base. This effect could be alleviated by holding a second distribution of seats at the national level; or by allowing small parties to join their lists and pool votes.

## ELECTIONS UNDER REGIONAL LISTS

### A guide to the new system for electing MEPs

#### Introduction

From 1999, Great Britain will cease to elect its MEPs through the first past the post method, and will switch to a proportional list system<sup>26</sup>. The government has legislated for this in the European Parliamentary Elections Bill. The legislation brings the UK more closely in line with the practice in other EU countries, all of which - with the exception of Ireland - use a list system for electing MEPs.

This briefing looks at some of the key issues arising from a decision to move to a list system in the UK. The issues covered are:

- the nature of the lists: 'closed' versus 'open', and variations of the open model
- the use and impact of preference votes
- the allocation of seats to parties
- the allocation of seats to regions
- parties' candidate selection procedures and the use of quotas
- the position of independents and minor parties
- the registration of political parties
- supplement lists and by-elections.

#### The electoral system

##### Closed versus open lists

Within the thirteen EU countries that elect their MEPs by a list system, the principal distinction is between those countries operating 'closed' list systems, and those operating 'open' lists. Under closed lists, electors can cast a single vote for a party only; they cannot vote for a particular candidate. The countries operating closed list systems are: France, Germany, Greece, Portugal and Spain.

The other EU countries operate open list systems, in that electors have the choice between voting for a party or voting for one or more of the candidates within a party's list. This option allows voters to express a preference for a particular candidate, although a preference vote is also counted as a vote for the candidate's party.

The government has proposed that the list system used in Great Britain will be a closed one. Unlike the five other EU countries operating closed lists, however, votes will be counted, and seats allocated, at the regional, rather than the national, level. This combination will have a negative impact on factions frozen out by their parties (and allocated places only at the bottom of lists, from which position their candidates would be unlikely to get elected). With a national allocation of seats, disaffected factions could run as separate 'splinter groups' with a realistic hope of gaining seats. The effect of allocating seats at the regional level will be to lower splinter groups' chances of success, and thus to reduce the likelihood of parties splitting. The rationale behind this is explained in more detail in the section on 'Minor parties and thresholds', on page 10.

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<sup>26</sup> Northern Ireland will retain its existing system of the Single Transferable Vote for electing its three MEPs. This Briefing therefore limits its comments to England, Scotland and Wales.

## **Variations in 'open' list systems**

Having distinguished between closed and open list systems, further distinctions need to be made between the types of open lists. The elements which combine to determine the 'openness' of a system are:

- how many votes each elector has
- how candidates are ordered on the ballot paper
- how candidates are elected from a party list: specifically, whether a 'party' vote counts towards any of the candidates' personal totals

### ***Number of votes***

Most of those countries operating an open list system allow voters only one preference vote. This is the case in: Austria, Belgium, Denmark, Finland, the Netherlands and Sweden. In Luxembourg, voters can cast up to six votes (the total number of seats available) for individual candidates: a voter may cast a vote twice for a single candidate, and may also vote for more than one party, if wished ('panachage'). In Italy, voters are allowed up to three votes in some regions, but only a single vote in others.

### ***Candidate order***

A second criterion in assessing the openness of lists is how candidates are ordered within each party list. In six countries operating open list systems - Austria, Belgium, Denmark, Italy, the Netherlands and Sweden - candidates are ordered by the parties, with the most favoured candidates at the head of the list<sup>27</sup>. This may be considered a less 'open' system than that in Finland, Italy and Luxembourg, where candidate lists are unordered (they are usually alphabetical), giving voters less of a 'steer' whom they should vote for<sup>28</sup>.

### ***Allocation of seats***

A final variation between open list systems relates to the method of allocating seats to candidates. The simplest form allocates seats to candidates according to the number of preference votes they have attracted. This system is operated in Denmark<sup>29</sup>, Finland - where party votes are not possible - Luxembourg and Italy. In Austria, Belgium, the Netherlands and Sweden, preference votes are supplemented by party votes, since the latter are treated

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<sup>27</sup> Sometimes, favoured candidates are also placed at the very end of the list, on the basis that voters - especially when confronted with long lists - pay particular attention to candidates in the top and bottom few places on the list, and are more likely to vote for candidates in these positions. Celebrity candidates are sometimes placed at the foot of the list as 'sweepers', to attract votes for the party, although they are themselves unlikely to be elected.

<sup>28</sup> Party lists in Luxembourg include a single priority candidate at the top of the list, with the remaining candidates listed alphabetically.

<sup>29</sup> Parties in Denmark have the choice of using party votes to top up the preferential votes of the candidates at the top of their list, or to allocate seats to candidates according to the number of preference votes each receives. In the 1994 European Parliament elections, all the parties used the 'preference votes only' option for allocating seats; in the 1989 elections, only one party - the Socialist People's Party - used party votes to top up preference votes.

as being an endorsement of the list's order. Under this system, party votes are allocated to candidates in the order in which they appear on the ballot paper (see Exhibit 1)<sup>30</sup>.

***Exhibit 1 - How 'party' votes are allocated to individual candidates***

Following the count, each party is allocated seats according to its share of the vote. The first stage in deciding which candidates are to gain one of a party's number of seats is to calculate the electoral 'quota': the share of the party vote needed to gain one seat. Quotas differ between countries: in Belgium, it is the number of votes received by the party divided by the number of seats it has been allocated, plus one:

$$\begin{array}{l} \text{eg number of votes} \div \text{number of seats allocated} + 1 = \text{electoral quota} \\ 1,000 \div (4+1) \qquad \qquad \qquad = 200 \end{array}$$

In the Netherlands, a quotient is used: until 1998, this was set at 50% of the total number of votes received by a party divided by its number of seats; from 1998, it will be 25% of the figure.

Any candidate on a party list whose preference votes exceed the quota is automatically elected (usually, only popular candidates, who have been placed at the very top of the list anyway, are in this position). If the first candidate on the list has not gained sufficient preference votes to be automatically elected, his/her preference votes are topped up with the votes cast for the party list until that candidate has reached the quota. Surplus party votes are then used to top up the second placed candidate until they reach the quota, and so on down the list until the party votes have been used up. Thus, unless they can attract a significant number of preference votes, candidates lower down a party list stand little chance of being elected, since they are unlikely to receive any 'topping up' from the pool of party votes.

A typology of list systems used in elections to the European Parliament can thus be constructed (Exhibit 2). For open lists, this is based on the ordering of the party lists, the method for allocating seats to candidates and the number of votes each elector has.

The European Parliament Elections Bill provides for a 'closed' list system for the UK: voters would be offered the choice only between voting for a party or an independent candidate. However, in the Bill's second reading debate on 25th November 1997, the Home Secretary indicated the government's willingness to consider an open list system, commending in particular the arrangement in Belgium.

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<sup>30</sup> Strictly speaking, there are no 'party' votes in the Netherlands since there is no party box at the top of each list; however, if an elector votes for the first candidate on the party list, this is taken as being an endorsement of the whole list, and operates in the same way as an explicit party vote.

***Exhibit 2 - Typology of list systems***

**CLOSED LISTS:** France, Germany, Greece, Portugal and Spain

**OPEN LISTS:**

	ORDERED PARTY LISTS	UNORDERED PARTY LISTS (May be alphabetical)
PREFERENCE AND PARTY VOTES COUNTED IN CANDIDATE ELECTION	Austria Belgium Netherlands Sweden <b>UK?</b>	
PREFERENCE VOTES ONLY COUNTED IN CANDIDATE ELECTION	Denmark Italy*	Finland Luxembourg*

\* Electors allowed more than one vote (only in some regions in Italy)

There is thus a possibility that the list system introduced into the UK will be a variant of the open system. In terms of the typology used to classify the systems operating in other EU countries (Exhibit 2), the UK would then join the four countries in the top-left box: voters will have a single vote, which they will be able to cast either for a party or an independent candidate, or for a particular candidate from within a party list. Lists will be ordered by the parties and preference votes received by the candidates at the head of the party list will be topped up by the party votes. Such a system would give less power to voters, and more to the parties, than the more open arrangements in Denmark, Finland, Italy and Luxembourg.

**The use and impact of preference voting**

This section considers the prevalence of preferential voting and the impact that it has on the election of particular candidates.

The practice of voting for a particular candidate, as opposed to a vote for a party list, varies widely in European Parliament elections in other European countries. The incidence of preference voting in four countries in the 1989 European Parliament elections is shown in Exhibit 3.

The impact of preferential voting is similarly mixed. In countries where party lists are unordered, and where seats are allocated to candidates solely on the number of personal votes they attract - Finland and Luxembourg - preferential voting is the sole determinant of who gets elected (party votes are translated into a single vote for each of the candidates on the list in Luxembourg). Although lists are ordered by the parties in Denmark and Italy, this has no relevance when seats are allocated to candidates,

***Exhibit 3 - Preferential voting in the 1989 European Parliament elections in selected countries<sup>31</sup>***

Denmark	68%
Belgium	50%
Sweden (1995)	50%
Luxembourg	40%
Netherlands	20%

Figures are percentages of total votes cast

Sources: *Europe Votes 3*, Tom Mackie (ed), 1990; Constitution Unit survey results

since only preference votes are counted. As a result, candidates are frequently elected out of list order: in the 1989 European Parliament elections, for example, 7 of the 16 MEPs elected in Denmark were elected out of order.

But in countries where lists are ordered, with party votes being allocated to candidates at the head of the list, the impact of preference votes is minimal. In the European Parliament elections of 1989, preferential voting in the Netherlands did not lead to the reordering of any party's list (ie all the candidates were elected in the order in which they appeared on each party's list). In Belgium, preferential voting led to only one candidate - from the Socialist Party's (PS) list - being elected prior to other candidates placed above him on the PS's list. Preferential voting in the European Parliament elections in 1984 and 1979 in Belgium and the Netherlands was similarly ineffective, with only two candidates being elected out of order from the 49 MEPs for both countries at each election.<sup>32</sup>

Why does preferential voting not lead to greater reordering of the party lists when it comes to allocating seats? The main reasons are:

- many preference votes are cast for the candidates at the top of the list, rather than those further down the order. This obviously reinforces, rather than upsets, the list order. About 90% of preference votes in Italian national elections to the Chamber of Deputies are for the first candidate on the list. In the 1994 Austrian national elections, one quarter of voters made use of their preference votes, and 16 candidates received more than the required one sixth of votes to be elected without recourse to party votes; but all 16 were already placed at the top of their party's list.
- preference votes for figures lower on the list are scattered between candidates, so that no single candidate receives sufficient preference votes to be elected
- there may be thresholds which a candidate relying on preference votes must exceed if he/she is to be elected. Until recently, candidates in the Netherlands had to attract 50%

<sup>31</sup> Prior to the reform of the electoral system in 1993, about 30% of voters in Italy made use of preference votes in national elections to the Chamber of Deputies (lower house).

<sup>32</sup> Preferential votes make negligible difference in national elections, too. In the Netherlands, preference votes have led to the list order being upset by the election of low placed candidates only twice in the 13 elections since 1945. In Austria, this has occurred only once since the introduction of a list system in 1971.

of the electoral quotient (the number of votes received by their party divided by the number of seats allocated to it) to be elected. Such a high figure effectively prevented candidates with a low list position from being elected. In an attempt to strengthen the link between voters' preferences and the election of candidates, it was decided in 1994 to lower the threshold needed to gain a seat to 25% of the electoral quotient; this will take effect from 1998.

An open list system in the UK would theoretically allow electors to choose which candidates are elected from within a party list. Analysis of the situation in those EU countries operating an open list system most like that which might be chosen for the UK suggests, however, that preferential voting has a minimal impact.

The likely impact of this will be to focus greater attention on the parties' candidate selection procedures: which candidates are chosen and in what order? The minimal likely impact of preference votes will act as a constraint on the parties, should they wish to include unpopular candidates on their list, or to give a low list ranking to popular candidates (see section on 'Candidate selection by the parties' on page 8).

### **Candidate selection by the parties**

The move to a list system of electing MEPs will focus attention on the way in which the parties select their candidates. The main consequence arising from the move from first-past-the-post to a regional list system is the need for parties to select a number of candidates for their slate, instead of just one. The parties may also wish to institute regional arrangements for selecting candidates, to reflect the move to a regional list system.

The importance of the candidate selection procedure will be compounded by the minimal likely effect of preference voting on the election of individual candidates (see the section on 'The use and impact of preference votes', on page 4). If a group of voters wish to see a particular candidate elected, the most effective strategy will be to focus attention on the intra-party selection mechanism rather than on persuading electors to use their preference votes when it comes to the ballot<sup>33</sup>.

Additional issues for candidate selection that are raised by a list system are:

- whether, and how, to consult party members
- the mechanism by which to rank order the candidates selected
- the use of quotas, to promote the candidacies of women and ethnic minorities.

Underlying these issues is the balance of power between the parties' headquarters and their 'grassroots'; one fear expressed about list systems is the potential power they give to the party executive to exercise control over list nominations (the "apparatchik rule of central party control", as Richard Shepherd MP put it in the Bill's Second Reading debate).

While there is concern in several other EU countries about the power of party executives to influence the composition and ordering of candidate lists, only in France is selection wholly

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<sup>33</sup> This has occurred in Belgium where, as a result of the limited effectiveness of preference votes, the Dutch speaking Liberal Party has urged reform of the candidate selection process, in particular a move to the use of primaries.

determined by the parties' central executive<sup>34</sup>. On the other hand, there are few examples of direct ballots of party members, the system currently operated by the Liberal Democrats in the UK. Most parties in EU countries fall somewhere between the wholly centralised or wholly decentralised models; the majority of candidate lists are drawn up by local and/or regional meetings of party members, and submitted to national executive bodies for approval.

In the UK, the Labour Party has announced plans to consult its members via a 'one member one vote' ballot in the present Euro-constituencies, with an appointments panel - composed of NEC members and regional representatives - vetting the candidates and ordering them on regional lists (*Guardian*, 28 January 1998). The Conservatives have decided to give party members the dominant role in both selecting candidates and rank ordering them, although on the basis of mass meetings, rather than postal ballots (*Financial Times*, 21 January 1998).

The typology in Annex 1 (*not included in this extract*) gives an indication of the balance in candidate selection between the different party levels and the role played by party members and executive bodies. In virtually all cases, the parties are free to adopt whatever procedures they wish; only in Finland is the selection procedure subject to legal regulation. However, our research has not discovered any parties that fail to lay down any internal rules of their own, leaving it to individual constituencies and regions to decide how to select their candidates.

### **Quotas**

The use of quotas in drawing up candidate lists is reasonably common among parties in other EU countries. The examples that the Constitution Unit has identified relate to the balance between male and female candidates, and not to the need for more candidates from ethnic minorities, although the Dutch Labour Party tries to ensure that its lists are representative of young people.

Most quotas employ a simple figure denoting the minimum percentage of female candidates that should appear on the list. Normally, this figure is 20% or 25% of all candidates. For the Belgian Socialist Party, neither sex is allowed to constitute more than two thirds of the list, and for the Social Democrats in Denmark, neither sex can account for more than 40% of list places. The Dutch Labour Party stipulates that one third of all its candidates must be women; this figure is 40% for the Social Democratic Party in Austria and Germany and the Socialist party in Spain, and 50% for the Socialist Party in France.

There are also examples (the Socialist parties in Denmark, France, Spain and Sweden, and the Greens in Germany) of 'zipping', where male and female candidates are ordered alternately on the list. As Germany operates a closed list system, the use of zipping guarantees female representation should the Green party gain two or more seats. An open list system, such as Denmark's, where only preference votes are used in deciding which candidates are to be elected could, in theory, negate the impact of zipping, since voters may choose to cast their preference votes for male candidates.

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<sup>34</sup> Such centralisation in France may be waning: the Socialist party, for one, is looking to involve party members more closely in selecting its candidates for the 1999 EP elections, possibly through a regional selection process for drawing up lists.

## **The position of independents and minor parties**

### ***(a) Independents***

Independent candidates may stand for election to the European Parliament in all EU countries except Greece (although in Germany only independent groups are allowed, not individual independent candidates; the reverse will be the case in the UK, since only individuals will be allowed to stand as independent candidates).

In general, independent candidates in European Parliament elections are rare and, when they do stand, unsuccessful. In the 1989 elections, for example, no independent candidates stood in Belgium, Denmark, Germany, Luxembourg and the Netherlands. The current European Parliament, elected in 1994, contains only one candidate (from Ireland) elected as an independent from outside a party list.

Independent candidates are more frequent in France and Italy, principally because they are included on party lists; these independents are usually high profile figures, and are included on the list for the votes they will bring to the party. Of the 81 MEPs elected in France in 1989, ten were independents, all included on one of five party lists. At the same elections, four independents were elected as Italian MEPs, from two party lists.

The principal reason for independent candidates' lack of success in European Parliamentary elections<sup>35</sup> is the presence of high de facto and de jure thresholds (the percentage of the vote needed to gain one seat). Because of the low number of seats available in European Parliamentary elections, compared to national elections, the threshold needed to gain one seat ( $100\% \div (\text{number of seats} + 1)$ ) is relatively high. The nominal national threshold for the 1999 elections ranges from 1% in Germany (99 MEPs) to 14.3% in Luxembourg (6 MEPs). The latter figure constitutes a major barrier for all but the major parties; in Denmark, Ireland, Austria, Finland and Sweden, the nominal threshold is lower, but is still 4% or more of votes cast.

Some countries have imposed additional de jure thresholds: Sweden and Austria have set a minimum limit of 4% of national votes before seats can be won<sup>36</sup>, and in France and Germany it is 5%.

### ***(b) Minor parties and thresholds***

The nominal threshold in Great Britain will be higher than in other EU countries, since votes are to be counted, and seats allocated, at the regional level. In the North East, for example, 4 MEPs will be elected, giving a nominal threshold of 20%, while in the South East, with 11 MEPs, the threshold will be 8.3%. In six of the nine English regions, and in Scotland and Wales, the threshold for gaining a single seat will be 10% or more of the vote.

By adopting a regional allocation of seats, the UK is not reflecting the practice in most other EU countries. Of the thirteen other countries using a list system for elections to the

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<sup>35</sup> They are also unsuccessful at national elections: in Denmark, for instance, there is only one independent candidate in the 175-strong Folketing. There are no independents currently sitting in the Spanish Cortes.

<sup>36</sup> In Sweden, if parties and independents fall below the national 4% threshold, they can gain seats at the constituency level, provided they gain at least 12% of votes there.

European Parliament, only Belgium allocates seats solely on a regional basis (13 MEPs in the Flemish area, with 11 MEPs in Wallonia). Italy uses a two tier process, with seats allocated first at the constituency level, and then at the national one.

The effect of a wholly or partly national system for allocating seats is to help those minor parties which lack a strong regional base of support (the Green Party, for example, or 'splinter groups' that have decided to split from the major parties). Such parties might fail to poll sufficient votes at the regional level to gain a seat outright (to use the 1999 elections in the UK as an example, a party might fall short of the 8.3% figure which represents the lowest nominal regional threshold - in the South East), yet might attract adequate votes across the regions to be entitled to one or more seats (with 8.2% of the UK vote, for example, a party in the 1999 EP elections should theoretically receive 7 seats).

The negative impact that the regional allocation of seats has on some minor parties could be alleviated by adopting the systems used in other EU countries:

- allocating seats at the national level: Great Britain's 84 seats would produce a nominal threshold of 1.2% of the vote
- a two tier system, which 'topped up' seats won at the regional level by an additional national allocation of seats (similar, in principle, to the Additional Member System proposed for the Scottish Parliament and Welsh Assembly)

Because of the existence of strong regional parties in Scotland and Wales, any reforms aimed at producing a more proportional result in the UK would either have to use the two-tier method, or treat England, Scotland and Wales as separate 'nations' for the purpose of allocating list seats. If Great Britain was chosen as the unit for allocating seats, the Scottish National Party and Plaid Cymru would receive few, if any, seats.

### ***(c) Minor parties and 'apparentement'***

An alternative means by which small parties could be helped to gain seats would be to allow them to join their lists and thus pool their votes ('apparentement'). This arrangement is used in Denmark and Finland for the European Parliament elections. Parties in most other EU countries can gain the same advantage by forming coalitions when presenting their lists. List joining or coalition forming are particularly important for small parties in countries - such as Great Britain - using the d'Hondt formula for allocating seats, since this mechanism is biased in favour of larger parties.



