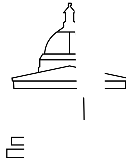

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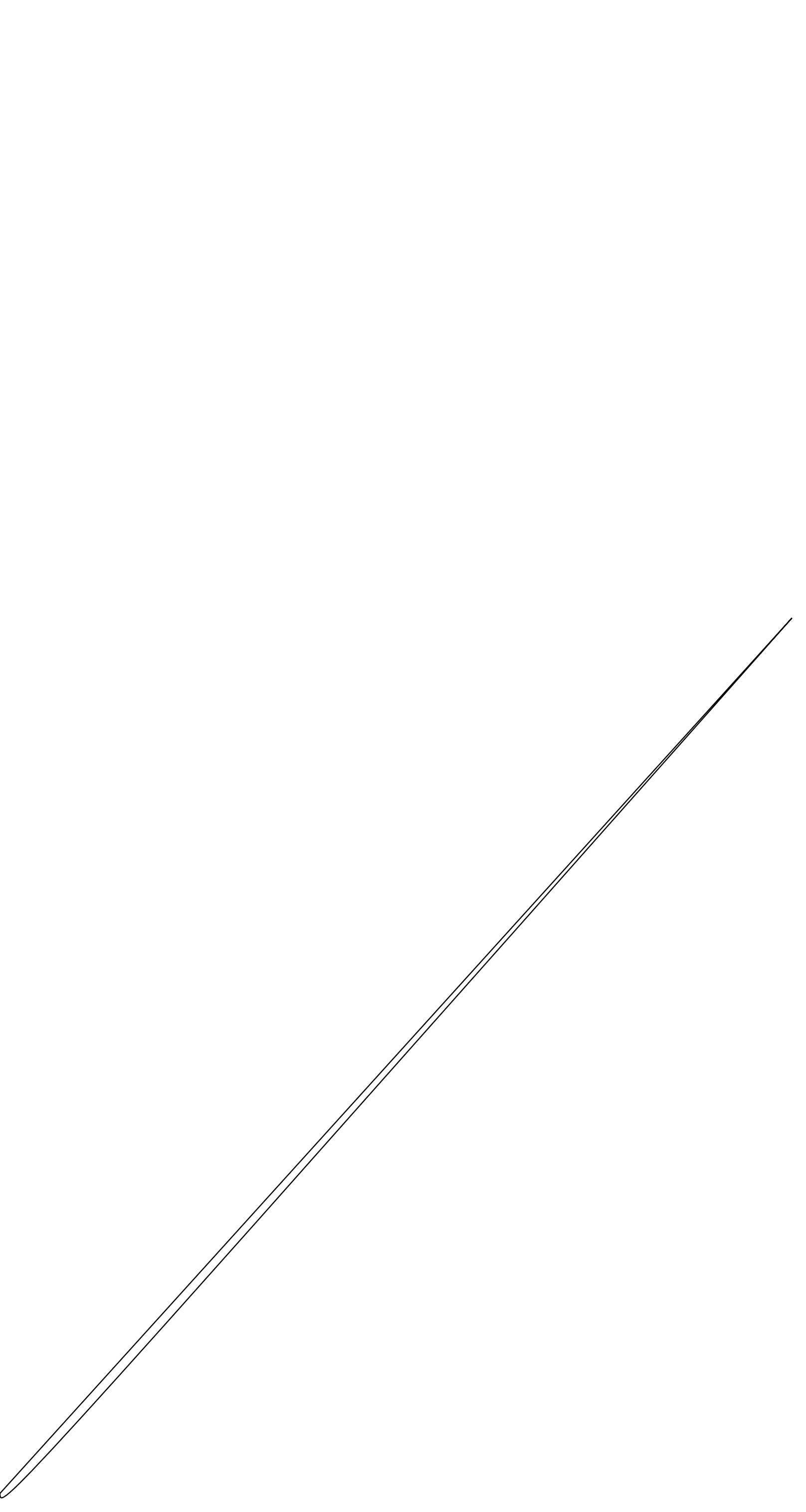

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Published January 2002

# 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 Commision.

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

## 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.[1] The second stage of reform was given for consideration to a Royal Commission, chaired by Lord Wakeham. The Commission reported in January 2000.[2] 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

But the White Paper fails to implement the Wakeham proposals in key respects, which led Lord Wakeham himself to join its critics.[3] 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

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

### *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

**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.

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.[11] 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

***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

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".[13] 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 lit3l6.5(vu) c Tf1on enab5(vu)6scm-0.9(cn)-PTw[to

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"'.[14] 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.[15] 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.[16] 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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[14] *A House for the Future*, Royal Commission on the Reform of the House of Lords, Cm 4534, 2000 (Recommendation 15).

[15] The other two are Israel and New Zealand, both of which have single chamber parliaments.

[16] 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.[17] It is to be hoped that the

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

## 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 GLA01 T.1(d8(t j)-5.it appeer6n8)0.2(e, aice ov.2826 0 290.0001It vis4 get a7anget

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.[22]

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

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.[25] 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

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

| Mode of Composition | No. |
|---|---|
| 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 |
| **TOTAL** | **58** |

**Wholly directly elected (16)**
Argentina, Australia, Bolivia, Brazil, Colombia, Dominican Republic, Haiti, Japan, Kyrghyzstan, 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.

## 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.

## 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[26]. 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.

**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[27]. 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[28].

***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[29], 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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[27] 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.

[28] Party lists in Luxembourg include a single priority candidate at the top of the list, with the remaining candidates listed alphabetically.

[29] 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.

***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 | Austria | |

***Exhibit 3 - Preferential voting in the 1989 European Parliament elections in selected countries***[31]

| Country | % |
|---|---|
| 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.[32]

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%

[31] 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).

[32] 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

determined by the parties' central executive[34]

## 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

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).

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