

‘Talking to the Guardians’

The Constitutional Role of the House of Lords

Lucy Atkinson

THE
CONSTITUTION
SOCIETY



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*THE CONSTITUTIONAL ROLE
OF THE HOUSE OF LORDS*

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About the Author

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Executive Summary

This paper aims to examine the existing academic assertion that the House of Lords has a 'constitutional guardianship' role. Based on interviews conducted with fifteen selected members of the House of Lords, it provides first-hand accounts of the nature of the constitutional work performed in the second chamber, looking more specifically at the types of individuals contributing to this constitutional oversight and how they go about it. It seeks to test the hypothesis that there is a self-aware sub-group of Peers within the House of Lords performing the constitutional functions of the Lords on behalf of the House as a whole.

All of the interviewees supported the premise that the House of Lords has a constitutional function, and there was a general consensus amongst respondents that the constitutional role of the House is – when necessary – to prompt the House of Commons to “think again.”

However, individual understandings of both the term 'constitution' and part played by the second chamber did vary. The responses can be divided into two distinct interpretations. For several interviewees, the constitutional function refers to specific examples of legislative scrutiny and debates surrounding overtly 'constitutional' issues, such as devolution, reforms to the House of Lords, and voting systems. For other respondents, the entirety of work undertaken in the House of Lords can be loosely defined as constitutional; the official responsibility of the second chamber in performing legislative scrutiny of Bills passed

through the House of Commons is in itself fundamental to the UK constitution, and thus – by extension – constitutional. This divergence is potentially problematic from the point of view of the coherent and effective performance of a constitutional role by the House of Lords.

Several interviewees intimated that the House of Lords is particularly well-suited to performing constitutional oversight. In particular, they claimed that the second chamber offers unique range in expertise and knowledge, a refreshingly non-partisan approach to its work – in comparison to the House of Commons – and the benefits attached to the “dispassionate”, “objective” influence of crossbench Peers.

A number of respondents identified certain recent trends and controversies as having a significant bearing on this constitutional work. Most significantly, they referred to the growth in the membership of the House, an alleged rise in partisanship of debates, problematic divergences between the balance of party political representation as between the House of Lords and House of Commons, and threats to the position of the second chamber more generally, as developments which have threatened to undermine the position of the House of Lords.

Having established that the House of Lords does perform some sort of constitutional oversight, interviewees were then asked to consider *who* assumes this role, and *how* they undertake this work.

Significantly, the results of the interviews did not serve to support the premise that there is a group of Peers acting collectively as ‘constitutional guardians.’ Certainly, there are a number of well-known Peers who are particularly instrumental in constitutional matters – most notably the current members of the House of Lords Select Committee on the Constitution (Constitution Committee).

However, respondents suggested that there is no single group of interested Peers. Peers who do respond to constitutional matters are more likely to work either as individuals, or to form loose and continually shifting informal groups of cross-party individuals, working towards a specific, current goal.

The profile of Peers who in some way contribute to constitutional work is extremely diverse. This is partly the result of the multitude of different entry points and personal motivations into constitutionally-relevant debates, and it is even possible for Peers to unconsciously engage in constitutional issues – for example, involvement in human rights discussions.

Members of the House of Lords engage in constitutional issues both collectively and individually, utilising a wide range of both the formal mechanisms and informal activities and networks of the second chamber.

When asked to consider the formal routes available, all of the respondents referred to the central role played by the Constitution Committee in the oversight of the UK constitution. Other committees were also identified as instrumental in this area, with references to the House of Lords Delegated Powers and Regulatory Reform Committee (Delegated Powers Committee) and the Joint Committee on Human Rights. Interestingly, respondents emphasised the significant work of the ad hoc select committee system, with several suggesting that ad hoc committees could be utilised to better effect in the oversight of current constitutional issues. Debates were also mentioned as a formal platform from which individual Peers can – and do – raise constitutional concerns across a variety of different subject matters.

However, respondents also referred to a number of informal forums, which are frequently used to perform constitutional work. They stressed the significance of informal networks and interactions that take place between individuals and groups of Peers, both in conjunction with – and in isolation from – the formal mechanisms provided in the second chamber. Members of the House may, for example, operate within networks of constitutionally interested Peers conversing informally in-between committee sessions or as part of their party group, and they may also interact with outside groups such as think tanks and academic institutions.

This combination of formal and informal methods utilised by Peers contributing – either consciously or inadvertently – to constitutional debates in the House elevates the importance of the *individual* in constitutional oversight. While formal mechanisms provide an effective means of initiating constitutional debate, they would entirely redundant without the individual Peers utilising them.

In sum, the House of Lords performs a significant role in the oversight of the UK constitution. Constitutional issues are discussed at formal and informal levels within the second chamber by fluctuating numbers and types of Peer, operating in different circles, and motivated by an array of concerns.

Introduction

*'The second chamber in the UK performs an important role [...] [in the] Guardianship of the principles and values of the British constitution.'*¹

This view, expressed in Dawn Oliver's 2015 Constitution Society pamphlet, is representative of a developing academic consensus on the significance of the constitutional work undertaken by members of the House of Lords. This paper follows on from this research; first, examining the extent to which the second chamber plays a role in constitutional oversight, and then probing this assertion, considering in more detail *who* is responsible for undertaking this constitutional work, and *how* and by *what* means Peers engage in constitutional issues. Based primarily on interviews conducted with a selected group of Peers, this paper provides first-hand accounts of the constitutional work performed in the second chamber. The purpose is to depict the performance of this constitutional function, as perceived by the individuals responsible for carrying it out.

The notion that the House of Lords plays a specific role in the guardianship of the constitution has historical precedent. In the seventeenth century, the House of Lords was often perceived as providing a 'balance' between the House of Commons and the King – between the democratic and monarchical elements of the constitution – an argument that was put with more urgency when it was claimed that the members of the House of Commons were

1 D. Oliver, 'Constitutional Guardians: The House of Lords', London: The Constitution Society, 2015, p29.

becoming 'corrupted' by the executive.² Some commentators have acknowledged its long-standing role in the evolution of the UK constitution, as well as contextualising this role as part of an international pattern of constitutional development. Aisling Reidy and Meg Russell's 2009 publication, for example, noted that constitutional guardianship has always been 'one of the classic roles of a second chamber.'³

The constitutional significance of the second chamber was undoubtedly fortified in 2001, with the establishment of the House of Lords Select Committee on the Constitution. This development extended the second chamber's capacity to scrutinise the constitutional implications of legislation and conduct inquiries into constitutional matters. Advocates of the Committee at the time called for a second chamber that would play a larger role in 'scrutinising the executive, protecting the constitution, safeguarding human rights, deliberating on issues which arise from devolution and decentralisation and examining secondary legislation.'⁴ Since then, there has been further interest in the constitutional responsibilities of the chamber, in light of disputes over the proper role of the Lords with respect to Statutory Instruments, and in response to arguments made for curbing the powers of the House of Lords during the scrutiny of the Draft House of Lords Reform Bill, 2010–12.

2 R. Paley and P. Seaward, *Honour, Interest and Power: an Illustrated History of the House of Lords 1660–1715*, Woodbridge: Boydell and Brewer, 2010, pp5–35.

3 A. Reidy and M. Russell, 'Second Chambers as Constitutional Guardians & Protectors of Human Rights', London: University College London, 2009, p4.

4 Wakeham Commission, Independent Report – 'A House for the Future: Royal Commission on the reform of the House of Lords', London: Cabinet Office, 2000, p6.

Despite these past and present developments in 'constitutional guardianship', academic research in this area has lacked any detailed analyses of the types of Peers involved in constitutional work, and the methods used by these individuals. This report hopes to address this gap in the constitutional research and contribute to existing work which has focused on the responsibilities of the UK's second chamber.

Quantitative online searches and qualitative semi-structured interviews were conducted to first establish whether there is a collective group of peers acting as 'constitutional guardians'; then, to determine more specifically whether this group – if it exists – has an existence distinct from the established formal mechanisms provided by the House, including the House of Lords Select Committee on the Constitution, or whether it operates outside the structural framework of the chamber. Semi-structured interviews were carried out with a select – yet within the chosen parameters representative – group of Peers, and used to provide detailed accounts of the opinions of these members. Care was taken to ensure that the paper reflects the first-hand accounts provided by each individual interviewee, and the main conclusions are drawn solely from this qualitative data.

Literature review

Literature dealing with the constitutional role of the House of Lords has primarily focused on the structural mechanisms and formal procedures set in place in the second chamber. There has been less consideration of the roles of individual members involved in constitutional debates and other forms of oversight, and of the informal routes open to them. The Wakeham Commission of 2000, for example, looked explicitly at the constitutional role of the House of Lords in its consideration of possible reforms to the second chamber. In its report, 'A House for the Future,'

the Commission investigated the formal responsibilities of the second chamber, exploring the possibility of enhancing the role of the House in the guardianship of the constitution. As part of its recommendations, the Commission suggested that 'an authoritative Constitutional Committee should be set up by the second chamber to scrutinise the constitutional implications of all legislation and to keep the operation of the constitution under review.'⁵ This recommendation found concrete expression in the form of the House of Lords Select Committee on the Constitution.

Subsequent assessments of the constitutional role of the Lords have maintained this focus on formal structures and instruments. The Constitution Committee itself has become the primary subject of interest for those engaged in such study, although the select committees on the Constitutional Reform Bill of 2005 and the Draft House of Lords Reform Bill have also been the subjects of academic research. For instance, Dawn Oliver, Robert Hazell, and Jack Caird explored the role of the Constitution Committee as protector of the UK Constitution in their 2015 paper, 'The Constitutional Standards of the House of Lords Select Committee on the Constitution.'⁶

A reference to the importance of the personal outlook of individuals came in a work by Aisling Reidy and Meg Russell. They referred to a conscious commitment to constitutional work by some members of the House, observing in their 2009 paper that many members see 'an important part of the House's role as

5 Wakeham Commission, 'A House for the Future, p4.

6 J. Caird, R. Hazell, and D. Oliver, 'The Constitutional Standards of the House of Lords Select Committee on the Constitution', London: The Constitution Unit, 2015.

constitution protection.⁷ However, this premise was not extended to consider the routes of intervention and involvement – both formal and informal – available to those members in any great detail.⁸

More general commentaries on the UK's parliamentary system and the House of Lords have taken a broader approach to the topic, looking at individual members and the informal roles available to Peers. Emma Crewe's work in particular provides an extensive anthropology of the House of Lords, detailing the manners, rituals, and politics of the second chamber. Her work highlights the significance of informal and changeable 'contexts of socialisation' that take place outside of the 'usual channels' of communication between Peers.⁹ According to Crewe's research, agreements made within the House of Lords are often verbal and not minuted, so that members are able to 'wield power in an aura of mystery', 'working behind closed doors'.¹⁰

Methodological inspiration was also taken from literature from other disciplines, focused on different institutions. Bruno Latour's ethnography of the Conseil d'Etat, serves as an example of how an anthropological approach can be used when studying parliamentary systems, in his case the 'higher' institution in the comparable French system of government.¹¹ Similarly, David

7 Reidy and Russell, 'Second Chambers as Constitutional Guardians & Protectors of Human Rights', p4.

8 Reidy and Russell, 'Second Chambers as Constitutional Guardians & Protectors of Human Rights', p4.

9 E. Crewe, 'An Anthropology of the House of Lords: socialisation, relationships and rituals.' *Journal of Legislative Studies*, 2010, 16, 3, p319.

10 E. Crewe, *Lords of Parliament: manners, rituals and politics*. Manchester: Manchester University Press, 2005, p160.

11 B. Latour, translation by M. Brilman et al., *The Making of Law – An Ethnography of the Conseil d'Etat*, Cambridge: Polity Press, 2009.

Howarth's 2014 paper illustrates how structured interviews can be used to examine institutions, exploring senior government officials' understanding of legal norms and conventions.¹²

Taking inspiration from these texts, and the work of Dawn Oliver and Emma Crewe in particular, this paper seeks to develop their hypotheses in relation to the constitutional work undertaken in the House of Lords. It seeks to develop Crewe's premise that the second chamber has a distinct culture, with social relationships established at different times and locations within the House¹³ outside of its more formal mechanisms. The results of the interviews conducted with members of the House are used to probe the assertion, of which Dawn Oliver is a pre-eminent advocate, that the House of Lords already plays an important part in the guardianship of the UK Constitution. The paper considers *who* – if anyone – acts constitutional guardians and *how*, looking at the routes through which these individuals might be operating. It is hoped that this research makes some headway in addressing the existing gaps in the literature, and provides a starting point for further research into the informal methods employed by individual members of the House of Lords, alongside the work of institutions and the deployment of formal mechanisms.

Definition of 'constitution'

The absence of a written constitution in the UK presents numerous complications, not least in establishing a definition for the term 'constitution'. This was noted by members of the Constitution Committee in their first report, when they acknowledged

12 D. Howarth and S. Stark, 'The Reality of the British Constitution: H.L.A. Hart and What 'Officials' Really Think', Cambridge: University of Cambridge, 2014.

13 Crewe, 'An Anthropology of the House of Lords: socialisation, relationships and rituals', p314.

the 'difficulties of any attempt to define a constitution.'¹⁴ More recently, debates around the Draft House of Lords Reform Bill considered the remit of constitutional role of the House of Lords, and the boundaries of its constitutional work. Reidy and Russell's paper, 'Second Chambers as Constitutional Guardians and Protectors of Human Rights,' also notes that 'if the House of Lords were to be given greater former powers over constitutional legislation,' a 'definition of the scope of bills which would be considered constitutional' would be required.¹⁵

This paper loosely adopts the definition chosen by the Constitution Committee in 2001 as its working definition: 'the set of laws, rules and practices that create the basic instructions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individuals.'¹⁶ With this definition in mind, an individual with an active interest in the UK constitution would be someone who considers the constitution as an entity in its own right. This might take the form of scrutinising proposals that have the potential to impact the way the UK is governed, looking at how the constitution functions more broadly, and exercising an oversight role of the processes and procedures in the parliamentary system.

However, this model does not help to address the unavoidable ambiguity of the concept of 'constitution,' nor does it provide a means of uncovering the broad array of subjects that are often associated with the constitution. As the Constitution Committee

14 See also: A. Blick, D. Howarth, and N. le Roux, *Distinguishing constitutional legislation: A modest proposal*. London: The Constitution Society, 2014.

15 Reidy and Russell, 'Second Chambers as Constitutional Guardians & Protectors of Human Rights,' p9.

16 House of Lords Select Committee on the Constitution, 'First Report: Session 2000-01', London: House of Lords, 2001, p20.

admitted in its first report, those involved in the oversight of the constitution must be careful not to 'become some sort of constitutional sieve, sifting through the fine detail of every constitutional issue whatever its importance.'¹⁷

It is not enough to take the term 'constitution' at face value. As the Wakeham Commission concluded in its report on the reform of the House of Lords, 'there is a fine line between constitutional matters and human rights issues', 'the latter aris[ing] in a broader range of circumstances and therefore merit[ing] separate consideration.'¹⁸ Indeed, both the quantitative and qualitative research undertaken for this report revealed that several Peers use the term 'constitution' when discussing human rights issues, while others would not consider human rights debates as constitutional work. Equally problematic are those Peers who unconsciously engage with a constitutional issue, participating in relevant discussions without acknowledging the constitutional implications.

'Constitution' means different things to different people, and it is impossible to separate some constitutional matters from other more tenuous issues. In order to capture this range of interpretations, interviewees were encouraged to offer their own definitions. This safeguarded against unwittingly imposing one particular definition of the constitution, whilst ensuring that the research reflects common usage and understandings of the term. This line of questioning was also used to gain some insight into general conceptualisations of constitution in the UK, and to establish whether there is a consensus on the term amongst those who are consciously involved in constitutional issues. In particular, it was hoped the interviews would disclose whether

17 House of Lords Select Committee on the Constitution, 'First Report', p22.

18 Wakeham Commission, 'A House for the Future', p54.

the existence of such ambiguity undermines the coherence and effectiveness of Peers seeking to address constitutional issues.

These difficulties in terminology and identification make it impossible to provide a finite and comprehensive overview of the various methods employed by Peers interested in the constitution. This study merely provides a starting point for further research into the roles undertaken by individual members of the House of Lords. It sheds light on a fraction of the informal activities that occur alongside the formal procedures in place in the second chamber.

Methodology

Compilation of lists

The first component of research undertaken for this report comprised a compilation of lists of: (i) Peers who have used the term 'constitution' at least twenty times in Parliament, (ii) current members of the Constitution Committee, (iii) past members of the Constitution Committee, (iv) past members of the House of Lords Select Committee on the Constitutional Reform Bill, and (v) any Peers listing the 'constitution' as an interest in their biography on the parliament webpage. This offered an immediate way of establishing Peers who have a self-aware and active interest in the UK Constitution.

Members of the Constitution Committee are expected to participate in regular meetings, evidence sessions, and inquiries, as well in the production of reports. The House of Lords website suggests that committee work offers a way for members to set up investigations of public policy and government activity related to the UK Constitution, to look at 'broad, long-term issues,' 'produce in-depth reports on findings,' and 'provoke discussion outside

Parliament and make recommendations to government.¹⁹ More specifically, as one of the five permanent House of Lords select committees, the Constitution Committee is expected to examine all Public Bills for constitutional implications and investigate wider constitutional issues. In the 2014–15 session, for example, the Constitution Committee published eleven reports in total.²⁰ Membership of the Committee requires regular interaction and participation, with the Constitution Committee normally meeting weekly when the House is sitting. It is thus reasonable to assume that members of the Committee are actively and consciously engaged in constitutional debates taking place in the House of Lords.

However, a member of the Constitution Committee is under no obligation to actively seek to be involved in the entirety of debates relating to the UK constitution. Although the Committee meets regularly and has some members who are particularly active in their roles as representatives of the Constitution Committee – participating in other select committee hearings and intervening in other departmental debates where they deem it appropriate – other members' interactions with the Committee may be more sporadic, with less meaningful engagement. When they leave the Committee, they may not necessarily remain closely involved in constitutional oversight. Moreover, there are others who are active in constitutional areas who are not, nor have ever been, members of the Committee. Therefore, while the Committee plays an important part in the constitutional role of the House of Lords, it is not synonymous with it.

19 <http://www.parliament.uk/business/lords/work-of-the-house-of-lords/lords-select-committees/>

20 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/>

Online searches

This report is also based on a series of online searches conducted using the search engines available through the hansard.parliament.uk, parliament.uk and theyworkforyou.com websites to produce a list of the members of the House of Lords who have used the term 'constitution' at some point during their Peerage.

An initial search for the term 'constitution' produced 3412 results, dating from 3 Dec 1945 to 22 April 2016 (though this research only identified Peers who remain alive). The advanced search facilities enabled the results to be organised by person (limiting the results to members of the House of Lords only), indicating *who* had mentioned the constitution the most, *when* they had discussed the constitution, *how many* times, and within *what* context. This helped to determine which discussions these Peers had been participating in when using the term 'constitution', and from that, revealed their points of entry into constitutional discussions, and the types of topics associated with the constitution.

However, there are limitations to this methodology. Most problematic is the way in which the websites are structured. Websites like theyworkforyou.com, hansard.parliament.uk, and parliament.uk use layouts which present the information in a particular way, undoubtedly influencing how users reflect on the information provided. For instance, theyworkforyou.com helpfully provides a "plain English" analysis of the main types of topics that the parliamentarian in question has chosen to vote on during their time as a Member of Parliament. Whilst the "selection of votes" provided indicates the sorts of issues that the MP is particularly interested in – and the way in which they choose to vote on such matters – it does not indicate how or why these particular topics were chosen for the main overview webpage. The website has the effect of elevating certain topics

over others, portraying the parliamentarian in a particular light that subsequently influences the user's initial characterisation of the individual.

In addition, the online searches do not provide a way of identifying Peers who were involved in constitutional discussions and contributing to constitutional matters without explicitly using the term 'constitution'. This gap relates to the broader issue of identifying Peers who are participating in constitutional debates, but do not use the exact term, perhaps because they do not view their contributions from a constitutional perspective. Discussions about human rights, for example, often have implicit constitutional implications, but are not constitutionally framed. There are thus unavoidable difficulties in identifying members of the House of Lords who intervene in constitutional affairs in this way.

Interviews

The main component of the evidence base for this report was a series of semi-structured interviews conducted with fifteen members of the House of Lords. In the main, interviewees were chosen on the basis of evidence of their active interest in constitutional issues, as suggested by publicly available data on formal parliamentary activities (the results of the preliminary online searches). The interviews were conducted to ascertain first-hand perceptions of the constitutional role of the House, the work of individual Peers in this arena, and the more informal methods employed by – or at the very least available to – Peers hoping to participate in constitutional matters.

Twenty members of the House of Lords were considered for interviews, from the preliminary lists drawn from the online search of the terms 'constitution' and 'rule of law', the list of current

and past members of the Constitution Committee, and those previously involved in the Select Committee on the Constitutional Reform Bill. The initial twenty Peers who were contacted were chosen to reflect a cross-section of the types of Peers expressing interests in the constitution. Efforts were made to interview as near a wide range of interviewees as the lists would allow. An attempt was made, through an assessment of parliamentary interventions, to identify individuals whose interests appeared more clearly to be in the constitution as a subject in its own right, as opposed to a tangential association through a single issue or discrete group of issues (such as devolution). Alongside this criterion, it was hoped that the results would span a range of characteristics for age, gender, and professional background, necessarily limited by the nature of the given sample.

Efforts were taken to ensure that interviews were undertaken with a range of individuals entering constitutional debates from a number of perspectives. Based on the initially compiled quantitative lists, it was hoped that the interviewees would include a member who had become interested in the constitution from a Scottish and devolution perspective, someone involved from a judicial and legal point of view (including ex-Law Lords), someone from an academic background, and someone from a political background. It was also important to ensure that all main political parties were represented (Conservative, Labour, Liberal Democrats, and a Crossbench member of the House of Lords), and that gender, age, and other determinants were also taken into account. Admittedly, given the oft-cited gender, ethnic, and cultural imbalances of the current membership of the House of Lords, the selection of Peers contacted for interview was not a model of diversity. The profile of the sample in itself speaks volumes for the types of people who are currently engaged with constitutional issues in society more generally.

The identification process was not intended to exclude the possibility of holding interviews with members of the House who were already known to have constitutional experience. Therefore, five of those contacted were already known to the Constitution Society as suitable candidates for interview, regardless of whether the search process captured them. To have intentionally omitted these individuals from the interview process for the sake of providing more scientific and unbiased data, would have been to miss out on a wealth of knowledge, experience, and invaluable insight into the nature of activity in this area.

Importantly, the final twenty approached for interviews also included a number of Peers who had not been flagged up by any of the online searches as having any obvious interest or active involvement in parliamentary constitutional debates. The inclusion of these individuals was intended to provide an account of how constitutional debates and discussions amongst other Peers were perceived, and whether there was a well-known, established group of Peers intervening in constitutional debates. These interviews also presented the opportunity to determine whether members of the House of Lords unknowingly contribute to debates (directly or indirectly) linked to the UK constitution. They provided a means of evaluating the effectiveness of the online search criteria in uncovering Peers interested in the UK Constitution. If the Peers initially identified as having made little or no contribution to constitutional work confirmed a lack of interest and engagement, it would appear that the methods were effective. If they contradicted this supposition, this outcome would be significant, with implications for academic understanding of perception and discourse surrounding the constitution in the House of Lords.

Of the initial twenty contacted, fifteen members of the House of Lords were interviewed for this paper. This final selection of Peers

was broadly representative of the demographic characteristics identified at the quantitative research stage. Interviews were conducted with five Baronesses and ten Lords, and, importantly, included five Labour Peers, five crossbench Peers, three Conservative Peers, and two Liberal Democrat Peers. The group contained a number of high profile individuals with impressive constitutional backgrounds – senior members of the judiciary, past and present members and Chairs of both the Constitution Committee and the Delegated Powers Committee, and leading figures in academia – as well as several deemed to have ‘little interest’ in the constitution. This paper does not identify individual interviewees, and references to the backgrounds and political orientation of particular respondents are made only where necessary.

Methodological issues

As with all forms of research, one should be aware of the methodological issues that arise when conducting interviews of any sort; this was not a wholly scientific nor entirely objective exercise. This paper is based on a relatively small number of interviews conducted with a select group of Peers. While the group was chosen to cover a wide range of different ‘types’ of members of the second chamber, their responses should not be taken to represent the views or experiences of their colleagues. The interview process used does not purport to offer a fully scientific means of uncovering all the formal and informal activities that inform current constitutional interventions amongst members of the House of Lords. The answers documented in this report should not therefore be taken to reflect the views of all members of the House of Lords with a direct or indirect interest in the British constitution. Difficulties with terminology, definition, and understanding of the ‘constitution,’ ‘rule of law,’ and in identifying

subjects that could be taken to be matters of constitutional significance (however indirect or implicit) rendered the task of identifying, let alone speaking, to each and every Peer who has some form of constitutional interest impossible.

The interviews were conducted in a semi-structured and semi-formal manner. Great care was taken in the designing of the interview questions, with consideration of the terminology used, the phrasing of questions, and the topics addressed in the interview. However, as with all interviews, the questions chosen beforehand undoubtedly influenced the types of responses and reactions given by the respondents. To a certain extent, the nature of oral research results in the unavoidable influence of the interviewer, although efforts were made wherever possible to limit any inadvertent bias.

While these methodological issues should not be ignored, there are also significant advantages to conducting semi-structured interviews. The process of compiling a list of questions to ask each interviewee ensured that each interview broadly followed a similar thread of discussion, directing the overarching types of issues raised in the interviews. This provided a degree of consistency in the questions asked across all interviews. At the same time, interviewees were afforded a degree of freedom and the opportunity to express their own personal opinions. The questions were used as a starting point, and although each interviewee was asked the same set of questions, the direction of the interview was not constrained by this predetermined 'list'. The interviews were conducted more as conversations, and interviewees were encouraged to elaborate as they saw fit. This freedom to digress from the pre-set list of questions also provided the opportunity to ask follow-up questions when it seemed appropriate.

Generally speaking, the interviews were used to establish:

- ◆ Whether the individuals actively sought to intervene in matters linked to the UK constitution.
- ◆ Whether interviewees perceived themselves as belonging to a group of Peers involved in constitutional matters, and if so, how far this group was working together, collectively and consciously, with a shared set of objectives, or was a more ad hoc and diffuse group of individuals.
- ◆ What the individuals were trying to achieve from a constitutional perspective.
- ◆ What means (both formal and informal) these Peers identified as available to them for making interventions in constitutional areas, and whether they felt these forums were facilitating effective engagement, providing a way of prompting constructive debates and inciting effective change.

Quantitative Results

The compilation of lists which made up the preliminary research for this paper revealed a broad overview of the characteristics and demographics of Peers with a self-aware and active interest in constitutional issues. The following speculations are based on this basic quantitative analysis of the members of the House of Lords who were flagged up in one or more of the following categories: a past member of the Constitution Committee; a present member of the Constitution Committee; a member of the Constitutional Reform Bill; a member who has mentioned the term 'constitution' or 'rule of law' in any form of public, documented debates in the House of Lords more than twenty times throughout their Peerage. These preliminary searches resulted in a final cohort of 55 Peers. At just under seven per cent of the total membership of the second chamber, the proportion of Peers identified as having an active interest in the UK constitution is surprisingly low. If – as it is hoped this paper demonstrates – the House of Lords does play an important constitutional role, this has significant implications for the legitimacy and effectiveness of the constitutional work undertaken in the House.

The group of 55 Peers offers surface-level insight into the types of members typically involved in constitutional matters. However, it serves as a useful starting point, and helpfully indicates the common points of entry into constitutional debates, and likely motivations for involvement in this area.

Age

To begin with, the mean age (i.e.: calculated by dividing the total sum by the number of Peers) came to 72.9. Members of the House of Lords participating in constitutional oversight are thus part of an older demographic. This is marginally higher than the average age of members of the House of Lords, which stood at 69 in 2012.²¹

Gender

Twelve of the 55 Peers identified in the compilation of lists were female. The majority of Peers interested in the UK constitution, as defined using this methodology, are therefore male. However, if one considers that at the end of the last session in 2016, only 25.5 per cent (207 women of the 812 total number of Peers) were members of the House of Lords, the number of women identified in the compilation of lists is not remarkably low.²² Female members make up 21.8 per cent of the 55 identified in this sample, suggesting that although more male than female Peers are likely to be involved in constitutional debates, the UK constitution is not a 'masculine' sphere of interest.

Political parties

Of the 55 Peers identified, 38 per cent were Labour Peers (21 members), 30.9 per cent were Conservative Peers, 18.2 per cent were Liberal Democrats, and 12.7 per cent were Crossbenchers. Taken at face value, it would thus appear that an individual

21 F. McGuinness, 'Standard Note: SN/SG/3900: House of Lords Statistics', London: House of Commons Library, 2012, p4.

22 <http://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/>; McGuinness, 'Standard Note: SN/SG/3900: House of Lords Statistics', p3.

member of the House of Lords interested in the UK constitution is more likely to be a member of the Labour Party than any other political party. However, there are methodological issues with these statistics, and those percentages do not necessarily provide an accurate reflection of the political orientation of Peers interested in constitutional matters.

The inclusion of past and present members of the Constitution Committee undermines the accuracy of these results, due to the formal process of selection. There are restrictions and stipulations in place which determine the membership of select committees in the House of Lords. Currently, House of Lords select committees have a fixed number of Peers from each political party. Each select committee is required to have four Peers from the Labour Party and Conservative Party, two from the Liberal Democrats, two Crossbenchers, and occasionally one Bishop as a thirteenth member.

This selection process has implications for the influence of political parties on activities taking place within the House of Lords. For example, although the House of Lords is supposedly more impartial and non-partisan than the House of Commons, the need for a specific number of members from each political party may result in an unknown degree of influence from party whips. Very little academic research has been conducted into the influence of the whips, particularly in relation to the Lords, but it would be unsurprising if party whips have some sort of say into the types of Peers who become members of select committees. This is merely speculative, although irrespective of the party political influence in House of Lords committees, this selection process undoubtedly plays a part in determining who becomes constitutional guardians.

Nevertheless, however selected, members of the Constitution Committee are important to the constitutional guardianship function of the Lords. It is interesting to compare the political parties of the 55 Peers identified in this research, to the overall percentages of members of the House of Lords. Conservative Peers make up 30.5 per cent of the total members of the second chamber, and almost an identical percentage of the 55 Peers sampled were Conservative Peers, at 30.9 per cent. In comparison, 38 per cent of those involved in constitutional debates were members of the Labour Party. This is significantly higher than the number of Labour Peers in the House of Lords overall, who make up under a third of the second chamber, at 26.1 per cent. This suggests that there may be a disproportionate interest in the UK constitution amongst members of the Labour Party.²³

Profession

The results of the quantitative research indicated that members who participate in constitutional debates enter the House of Lords from a wide array of different professions. This being said, the sample did reveal some broad themes that are worth noting. Ten of the 55 Peers identified had experience in either central or local government, working as civil servants, as Members of Parliament in the House of Commons (and possibly ministers) before entering the House of Lords, or for local councils (as local councillors and as council officials).

23 Conservative – 248/812 = 30.5%; Labour – 212/812 = 26.1%; LD – 108/812 = 13.3%; Crossbench – 178/812 = 21.9% [all based on stats from <http://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/>, which excludes ineligible members. The information on this page is updated daily when the House of Lords is in session, and at least weekly during recess].

A noticeable number of the 55 Peers had legal backgrounds. Almost a third of the sample (29 per cent) had some sort of legal expertise, with thirteen members experienced as barristers and ten Peers being QCs. The high proportion of Peers approaching constitutional issues from a legal perspective is unsurprising. Experience in this area provides Peers with a particular understanding of the unique constitutional set-up in the UK, and it could be argued that Peers with legal backgrounds may be more likely to become involved in constitutional debates – and feel more confident in their contributions – than those without any legal expertise. The significant number of members entering constitutional debates from a legal perspective also reinforces the frequently-rehearsed premise that the House of Lords is unique in providing a space for individuals with a range of notable expertise.

Areas of interest

While some peers participated in a variety of different debates that spanned a wide range of constitutionally-significant topics, others focused exclusively on one particular subject-specific issue. Issues surrounding the current governance specifically of Scotland motivated eight of the 55 Peers examined to mention the UK constitution in House of Lords debates, while nine commented on the UK constitution in the context of devolution generally. Another popular way of approaching the constitution was from the perspective of an overarching interest in human rights.

Although the quantitative research indicated that some constitutional issues are more likely than others to motivate Peers to enter debates on the constitution, the results suggested that Peers who participate come from a relatively diverse range of backgrounds.

Qualitative Results

Interviews were conducted with fifteen Peers from across the political spectrum to offer a more qualitative insight into the constitutional work undertaken in the House of Lords. The semi-structured conversations with this select – but diverse – group of Peers provided first-hand, personal accounts of the ways in which members of the second chamber: consider the UK constitution; conceptualise the constitutional role of the House of Lords; view their own personal part in the supposed constitutional guardianship function; and how they go about engaging in constitutional issues. The following discussion is based exclusively on the results of the interviews. To ensure that the oral evidence remained at the fore, efforts were made to avoid including contextual background knowledge and inferences in this section.

Constitutional guardianship role

All of the interviewees supported the premise that the House of Lords has a constitutional role. However, responses varied in relation to the ways in which Peers interpret this responsibility, the ways in which it should be played out in theory, and the ways in which it is played out in practice.

Respondents approaching the topic of the constitution from an academic or professional capacity were more likely to cite historical precedence for constitutional oversight in the House of Lords. A few interviewees referred to the Salisbury Doctrine.

They argued that the House of Lords plays a long-standing part in the defence of the constitution; ensuring that the government “doesn’t encroach on the rights of the people”, and “mobilising forces” should a constitutional issue arise. To Peers who are more acutely aware of the history of the UK constitution, then, the House of Lords has always played some sort of role in the oversight of constitutional conventions. They maintained that although the work of the second chamber had naturally shifted over the last few centuries, it continues to play a part in the process of legislating and – by extension – the UK constitution.

Several noted that the absence of a written constitution in the UK, and resulting constitutional ambiguity, has elevated the need for a guardianship role to be performed. International comparisons were made to demonstrate that while countries with written constitutions have “something set in stone to fall back on,” the UK has been forced to rely upon a series of vital “judgements, checks, and balances” to be carried out by the House of Lords.

Significantly, the interviews indicated that there are noticeable differences in conceptualisations of the constitutional role of the House of Lords. It was possible to divide the interpretations of a ‘constitutional issue’ given by respondents into two ‘groups’. Respondents might refer to *one or other or both* types of conceptions in the interviews. In fact, one interviewee – a current member of the Delegated Powers Committee, whose previous career involved a direct role in the operation of constitutional processes – independently highlighted these two schools of thought explicitly in their description of the guardianship role of the second chamber.

To a number of respondents, the House’s constitutional function relates to the legislative scrutiny of specific often ‘overtly’ constitutional issues – such as devolution and voting

systems. Significantly, for some of the Peers who supported this interpretation, there was an underlying pre-occupation with the future position of the second chamber itself. To a few interviewees, the constitutional work undertaken by the Lords is needed to limit reforms on the powers of the second chamber, and preserve what they see as its valuable core features.

For other respondents, the Lords is seen more as a component *within* the constitution, allotted a specific constitutional role within the legislative process. Following this interpretation, the unique position of the second chamber in the structural make-up of the UK constitution renders *all* work undertaken in the House of Lords in some way ‘constitutional’. The process of discussion, debate, and scrutiny of Bills passed on from the House of Commons is taken as a form of constitutional responsibility; it plays a part in the formal legislative process in the UK parliamentary system, and thus, contributes to the guardianship of the UK constitution.

Nevertheless, it was possible to extract a more general, overarching consensus from the interviewees on the nature of the constitutional role undertaken by the House. When asked to describe the fundamental, basic constitutional role of the second chamber, most answered that the House of Lords is responsible for prompting the House of Commons to “think again”. A number of respondents mentioned the recent amendment to the Immigration Bill (concerning the relocation to the UK of unaccompanied minors and refugees who have reached the European Union) as an example of a successful intervention which forced the government to “think again”. The recent amendments to the Trade Unions Bill were also highlighted as examples of constitutional ‘success’. Interviewees attributed the differences in the final model of the Bill to the scrutiny and suggestions made by the House of Lords, comparing it to the original Bill that

initially passed through the House of Commons. One respondent utilised this example to suggest that the constitutional role of the House of Lords is not necessarily to undermine decisions made by government, nor to put forward an outright rejection of a legislative proposal. Instead, they argued that the House of Lords operates by offering an additional stage of scrutiny, that may result in encouraging the government to “re-think”. When asked what ‘success’ in this role looks like, they responded with “to get the government to think again on the issue, and possibly bank a good concession”.

Despite the overarching “think again” consensus, the majority of respondents were unable to pinpoint exactly what ‘success’ in the Lords’ constitutional role might look like, claiming that the ambiguous and unofficial nature of the responsibility makes its contributions “very hard to measure”. The reasons given for these difficulties in measuring constitutional effectiveness provide significant insight into how Peers typically perceive the role of the House, and what it is trying to achieve. For instance, it was suggested that ‘success’ in constitutional oversight isn’t always obvious or recognisable, in part because if the Lords are successful in encouraging the government to “think again”, resulting changes would be performed outside of the House of Lords. Amendments to legislation are either conducted back in the House of Commons, or they occur outside of the public eye in informal meetings and ‘behind the scenes’ discussions amongst Ministers and Peers. For another respondent – a past member of the Constitution Committee – the constitutional role of the second chamber extends beyond a mere “think again” result, and ‘success’ thus comes in the form of inciting effective legislative change, in keeping with the second chambers’ recommendations.

Significantly, although all of the respondents supported the premise that the House of Lords plays a unique role in the

oversight of the UK constitution, a few were wary of the phrase 'constitutional guardianship'. One of the interviewees went as far as to suggest that the term 'guardianship' is a florid description that exaggerates the constitutional role of the second chamber. Indeed, several interviewees had reservations about the term 'guardianship', suggesting that it implied that the role is in some way 'protective', there to prevent change or progress. Instead, they suggested that the term 'oversight' better reflects the role of the House of Lords in providing constitutional scrutiny. Respondents also intimated that there is a greater degree of fluidity, heterogeneity, and spontaneity to the constitutional work undertaken both formally and informally in the House of Lords that is not adequately reflected in the term 'guardianship'.

Despite discrepancies in semantics and understandings, all respondents were unanimous in their belief that there would be a noticeable gap in the oversight of the constitution if the House of Lords didn't perform its role. One Labour Peer made an interesting comparison with the system of governance in Scotland, which currently does not have a second chamber. They argued that there is noticeable support for the introduction of a second chamber in Scotland, which would be able to perform some kind of pre-legislative scrutiny – "checks on the constitution" – which is currently not undertaken in any form. Several respondents also raised concerns about the idea of this constitutional scrutiny role being performed by an outside body (the example of the Supreme Court was given). They held that it would be unlikely for pre- and post-legislative scrutiny to be undertaken with the current level of flexibility in response to unwritten conventions that is currently afforded by the House of Lords.

Overall, it is possible to conclude that members of the House of Lords support the premise that the House of Lords is responsible for undertaking constitutional oversight. This point

is strengthened by the fact that the sample of 'non-constitutional' Peers – those who were not identified in the preliminary searches, and did not seem to have any formal 'interest' or 'involvement' in constitutional work undertaken in the House of Lords – also reinforced the constitutional part played by the House.

Definition of a 'constitutional issue' – “you know one when you see one”

Conceptions of the UK constitution and the role of the House of Lords in the oversight of these unwritten conventions are fluid and personal. Interviewees approached the topic of the UK constitution from a variety of different and individual standpoints, and there are thus numerous angles and entry points to constitutional debates taking place both within and outside the House of Lords. While some of the respondents acknowledged that their colleagues approach constitutional issues from different perspectives, others seemed unaware that their conceptions of the UK constitution have been influenced by personal interest, often linked to a particular issue or topic. For instance, those who have previously sat in the House of Commons as Members of Parliament before entering the House of Lords were particularly aware of the respective constitutional roles of both Houses, and the potential constitutional implications of their work. They were also more acutely aware of the differences between the two Houses, most notably in relation to responsibilities in constitutional oversight.

The question on the definition of a 'constitutional issue' produced a wide range of responses. Only one interviewee (who had been involved in the production of the report) referred to the official definition of 'constitutional issue' provided by the Constitution Committee in its first report, which referred to the two 'P's test of principal and principle. For the majority of respondents, a

constitutional issue is taken to mean something that “affects the way government manages its business”, whether this is in relation to its ability to “reflect the voice of the people”, “the functioning and make up of either Houses”, or the way in which “governance is distributed across the nation”.

Despite a range of different individual definitions of a ‘constitutional issue’, most of the respondents identified a few topics that they deemed to have overt constitutional significance. In particular, devolution, reforms to the House of Lords, and voting systems were frequently highlighted as ‘obvious’ matters of the constitution.

One interviewee suggested that while there is a broad consensus on the general constitutional conventions which inform the work undertaken in the second chamber, disagreements lie in the interpretation and implementation of these unwritten conventions. They argued that Peers recognise the parts played by both Houses in the scrutiny of legislation and oversight of the actions of the government, but are less united in their understanding of how these roles are followed through in practice, and the interaction between the two Houses. For this particular Peer, constitutional matters are issues concerning “the role of the respective institutions, the actions of the government, and how the two Houses fulfil their roles in relation to legislation and the management of government”.

Another respondent complained of a lack of debates about the devolved countries (Scotland, Wales, and Northern Ireland) and a significant gap in the second chamber’s proceedings. This – alongside concerns that there is a distinct lack of geographical diversity amongst Peers – raises a question of legitimacy. It was noted by two of the interviewees that the overwhelming majority of Peers live in London, or nearby in the South East of

England. If one accepts the conclusions of this research that the House of Lords plays a significant part in the oversight of the UK constitution, questions must now be raised about how this role is played out, and the extent to which it is legitimate, if the Peers involved in the process are not representative.

Discussions with House of Lords select committee staff also revealed that there are occasionally differences in the legal and non-legal conceptions of the UK constitution. Differences between members of the Constitution Committee, for example, occasionally arise between those who are approaching a constitutional issue from a legal perspective, and those who have expertise in a different field. Significantly, conceptual discrepancies can also occur amongst legal practitioners, dependent on the type of law practised, and the range of legal expertise.

Interestingly, one past participant of the Constitution Committee intimated that individual conceptions of the UK constitution are occasionally sculpted and re-configured to push particular issues forward onto the parliamentary agenda. They hinted that members of the House have been known to present policy issues as constitutional matters to create a sense of urgency, in the hope either to encourage the government to prioritise the case in point, or to detract from the policy implications of the matter. In the words of the respondent, a constitutional issue is “a good stick to beat people with”. They cited the recent Tax Credits case to illustrate this point, suggesting that some members of the House had augmented the constitutional implications of the debate (or at least intentionally played the “constitutional card”), as a means of drawing attention away from significant and problematic policy issues.

Unsurprisingly, in the absence of a written constitution, there is no single way of defining the term 'constitution'. Individual conceptualisations of a 'constitutional issue' are inextricably linked to a range of different variants; their understandings are moulded and shaped by personal experience and prior conceptions of the role of the parliamentary system. There is thus no single way of interpreting the constitutional role of the House of Lords.

Characteristics of the House of Lords

The majority of interviewees highlighted a number of specific qualities of the second chamber that make the House of Lords particularly well-suited to performing some sort of constitutional role.

Expertise

Peers claimed that the second chamber offers unique breadth and range in expertise and knowledge, lending itself to a role in the oversight of the UK constitution. This was particularly evident in the interviews conducted with respondents who had not been recognised in the preliminary searches as having any explicit involvement in the constitution. One crossbench Peer saw their primary role as a Peer acting as a representative of their field of expertise, applying knowledge to relevant debates and bills considered by the House. They argued that the work of a Peer is first and foremost about questioning; utilising existing knowledge to consider what advice the government might wish to have in that specific field. As part of their efforts to fulfil their individual role as an advisor and expert – in this case, in the Middle East and Iranian law – they seek out Ministers involved in specific legislative proposals *before* anything is tabled. Their work in the oversight of relevant legislative discussions is played out on

an informal level, in “quiet and discreet chats in the corridors”, occasionally culminating in an informal meeting with Ministers in the House of Commons. This illustrates the use of *informal* networks both amongst Peers, but also between civil servants, Ministers, and Members of Parliament.

Significantly, although the overwhelming majority of respondents supported the premise that individual expertise plays a part in constitutional oversight, it is worth noting that one respondent remained less convinced. A notable exception to the rest of the cohort, they suggested that the “House of Lords actually doesn’t have the range of expertise it claims to have”, but rather “relies on *old* expertise in fields of interest that have changed significantly since Peers were at the forefront of their respective fields”.

Non-partisan nature of the second chamber

Respondents also suggested that the constitutional role of the House has been helped by a noticeable avoidance of partisan politics, and non-partisan collaboration. Several of the interviewees highlighted this as a significant distinction between the two Houses. There is a general understanding that debates taking place in the House of Lords revolve around the need to establish non-partisan *consensus*. Interviewees claimed for instance that it is very rare for members on any of the House of Lords select committees to divide on party lines (with the exception of the recent Trade Union Bill 2015–16).

However, those who have had an active involvement in party politics were more likely to challenge this assertion. In fact, three of the respondents claimed that there is a “definite party political dimension to the House of Lords”, with one intimating that “even crossbenchers often have some form of political affiliation influencing their ideas, although they would not care to admit

it". They went further to argue that "party politics undoubtedly informs constitutional debates in the second chamber", noting that Labour Peers had had a particular interest in the recent debates about hereditary Peers.

Indeed, several of the interviewees argued that the House of Lords has become increasingly partisan over the last ten years or so. They maintained that this rise in party politics threatens to undermine the effectiveness of the House of Lords as a constitutional scrutiny body. If one accepts the notion that the second chamber is becoming more partisan – with the Executive "electing to the Lords through the backdoor to play another political numbers games" (in the words of one crossbench Peer) – the current constitutional role of the House of Lords is undoubtedly being compromised. Two respondents contextualised this historically, claiming it was first suggested in the early seventeenth century that the House of Lords was the only body deemed fit to perform a constitutional function, as the more 'depoliticised' and 'non-partisan' of the two chambers. These claims undermine the premise that the House of Lords has a legitimate part to play in constitutional oversight.

Crossbenchers

Several respondents argued that the significant body of crossbenchers makes the House of Lords particularly well-suited to the oversight of constitutional issues, giving the House an "extra edge in its legitimacy of constitutional oversight". They suggested that support of crossbench Peers is central in ensuring that concerns are addressed and taken forward. In the words of one of the respondents, the presence of crossbenchers and cross-party interaction within the second chamber provides "dispassionate" analysis of legislative proposals.

One Liberal Democrat Peer, however, was more cautious in their assessment. Although they concurred that the presence of crossbenchers undoubtedly contributes to the effectiveness of the House of Lords in constitutional oversight, they suggested that in recent years it has been possible to trace patterns in voting amongst crossbench Peers. One should not necessarily assume, then, that crossbenchers can be relied upon to provide an impartial, non-partisan approach to their work in the second chamber.

Recent developments

Respondents referred to a number of recent developments in the House of Lords thought to have had a significant – and primarily negative – impact on its ability to perform constitutional oversight.

Size of the second chamber

Several respondents raised concerns over the recent increase in the number of Peers entering the House of Lords, arguing that this has had significant implications for constitutional work undertaken in the House. The issue of size and the current number of members is not, of course, a constitutionally-specific concern and has doubtless affected the work of the second chamber in a multiplicity of different policy areas. However, a significant number of respondents mentioned it, with one Labour Peer suggesting that it is the “main barrier preventing Peers from actively contributing to constitutional debates”. Interviewees were clear that the rise in the number of Peers has had a knock-on effect on the probability of individual Peers being chosen in the ballot selection process for putting forward oral questions to the House. The likelihood of individual Peers being successful in proposals for the selection of topics for the sessional ad hoc select committees has also diminished.

For Peers wishing to speak in debates, the sheer number of Peers participating has led to a noticeable reduction in the amount of time allocated for each speaker, in some cases as little as four minutes in popular debates. Attendees are also less likely to be able to respond to speeches and questions put forward by other Peers. The interviewees were concerned that oral responses to questions now “end up in ‘a loudest voice wins’ scenario”, with the most confident Peers “simply getting up and shouting”. This has also meant that Peers who have had experience debating as Members of Parliament in the House of Commons have a significant advantage, which has grown as a direct result of the size of the House. In turn, this has clear implications for the involvement of individual Peers wishing to participate in the oversight of the constitution.

Political party representation

The interviews also revealed that many Peers believe that current shifts and changes in the membership of both Houses have created a unique historic conjuncture for the House of Lords. Most significant is the current balance in political party representation between the two Houses of Parliament, which shifted dramatically in the 2015 General Election.

It is significant that the Conservative government in office does not have a majority of Conservative Peers in the House of Lords. One crossbench Peer – and a current member of the Constitution Committee – was particularly concerned by the current political party representation in the House of Lords. Although other Peers mentioned the arithmetic of the second chamber, and the impact this has arguably had on the nature of debates, they were the only interviewee to frame these concerns as a legitimacy issue.

There are currently significant differences between the number of political party representatives in the House of Commons and the distribution of representatives in the House of Lords. The example of the number of Liberal Democrats is commonly cited. Its percentage presence in the Lords far exceeds that in the Commons. Similarly, although the Scottish National Party (SNP) has 56 Members of Parliament, they are not represented in the House of Lords. Admittedly, the SNP is an exceptional example, with members refusing to recognise the legitimacy of the House of Lords (this in itself, raises a more general legitimacy issue about the ability of the second chamber to effectively perform a constitutional guardianship role).

A further problem noted in interviews was the failure to provide representation for some parties in the Lords (or Commons) that reflects their popularity as measured in votes cast at the General Election. Despite winning a significant percentage share of the vote (13%) in the 2015 General Election, the UK Independence Party, which has just one MP, does not have any representation in the House of Lords. The Green Party is in a similar position. Thus a case could be made that, while the Commons is disproportionate, the Lords suffers from this defect even more severely. The lack of representation in these examples has arisen from very different circumstances, but they do nevertheless demonstrate the issue of representation in the second chamber. The lack of representative political party presence undermines the legitimacy and effectiveness of the House of Lords in its role as a 'constitution guardian'.

A number of the interviewees – Labour Peers in particular – specifically mentioned the large number of Liberal Democrat Peers currently in the House of Lords, implying that this has had constitutional implications. These respondents argued that the unprecedented number of Liberal Democrat Peers in the House

of Lords, coupled with relatively few Liberal Democrats seated as Members of Parliament in the House of Commons since 2015, has meant that the main political work of the Liberal Democrat Party has subsequently taken place in the House of Lords. This, in turn, has arguably led to a noticeable increase in the number of fatal motions put forward by the second chamber.

They also criticised this reliance on fatal motions, arguing that it often removes the emphasis on the policy of an issue, and instead projects it as a constitutional matter. One example given was the proposed amendments to the Tax Credits system in 2015. Interestingly, one of the Labour Peers also implied that this has had a knock-on effect on the other political parties, forcing Labour Peers to vote “in particular ways, in the hope that the Liberal Democrats won’t be successful in affecting the votes”. This supports the premise that the House of Lords has become increasingly ‘political’ and “partisan” in recent years, challenging the aforementioned idea that the House of Lords has a non-partisan approach to its work.

These arguments are contentious and were not endorsed by all respondents – although a surprising number of interviewees did support the premise that the number of Liberal Democrat Peers has had an impact on the recent rise in fatal motions being proposed. The Liberal Democrat Peers who were involved in the research attributed the number of rejections by the House of Lords to more general shifts in the balance of political party power. These respondents maintained that the current situation owes far more to the overall imbalance of political party representation in the House of Lords – and the resulting lack of Conservative majority in the House of Lords – than to one particular individual political party. One Liberal Democrat Peer suggested that crossbench Peers have been far more instrumental, citing the recent Housing and Planning Bill as an example of the

influence of individual crossbench Peers in steering discussions and votes across the House.

Quality of legislative scrutiny performed by the House of Commons

Several Peers were concerned by what they perceive to be a lack of sufficient legislative scrutiny performed by the House of Commons. They claimed that the current legislative procedures undertaken in the House of Commons produce bills that are “completely unreadable and inaccessible”, with time limits and public demands for high volume of bills to be passed leading to Parliament “churning them out”. One Conservative Peer argued that the House of Commons has become a “legislation factory” in recent years, focusing on the number of bills put forward, without giving adequate scrutiny or time to each legislative bill. Another interviewee described the current House of Commons as a “law-making machine”.

According to these respondents, then, the House of Lords plays a vital role in rectifying this, providing much-needed expertise and attention to detail, although they were clear that the existing system of “starting with something rubbish and trying to make it less rubbish” is still far from ideal. In this context, the role of the House of Lords in the scrutiny of legislation has become increasingly important in recent years.

One crossbench Peer was also concerned by an alleged shift in power balance in favour of the executive. They argued that the extended power of the executive, demonstrated in its ability to oversee the appointment of the second chamber, has led to an increasing obligation on the House of Lords to ensure that the conventions of the UK constitution are upheld. The same Peer also mentioned the use of Henry VIII clauses by the House of

Commons as a worrying trend that – in their opinion – has elevated the need for the House of Lords to be more assertive in legislative scrutiny. They highlighted issues with one of the clauses in the recent Childcare Bill, suggesting that the House of Commons has all too frequently approved legislation that affords Ministers and the executive with too much power. The supposed outcome is Bills which are, to quote, “blank sheets of papers”, with underlying policy issues unresolved, and appointments of responsibilities left to individual Ministers.

More generally, one respondent spoke of growing concerns allegedly circulating amongst fellow Peers that there has been a “tampering” with the longstanding constitutional role carried out by the House of Lords. With reference to the traditional ‘tri-partite’ model, they claimed that constitutional transformations over the last decade or so had unbalanced the constitution and jeopardised the success effectiveness of constitutional oversight. Changes they referred to in this context included the removal of most hereditary Peers (under the *House of Lords Act 1999*); and the reform of the office of Lord Chancellor and the establishment of the Supreme Court (both mandated under the *Constitutional Reform Act 2005*).

Substantive concerns were raised in the context of the Strathclyde Review – published by the government in December 2015 in response to the House of Lords’ passing of two amendments to a draft Statutory Instrument on the UK tax credits system. Almost half of the respondents mentioned the ‘Strathclyde issue’ as the primary current source of constitutional concern within the second chamber, a subject of debate amongst Peers seemingly irrespective of professional background, area of expertise or political party affiliation. Significantly, one respondent suggested that the ‘Strathclyde issue’ has encouraged greater consideration of the “character of the UK’s current legal procedures”, and

the degree to which “Bills have been well thought-through”. Using the example of the Children’s Bill, they noted that there has been a noticeable rise in interest in the state of the UK constitution amongst Peers who had previously not participated in constitutional discussions.

How this role is performed

Having established that the interviewees supported the premise that the House of Lords plays a part in the oversight of the UK constitution, Peers were asked to consider *how* this role is performed, *who* is responsible, and *what* are the routes taken when making constitutional contributions.

The research revealed a multitude of different routes utilised by Peers wishing to participate in constitutional debates both inside and outside the institutional structures in place in the House of Lords. Constitutional oversight undertaken in the second chamber can loosely be categorised, and there is a dual distinction between (i) formal and informal work, and (ii) collective and individual contributions. The formal mechanisms afforded to Peers – in the form of debates and House of Lords select committees – are often the first port of call for members wishing to intervene in constitutional matters. Yet all of the interviewees also referred to the informal networks of influence that play a part in the development of constitutional work in the House.

Although it is helpful to distinguish between the formal, informal, collective, and individual, these categories should only be used as guidelines. The research revealed that there is a multitude of different combinations of these types of engagement. The same Peer that chooses to raise a constitutional issue by submitting a question in a formal debate on human rights on one occasion, may opt to discuss their concerns about a proposed Bill on devolution

informally with a fellow member of the Campaign for an Effective Second Chamber before a weekly meeting. One interviewee – a member of the Delegated Powers Committee – underlined the fluidity of engagement with constitutional matters, arguing that the diversity and multiplicity of ideas and motivations makes it near-impossible to pinpoint how the exact role of the House of Lords is performed.

'Formal' Mechanisms

Constitution Committee

Unsurprisingly, the Constitution Committee was frequently cited by respondents as the most obvious example of a 'formal' means of constitutional oversight. There was a general consensus amongst all of the respondents that the Constitution Committee plays a fundamental role. The Committee is extremely well-regarded, with great weight attached to its work on the constitution, its choice in topics and consideration of constitutional issues, and its resulting reports. Interviewees were particularly impressed with the calibre of the membership of the Committee. Known for their own personal expertise and knowledge in this area, the breadth of experience offered by each member on the Committee inspires a confidence that the Committee can be relied upon to perform a proactive and reactive role in constitutional oversight.

The past and present members of the Constitution Committee interviewed for this paper concurred that the ongoing 'success' of the Committee can be attributed to a combination of significant factors. As with all select committees operating within the House, the cross-party nature of membership offers Peers a certain degree of assurance that matters will be handled fairly and objectively (as far as this is possible). Members of the Constitution Committee maintained that the Committee is particularly effective because

it is *non-partisan*. They argued that it is vital to the work of the Committee that it is perceived and acts as a non-partisan body, with members from all political parties, as well as a selection of crossbenchers. The influence and reputation of the Committee comes from this intentionally non-partisan approach. It is therefore important that the selection process of the members and the chairman results in a Committee that is united in its efforts to uphold these principles – regardless of individual members' political affiliations outside of the Committee.

Several Peers also highlighted the advantage of having a Committee that is a 'regular', 'permanent' fixture in the procedural infrastructure of the second chamber, allowing for frequent and reliable constitutional oversight to be performed by the House of Lords. As one of the fixed House of Lords standing committees, the Constitution Committee offers a reassuring degree of permanency and reliability, whilst its remit ensures that there is a fixed body which will automatically review any constitutional concerns that come to its attention.

Work undertaken by the Constitution Committee

In terms of its constitutional significance, interviewees frequently described the Constitution Committee as a constitutional "backstop"; a vehicle through which members can effectively investigate constitutional issues, scrutinise relevant legislation, and produce detailed reports with dispassionate solutions. To quote one respondent, the Committee is viewed as a 'triggering mechanism'. The Committee works in either 'response' mode – reacting to proposed reforms and legislative bills put forward to the House of Lords – or in 'proactive' mode – pursuing constitutional issues that may become relevant to the House of Lords. The past and present members of the Committee interviewed for this paper were confident that it is successful in triggering government

consideration and response. Although the Committee's work does not always result in the specific government reaction that members were hoping for, they maintained that the Committee is nevertheless effective in eliciting a response of some kind.

The Constitution Committee works alongside other organisations and institutions in the oversight of the UK constitution. Interviewees who have had some involvement with the Constitution Committee all highlighted the significance of committee interaction, particularly with the Joint Committee on Human Rights. Communication with the various other committees in the House of Lords, House of Commons, and joint committees is usually initiated by clerks or chairs, and can take a number of different forms. Members from other committees are sometimes invited to attend the Constitution Committee's evidence sessions – on issues that are deemed particularly relevant – and the Chair of the Constitution Committee has also been asked on occasion to brief other committees and their members on issues of 'constitutional significance'. There can be several committees working on similar constitutional issues at any one time, all acting as vehicles for effective oversight. The Constitution Committee thus liaises with other committees simultaneously on a variety of different topics.

The Committee also interacts with organisations operating outside of the House of Lords. Organisations including the University College London Constitution Unit – mentioned by several interviewees – are called on for specific evidence, or asked to participate in a particular scoping enquiry. More informally, the outside 'experts' of a particular field are sometimes asked to join committee sessions and private meetings to run through possible topics for committee consideration, before being called later as formal witnesses. This interaction with outside organisations offers yet another example of the blurring of the *formal* and *informal* boundaries in constitutional oversight.

Interaction with non-members

The qualitative research also revealed that a significant number of Peers rely upon the Committee to perform the role of constitutional oversight for the whole of the second chamber. Amongst the few Peers who admitted to having no active interest in the UK constitution in particular, there was an assumption that any constitutional issues worth raising are addressed by the Committee. One crossbench Peer argued that although they were not aware of any *formal* interaction taking place between non-members and members, the Committee plays an important part in providing guidance to Peers who do not consider themselves to be experts in this area. They maintained that they often read the minutes and reports published by the Committee as a way of forming opinions on constitutional issues. Some Peers who are not directly involved in discussions about constitutional conventions look to the work of the Constitution Committee as a means of formulating their own viewpoint and understanding. In this respect, the Constitution Committee operates as the first port of call for the consideration of constitutional issues.

The Constitution Committee also offers Peers a point of entry into debates. However, while in theory interaction can take place between members and non-members of the Constitution Committee (in the form of evidence sessions and advisers), it would seem that Peers seeking to voice their concerns on a constitutional matter would not normally use the Committee as a formal means of entering debates. A number of the interviewees implied that the formal, structural procedures in place in the House of Lords select committee system dissuade non-members from participating in the Committee's debates ad hoc.

Only one respondent voiced specific criticisms about the conduct of the Committee. They intimated that there was a

feeling amongst some Peers that the expertise and calibre of both past and present members of the Constitution Committee has occasionally meant that the Committee has run the risk of being too staid and conservative in its approach to some topics. To illustrate this point, they referred to the 2008–2009 discussions on the Barnett Formula – the product of the (ad hoc) House of Lords Select Committee on the Barnett Formula. They suggested that proposals for change to the Barnett Formula that the ad hoc committee had advanced would not have been made, if the Formula had been considered by the Constitution Committee, rather than a sessional committee.

Select committees

It was clear from the interviews that the Constitution Committee is by no means the only select committee or formal mechanism utilised by Peers wishing to participate in constitutional work. The select committee system in general in the House of Lords provides an effective point of entry into constitutional debates; a focal point for individual Peers interested in the constitution.

Select committees offer Peers the chance to become actively involved and engaged in numerous debates concerning topical policy areas, and the majority of the respondents were confident that the House of Lords select committee system provides an effective means of addressing particular issues and informing government decisions. Respondents who have themselves been members of a number of select committees in the House were particularly keen to highlight the existing role of committees in constitutional oversight. However, there was a general consensus amongst interviewees that select committees are instrumental in holding the government to account on particular policy areas – and in this respect contribute to the constitutional work of the House.

A significant number of interviewees also mentioned the work of the Delegated Powers Committee – although it was not referred to by all of the respondents, and was not revered for its contributions to constitutional work to the same extent as the Constitution Committee. Set up in 1992, the Delegated Powers Committee reviews all relevant Bills as they are sent to the House of Lords, examining the extent to which they propose to confer powers to government ministers. More specifically, its remit in relation to delegated powers is “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny”. It is not surprising, thus, that the Delegated Powers Committee was mentioned by the respondents as an instrumental platform that undertakes constitutional work in the House of Lords.

The work of the Committee primarily culminates in the form of reports, recommendations, responses to drafts of Legislative Reform Orders (LROs), and the examination of documents and draft orders laid before Parliament. The Committee therefore provides its twelve members with a selection of formal means of participating in constitutional debates, mediating discussions about the constitutional roles of Parliament, on the one hand, and the executive, on the other, ultimately influencing the legislative process which forms the basis of the UK constitution. The Committee serves as another example of the way in which the select committee system plays a part in the Lords’ constitutional work.

The role of the Delegated Powers Committee has been particularly instrumental in response to the Strathclyde Review, December 2015. Both the Delegated Powers Committee and the Constitution Committee have been at the fore of the relevant constitutional debates and discussions taking place within the second chamber.

Both committees published reports in the response to the Strathclyde proposals, criticising the recommendations to strip the second chamber of its power to “veto statutory instruments” in certain situations. As the Constitution Unit’s March 2016 paper entitled ‘Parliament, government and secondary legislation: Lords select committees respond to the Strathclyde Review’ noted, Peers were able to utilise their powers as members of the aforementioned House of Lords select committees to call for the ‘pause – if not stop – button to be pressed’ on what the Constitution Committee described as a ‘constitutional crisis’.

The current House of Lords Select Committee on the European Union also illustrates how the formal select committee system offered to members of the House of Lords can be utilised to oversee constitutional issues, through a subject-specific select committee. Our respondents described how members of the Select Committee on the European Union have considered a range of matters relating to the UK constitution, most specifically relating to human rights.

The House of Lords Select Committee on the Constitutional Reform Bill of 2004 provides another example of the significant role played by committees. This select committee was set up specifically to scrutinise the Bill and was given the power to amend the legislation. This privilege had not been provided since 1919. It was provided an exceptional case for the House of Lords, and has not been frequently resorted to. However, it was cited in interviews as an example of how committees can be used (at least in theory) as an effective means for Peers to intervene in constitutional issues.

Ad hoc select committees

Ad hoc select committees in the House of Lords provide Peers with another opportunity to put forward suggestions for discussions, and make contributions in particular policy areas, which have the potential to influence decisions taken by the executive. This system offers Peers a more flexible and accessible means of bringing together informal groups of Peers interested in a particular constitutional issue. This a good example of how *formal* procedures put in place in the second chamber are utilised and play an important role in constitutional oversight.

Members of the House are invited to put forward suggestions for topics, which are then considered by the Liaison Committee. The Liaison Committee selects five ad hoc committees each session, and each committee runs for a single session. They are therefore often more topical and reactive than the permanent select committees, enabling Peers to discuss relevant and immediate issues, and to offer the government swift recommendations. Theoretically, the selection process provides an objective route for individual Peers wishing to instigate further debate in a particular area of interest. The ad hoc committee system is thus one of the various routes through which Peers can shape the way in which constitutional issues are discussed.

In general, the interviewees offered positive accounts of the ad hoc committee system, confident that the cross-party membership of the Liaison Committee (which includes several crossbenchers) ensures that the selection process is fair. One of the respondents was less convinced that the decisions made by the Liaison Committee are wholly non-partisan. They intimated that party whips have occasionally held "discreet influence over the topics chosen by the Liaison Committee" – although they were careful to note that this does not mean the Committee should be described

as “overtly partisan”. According to the respondent, unspoken conventions of the House of Lords have occasionally resulted in “party trade-offs” in the selection of ad hoc select committees and the subsequent selection process for the chairmanship. However, this view contradicted the opinions of the rest of the respondents, and should thus be taken as a minority perspective.

Significantly, two respondents remarked that although it is theoretically possible for individual Peers to put forward suggestions for a new ad hoc committee independently, in reality this simply does not happen. They observed that there needs to be a certain baseline level of support for a particular topic, if it is to be taken seriously and selected by the Liaison Committee. Individual Peers would not submit a suggestion for such a committee without informally discussing it with other colleagues in the House. Without the support from other colleagues in the House, a committee would lack the personnel and dedication required to be successfully set up.

Despite these reservations, the second chamber’s unique ad hoc select committee system provides Peers with a viable means of addressing constitutional matters – even if this is a system which could be utilised to greater effect in this sphere of interest. The respondents singled out the immediacy of these committees, arguing that members were able to address topical and current issues in a way not necessarily afforded to members of the permanent select committees. The transience of the committees ensures that members are able to concentrate on one single topic, without having to juggle several lines of enquiry at once. In theory, if not always in practice, the ad hoc select committee system provides another formal means through which Peers can address constitutional matters. One former Chair of the Constitution Committee went as far as suggesting that the system is “one of the most important things that the House of Lords has developed over the last fifteen years”.

Two respondents went even further, by suggesting that these committees could play an even greater role in constitutional guardianship, specifically in relation to pre-legislative scrutiny. They argued that an extension of the pre-legislative scrutiny undertaken by the current ad hoc select committees would address what they perceive to be gaps in current pre-legislative scrutiny procedures.

Debates

Participation in the formal debates which take place in the second chamber is often the “first port of call” for Peers wishing to raise a particular constitutional issue and contribute to constitutional discussions.

Debates provide a means for all Peers, irrespective of background, expertise, political orientation, and professional experience, to raise constitutional matters. Several respondents referred to the current European Union Referendum as a topic which has inspired a diverse range of Peers who would not usually participate in constitutional debates, to actively contribute to constitutionally-specific discussions. One past member of the Constitution Committee referred to events at the time of the 2010 General Election as reinforcing the significance of debates as a “constitutional gateway”. They described how concerns about the operation of the electoral voting system at the time (in which a sizeable number of prospective voters queuing to cast their votes were turned away from the booths at the official 10pm cut-off point) got “everyone in the House involved in an indisputably constitutional debate”.

A significant number of interviewees – including several current members of the Constitution Committee – mentioned the House’s formal debate system as one of the main ways in

which members wishing to raise a constitutional concern would go about this. For some respondents, debates are “almost as effective as committees” in providing Peers with a platform for informing constitutional work. Interviewees also noted that the discussions that take place in the House, as part of the passage of legislative bills from the House of Commons, can often result in a wide range of Peers with different interests and expertise discussing a variety of policy areas that end up having significant constitutional implications. Peers who do not necessarily intend to participate in constitutional discussions might find themselves inadvertently contributing to the constitutional work of the second chamber, simply by raising a question, or responding to a colleague’s concerns.

Individuals

Formal mechanisms thus provide effective platforms for constitutional debates to take place in the second chamber, but they would be entirely redundant without the initiative of the Peers who utilise them. All of the interviewees agreed that individual Peers play an invaluable part in the oversight of the constitution. One respondent described the second chamber as a “self-starting House”, suggesting that unlike the House of Commons – where the actions of individual MPs are often governed by the party political system – members of the House of Lords have the ability to act far more independently. Peers who have missed out on being selected for the Constitution Committee or Delegated Powers Committee, for example, can still work separately and make valuable contributions to the constitutional work of the House.

The results of the interviews revealed that these formal mechanisms are just a few of the wide array of different forums, institutions, groups, and individuals operating in the House of Lords and

making invaluable contributions to constitutional work. With the exception of the majority of past and present members of the Constitution Committee – whose first port of call tends to be the Committee itself – the majority of respondents mentioned the formal mechanisms in conjunction with more informal forums utilised by members of the House. Indeed, they were keen to emphasise the flexibility and fluidity of the constitutional work undertaken in the second chamber. In order to gain realistic insight into the constitutional work carried out by the House of Lords, there must be a more thorough consideration of the relationships between the formal and informal, the individuals and the groups, than the existing literature currently provides.

The majority of the respondents were able to name a few key individuals who they thought are particularly well-known for their involvement in constitutional work. Given the esteemed reputation of the Constitution Committee, it is unsurprising that a number of past and present members of the Committee were given particular mentions (including several of those interviewed for this paper). Significantly, however, the interviews indicated that oversight of the constitution within the House of Lords is not confined to this select group of well-known individuals. While they undoubtedly play a central role in the constitutional role of the House of Lords – leading and instigating relevant debates within the chamber – one should not overlook contributions made by a variety of different types of Peers.

'Key players'

All of the respondents affirmed that there are several Peers in the House of Lords that are well-known amongst the majority of other Peers for their interest and involvement in constitutional matters. Typically, those known for their constitutional contributions both inside and outside the House of Lords have had some

level of involvement with the Constitution Committee. They have also typically entered the House of Lords with pre-existing constitutional knowledge, reinforced by backgrounds in the judicial and legal professions or academia. Several respondents acknowledged that former and current lawyers are able to “see their way through the maze” of the UK constitution (as one of the interviewees put it) whereas non-lawyers might find such issues more challenging. Thus although the second chamber provides space and opportunity for all members of the House to participate in constitutional debates – irrespective of expertise or professional backgrounds – there are certain individuals known within the Lords who are particularly influential in House of Lords’ engagement with the UK constitution.

The interviews also revealed that Peers often rely on these ‘key players’ to undertake the majority of constitutional work in the House of Lords. They identified several advantages to this form of ‘dependency’. Peers who would like to raise specific constitutional concerns know that there are a number of key figures they can converse with, usually in an informal capacity. Peers can approach these key figures knowing that the respect and esteem held for these individuals will most likely ensure any resulting interventions in debates on their behalf will be well-respected and addressed appropriately. However, should one of these individuals become absent from the House for whatever reason – if they are required to dedicate more time to their professional work outside of Parliament for instance – this would (and sometimes does) have a knock-on effect on the oversight of constitutional matters. Their absence may not have a *formal* impact on the constitutional role of the House of Lords, but it would undermine the effectiveness of the *informal* networks which work as a central feature of constitutional oversight.

Group of constitutional guardians

A central purpose of this research was to test the hypothesis that there is a relatively clearly defined group of Peers performing the 'constitutional guardianship' role on behalf of the House as a whole. Participants in this entity, if it existed, would be individually and collectively aware of their function and the nature of the group of which they were members.

Certainly, there are a number of Peers who are evidently particularly instrumental in constitutional matters – most notably the current members of the Constitution Committee. However, the qualitative research did not support the notion that there is a coherent, self-aware social group of Peers working as guardians of the UK constitution. Instead, it revealed that Peers who do respond to particular constitutional issues are more likely to work either as individuals, or to form a loose, informal group of cross-party individuals working towards a common goal. This undermines the premise that there is a specific and delineated group of members of the Lords working as 'constitutional guardians'.

However, one interview with a past Chair of the Constitution Committee referred to the existence an informal group of Peers – separate to the Committee itself – which has a shared interest in the constitution. The membership, nature, and role of this 'group' fluctuates and shifts according to particular constitutional priorities, individual agendas, and membership of the Committee itself. This is in part due to the changing membership of the Committee, and the competitive selection process for membership. The respondent was keen to point out that this 'informal group' includes both members and non-members of the Committee.

Several respondents suggested that whilst there is a fairly consistent select group of 'experts', "grey areas" in individual

understandings of a 'constitutional issue' lead to swathes of different individuals entering into constitutional debates. Indeed, the qualitative research revealed a level of fluidity in conceptions of constitutional issues; interviewees responded to the question in a variety of different ways, demonstrating that the term 'constitution' means different things to different Peers. This ambiguity in turn has consequences for any attempt to define a group of 'constitutional guardians'.

The numbers and types of these well-known Peers are also constantly shifting. Participation in constitutional matters is – to a large extent – personal and thus, involvement in constitutional discussions shifts according to the individual and the current selection of legislative proposals and policy discussions raised in either or both Houses. Peers enter constitutional debates from a wide array of different professional backgrounds, motivated by a variety of concerns. Entry into debates is not always necessarily constitutionally-motivated. A significant proportion of interventions are based on an issue-specific involvement in the constitution, a keenness to address topics such as human rights or devolution.

Constant shifts and fluctuations in the type of constitutional issues that are raised in the House of Lords also lead to changes in the types of Peers labelled as 'constitutional experts'. This continuously evolving and shifting group of individuals who engage with constitutional issues reflects the fluidity and heterogeneity of the individual Peers interested in constitutional matters, again, reaffirming that there are no obvious characteristics for those involved in constitutional debates. Although topics like devolution provide the entry point to constitutional discussions for some Peers, other policy areas like human rights, or even more specific legislation motivate others to enter relevant debates. Renewed interest in devolution and Scotland, for

example, recently prompted greater participation of devolution 'experts' in this pool of 'well-known' Peers with constitutional interests. There is thus *no single group of interested Peers*. Instead, it is perhaps more helpful to acknowledge a *shifting group of interested and engaged Peers*.

Role of Peers

Admittedly, there was a marked distinction in responses between Peers who have had an active interest in the UK constitution, and those who have not consciously sought to be involved in constitutional work. Interviewees who consciously declared themselves to have little or no interest and/or involvement in constitutional matters intimated that the majority of constitutional work was carried out by either members of the Constitution Committee, or individual Peers working within their field of expertise. In contrast, those with an active interest in the constitution cited a range of different individuals and formal and informal bodies, committees, and groups, that all work alongside each other in the oversight of the constitution.

However, when questioned further on the types of Peers who are in some way engaged with constitutional issues, the overwhelming majority of interviewees gave examples of the various ways in which Peers can – and do – make constitutional contributions. Interviewees noted, for instance, that well-known individuals involved in this area – most commonly past and present members of the Constitution Committee – frequently interact with non-members of the Committee on matters of the constitution. The qualitative interviews highlighted the significance of *informal* networks utilised by Peers interested in constitutional scrutiny. Several respondents claimed that they are frequently approached by colleagues as experts in their particular field of expertise. This reiterates the point made earlier in this

paper. Interviewees repeatedly referred to the impressive depth and width of knowledge and individual expertise as the main “selling point” of the House of Lords; a feature of the House that contributes to the success of constitutional oversight.

One interviewee who had previously chaired the Constitution Committee noted that its members were – and continue to be – approached by non-members of the Committees who are keen to discuss a constitutional issue. ‘Behind the scenes’ discussions also take place between committee members and Ministers. The interviews with Peers who have not had any conscious involvement in constitutional affairs noted that they are similarly approached by colleagues as experts in their own particular fields of interest. Informal interaction also extends beyond members of the House of Lords. Several interviewees referred to occasions when clerks and civil servants had sought their advice on a particular area of their expertise, “bumping into them to have an informal chat”.

In the main, interviewees referred to a sense of collective responsibility amongst their colleagues in the guardianship of the constitution. With the exception of one respondent – who admitted to being uninterested in and disengaged with ‘constitutional’ topics, actively avoiding participation in these areas – the research supports this premise. Despite approaching this role in ‘constitutional guardianship’ from a variety of different access points ranging from devolution to the European Union, the interviews indicated that the majority of Peers acknowledge and understand the importance of constitutional oversight.

There was a common belief amongst respondents that they personally contribute in some way to the oversight of the UK constitution. Several interviewees argued that regular attendance and participation in the formal procedures in the House of Lords is enough to constitute an inadvertent contribution of sorts.

Participation in debates – regardless of subject or policy matter –, formal and informal chats amongst colleagues, and an awareness of bills being discussed at committee stage, were all cited as part of the overall oversight of the UK constitution. This supports the idea that all work undertaken in the House of Lords can be loosely categorised as ‘constitutional’ work; the scrutiny of bills and legislative proposals plays a central part in the formation of legislation, and in turn, the make-up of the UK constitution.

Significantly, some of the interviewees made an interesting distinction between Peers who are *consciously* engaged in constitutional work, and others who are not aware of the indirect impact their work might be having on constitutional issues. It was suggested in several of the interviews that a large proportion of Peers have acted consciously as ‘constitutional guardians’, motivated to vote on a particular issue to “protect” or “uphold” a particular unwritten constitutional convention, instead of approaching the topic from a policy perspective. The approach to statutory instruments in the House of Lords was mentioned as a good example of this, including the votes in 2015 on the proposed changes in the Tax Credits system.

However, some of the respondents did not consider the constitutional implications of their active participation. In one case, a respondent referred to an instance in which they had voiced their opinions and suggestions publicly to the House on the Strathclyde Report. Yet they claimed later on in the same interview that they had not – and would not – raise a constitutional issue in the House of Lords. It is not unlikely that some Peers inadvertently participate in ‘constitutional’ discussions in a purely policy-driven capacity, without considering the constitutional implications of their work. The interviews thus revealed differences in the ways in which individual Peers perceive the part they personally play in the oversight of the constitution.

Access to constitutional work

A broad span of Peers may become involved in constitutional matters – consciously or otherwise – as part of their day-to-day work in the House. Furthermore, interviewees suggested that the House of Lords provides all of its members with ample opportunities to participate more proactively in constitutional work, should they so wish. In the main, the respondents did not perceive any barriers to Peers wishing to participate in constitutional debates. A member of the Delegated Powers Committee provided several examples of cases when Peers who had not previously engaged in debates relating to the constitution, suddenly participated to constitutional debates – in one instance – responding to a question raised by a ‘key player’ in the recent Housing and Planning Bill. To the majority of respondents, then, the House of Lords provides the formal infrastructure enabling all members of the second chamber to participate in debates, raising questions, and formally writing to the Constitution Committee.

This being said, several interviewees intimated that while there were no obvious formal or informal obstacles in place, Peers who do not have any former experience or interest in the constitution are very unlikely to utilise the routes available to them. For instance, while there is theoretically nothing preventing any member of the House from writing to the Constitution Committee or publicly putting forward a constitutional question in a debate, this seldom happens. Most Peers simply do not have the time or resources to be involved in this way. Instead, interviewees implied that Peers focus on their own areas of expertise, relying on the ‘well-known’ experts in the constitutional field for constitutional oversight.

One respondent suggested that in reality unspoken conventions might dissuade individual Peers from becoming involved. The interviewee referred to the weekly meetings of the Campaign for an

Effective Second Chamber, noting that there is one individual – a member of the House of Lords – who is well-known for standing up regularly to participate in discussions concerning the constitution. Unlike other members, however, this individual does not usually have support of the other members, and several members have expressed their surprise at the individual's interjections. The interviewee utilised this example to suggest that although there are no formal barriers to preventing members from participating in discussions, it is unusual for individual Peers to speak up on constitutional issues without the support of other colleagues. Unspoken conventions ensure that, for the most part, Peers will only involve themselves in discussions and debates if they are confident that they already have the support of at least a handful of colleagues.

One crossbench Peer admitted that while they consciously see themselves as having a personal interest in the oversight of the constitution, their self-perceived lack of particular expertise or credentials in this area means they are reluctant to publically participate in constitutional work. They argued that there are better positioned members of the House of Lords who are more qualified and prepared to make valuable contributions to the relevant debates. Instead, this crossbench Peer participates in more informal discussions as a member of the Campaign for an Effective Second Chamber, in order to raise constitutional concerns.

'Informal' Mechanisms

Informal Groups

With a variety of different Peers participating in constitutional work through a span of diverse forums, then, it is unsurprising that the research pointed to a multitude of both formal and informal groups of Peers currently operating within (and in some cases outside of) the House of Lords.

One such group is the Campaign for an Effective Second Chamber, which several of the respondents mentioned as their main point of access into constitutional debates and active participation in constitutional discussions. Taken from the group's written evidence to the Draft House of Lords Reform Bill, 'the Campaign for an Effective Second Chamber comprises almost two-hundred MPs and peers, drawn from, but not confined to, the three main parties as well as the cross-benches in the House of Lords. The group exists to make the case for reform of the House of Lords but is opposed to the Government's proposals for an elected second chamber [at the time the coalition then in office was in theory committed to an elected House of Lords].'

Several interviewees drew on their experiences as members of this group as a means of describing the current responsibilities of the House of Lords, and its role in scrutinising legislation. Their opposition to government proposals for an elected second chamber in the 2010–15 Parliament influenced their conceptions of the constitution and often provided an entry point into discussions about the constitution. In some cases, this resulted in a conflation of ideas. A few Peers took the constitutional role of the House of Lords as synonymous with the protection of the responsibilities of members of both Houses, and the current position of and relationships between the two Houses. While the status of the House of Lords is undoubtedly a first-order constitutional issue, this line of thought does reveal a particularly self-reflective outlook by some Peers, particularly if their primary concern in constitutional oversight relates to their own future positions and rights as members of the House of Lords.

Interviewees were clear that groups like this provide Peers who do not claim to have any 'expertise' or experience in this field of interest with regular and reliable access to information and debate. For a number of respondents, this group has been their

main point of call for all matters constitutional, acting as an effective way of convening both Peers and MPs. It also provides a means for outside organisations, – such as the UCL Constitution Unit – individual academics in the field, and other bodies to interact with the two Houses. Regular speeches from experts and leading figures on the constitution provide a platform for productive debates. Significantly, there are notable overlaps in the membership and leadership of this group, and past and present members of the Constitution Committee.

There are difficulties in categorising groups like the Campaign for an Effective Second Chamber. In many ways, it can be seen as an 'informal' group. It is not bound by any legal or formal requirements by the House of Lords, and operates outside the formal infrastructure of the second chamber. Its membership is also cross-party and drawn from both the House of Lords and the House of Commons. Meetings are regularly attended by interested bodies from outside Parliament. One must also consider the campaigning nature of this particular group. Indeed, one interviewee was conscious of this, admitting that the nature of the group and its overarching aims and recommendations undoubtedly influence the opinions of those Peers using the group as their main point of access to constitutional debates.

The Campaign for an Effective Second Chamber thus serves as an example of one of the many quasi-formal forums available to Peers wanting to become involved in constitutional discussions. It is one of several 'groups' that have been set up outside the formal infrastructure of services available to Peers in the House of Lords, and yet play an invaluable and central part in the House of Lords' oversight of the UK constitution.

Informal networks

Interviewees also underlined the importance of informal networks operating both inside and outside the confines of the second chamber. Respondents gave numerous examples of situations which undermine the boundary between formal and informal, and inside and outside the Houses of Parliament. Peers operate within an unspoken system, utilising both the formal structures and committees offered by the official infrastructure, alongside the everyday informal meetings and chats that take place in a variety of settings.

As this paper demonstrates, there are various ways a member of the House of Lord can participate in constitutional matters, should they so wish. Pathways into relevant debates depend on the individual, the type of issue, and the subject matter. One crossbench Peer illustrated the effectiveness of informal networks with reference to a particular instance. They described how a senior member of a House of Lords select committee recently approached the Speaker for a formal debate on a significant constitutional matter, in order to convey the opinions of the Peers who would be participating, and forewarn them of potential points of contention.

Another respondent referred to the current debates surrounding the relationship between the BBC and the government; more specifically, the role of the government in the appointment of personnel for non-governmental bodies, and the implications of this on the organisation's independence. They then described the process of voicing their concerns, detailing that they would (1) ask questions, (2) assemble their evidence, before (3) raising the debate either by putting forward a question to the House, or (4) speaking more directly to members of the relevant committees.

Although this interviewee was noticeably more active in their efforts to raise awareness on particular policy areas, the

qualitative data undoubtedly indicated that despite the formal structures of the House open to Peers wishing to participate in discussions and debates, the majority of Peers opt for these informal networks available to them. As one respondent claimed, the lack of “restrictions with informal networks” often means that informal discussions are “far more organic and productive”.

A few of the interviewees spoke of their ‘friendships’ with other Peers who are also operating in similar subject areas. Respondents distinguished between the professional admiration and working relationships maintained with some colleagues within the House, with their friendships with specific individuals and groups of Peers whom they have come to see as friends – typically members of the same groups and networks outside the chamber. Whilst groups of Peers with similar interests will often meet inside the House, friendships extend well beyond the formal structures and physical boundaries of the House. The work of Peers outside of the House feeds back into the work within the House.

The interviews therefore demonstrated that constitutional matters are discussed at different levels by a fluctuating number of Peers, operating in different circles, and motivated by an array of different concerns.

Conclusion

The constitutional work in the UK’s second chamber is performed by a diverse range of different Peers working both independently and collectively through a range of different mediums, on a variety of formal and informal platforms. This paper thus supports the existing premise that the House of Lords performs some sort of constitutional role. However, while there was a consensus amongst the interviewees that the second chamber has some form of responsibility in the oversight of the UK constitution, respondents were slightly less united in what this role actually amounts to.

Broadly speaking, Peers conceptualise the UK constitution and the role performed by them and their colleagues in two ways. Several respondents described constitutional work in relation to specific legislative proposals. For other interviewees, the constitutional role performed by the second chamber is far more wide-ranging. According to this thesis, the whole of the procedural function performed by the second chamber in legislative scrutiny – the consideration of every Bill put forward by the House of Commons, the ensuing debates regarding the scope of each Bill, and any resulting amendments proposed – contributes to the UK’s legislative process, and by extension, the maintenance of the UK constitution. Following this line of thought, then, the entirety of work undertaken by Peers can be loosely categorised as constitutional.

Having affirmed that the House of Lords does undertake some form of constitutional oversight, and supported this conclusion with an evaluation of the various conceptualisations of this responsibility, the interviews provided a means of establishing *who* is responsible for performing the constitutional work, and by *what* means such individuals or groups are able to do so.

Who

One of the main objectives of this paper was to explore the notion that there may be a group of Peers acting collectively as constitutional guardians in the House of Lords. Before the interviews were undertaken for this paper, there was an expectation – based on existing research in this area – that the research would reveal a self-aware group of members of the House of Lords. The exact characteristics of these individuals, the extent to which they were self-aware and operated collectively, and the relationship between this group and the formal mechanisms were unknown, but it was assumed that constitutional work undertaken in the second chamber is predominantly carried out by a select few. It was anticipated that the interviewees would help answer some of the following questions: How far can it be said that there is a self-aware group of constitutional guardians in the Lords, and what is the character and impact of this group? In as far as it exists, what are the implications of the possible existence and operation of this group, including from a legitimacy perspective?

As this paper reveals, however, the results from the interviews challenged these pre-conceptions. The respondents were admittedly quick to identify individual Peers who are well-known for their contributions to constitutional work – both inside and outside the second chamber. These 'key players' are more likely to actively and consciously participate in constitutional debates and yet, the respondents were not convinced that there is a

'group' of such Peers, who collectively work together. Instead, interviewees emphasised the diversity of members of the House who contribute to its constitutional function. Past and present members of the Constitution Committee and the Delegated Powers Committee were similarly wary of identifying a 'group' of constitutional guardians, instead intimating that the 'key players' in this sphere are in a constant state of flux.

Changes to membership of the standing House of Lords Select Committees, shifts in topical constitutional concerns, and the issue-specific nature of constitutional debates, all result in a constantly evolving 'group' of Peers who are actively engaged and involved in the constitutional work undertaken in the House. It is thus not only unhelpful, but near impossible, to identify any specific characteristics or demographics of the individuals who in some way contribute to the constitutional work undertaken in the second chamber. This is, in part, the result of the significance of the use of informal networks and nature of unwritten conventions, which will be addressed in the following section.

How

Existing literature in this field has predominantly focused on the formal mechanisms available to members of the House of Lords. The work of scholars (including previous Constitution Society publications) has invariably concentrated on the infrastructure of the second chamber, looking in particular at the role of the Constitution Committee in efforts to examine the constitutional significance of the House of Lords. Dawn Oliver's recent work on 'constitutional guardianship' referred to the importance of informal networks working alongside the more formal institutions, but did not elaborate on the types of individuals and groups operating both inside and outside the House of Lords.

It is clear that the formal mechanisms of the second chamber provide a selection of significant vehicles through which Peers can – and do – participate in issues relating to the UK constitution. To a certain degree, then, the research supports the conclusions reached in the existing literature; the permanent House of Lords select committees play an active and irreplaceable role in the House of Lords' oversight of the constitution. However, it is misleading to assume that the committees like the Constitution Committee and the Delegated Powers Committee “have the constitution covered,” as one interviewee claimed. Similarly, one should be wary of accepting the point made by one interviewee that “if it wasn't for the Constitution Committee and its scrutiny of secondary legislation, there wouldn't be any means of scrutiny [in the House of Lords].”

A significant number of respondents highlighted the role of the ad hoc select committee system in place in the House of Lords, as an effective vehicle for addressing constitutional issues. Despite reservations on the selection process itself, and providing that the proposed topic is selected by the Liaison Committee, interviewees argued that the second chamber's unique ad hoc select committee system provides Peers with a viable means of addressing constitutional matters – even if this is a system which could be utilised to greater effect in this sphere of interest. The respondents singled out the immediacy of ad hoc select committees, arguing that members were able to address topical and current issues in a way not necessarily afforded to members of the formal and permanent select committees. The transience of these committees ensures that members are able to concentrate on one single topic, without having to juggle several lines of enquiry at once. In theory, if not always in practice, the ad hoc select committee system provides another formal means through which Peers can address constitutional matters.

Significantly, however, these mechanisms are operated by key individuals; the formal institutions in the House of Lords rely on individual Peers to remain instrumental in constitutional oversight. Academic interest in this area which has – correctly – established the significant parts played by the formal infrastructure of the second chamber, would therefore benefit from further analysis of the *informal* networks and *individuals* operating within this field. The formal institutions in place in the second chamber facilitate the constitutional role of the second chamber, but it is its members who consciously and actively utilise these mechanisms themselves.

Both the quantitative and qualitative research revealed that a variety of Peers contribute to the oversight of the UK constitution. They operate from a diverse range of backgrounds with different conceptualisations of ‘constitutional issues’, utilising numerous entry points into constitutional debates. While some interviewees have focused their interests almost exclusively on devolution, others are more flexible in their involvement in constitutional matters, dipping in and out of numerous debates, where they see fit and appropriate to do so. This flexibility is facilitated by the multitude of different forums through which Peers can contribute to the constitutional sphere, working both independently or collectively. The lack of distinct boundaries between individual involvement and group participation enables Peers to work simultaneously as individuals and alongside colleagues, both within and outside the second chamber.

Reflections

Taking these conclusions forward, there is scope for further scrutiny of the possible legitimacy problems and implications of the House of Lords in the guardianship of the UK constitution. As several of the respondents noted, there are legitimacy issues

attached to the constitutional responsibility felt by members of the House of Lords.

The multitude of different ethnicities, races, ages, genders, sexual identities, regions, and other such demographic variants that make up the United Kingdom today is poorly reflected in the current membership of the House of Lords – and for that matter in the House of Commons. The lack of diversity – in relation to region, geography, race, age, and gender – of the membership of the second chamber arguably undermines the effectiveness of the House in its ability to oversee the constitution of such a multi-cultural and diverse country. Similarly, as several of the respondents for this paper highlighted, the membership of the second chamber is not representative of the political parties in a democratic sense, as measured by votes cast or seats won in general election. A connected imbalance between party representation in the House of Lords and the House of Commons has become particularly apparent since the 2015 General Election. Lastly, there is a lack of necessary interaction with the people of the United Kingdom in the oversight of the UK constitution and the handling of constitutional debates within the House of Lords. Despite engagement with outside bodies – most notably with academic institutions and research bodies in the submission of evidence and the witness sessions at select committee level – members of the second chamber do not typically consult the public in matters of the constitution (though select committees as institutions receive evidence from any interested parties as part of their inquiries).

The legitimacy of the constitutional role undertaken by the House of Lords, and possible changes and alternative models which could lead to a more representative and democratic constitutional guardianship, is something which academics may wish to consider as a topic for further research in this field.

Appendix 1: Interview Questions

- ◆ Some commentators have suggested that the House of Lords has a role in performing constitutional guardianship. What are your thoughts on this?
- ◆ How would you define a constitutional issue?
- ◆ What are the formal and informal routes available to Peers wishing to participate in constitutional matters?
- ◆ If Peers did not take an active role in the guardianship of the constitution, would there be a noticeable gap? How might this be filled?
- ◆ What part do select committees (specifically the Constitution Committee and the Delegated Powers and Regulatory Reform Committee) play in the oversight of the constitution?
- ◆ Do these select committees interact with non-members?
- ◆ Have you been involved in constitutional matters during your time as a Peer?
- ◆ If you wanted to intervene over a matter of constitutional significance, how would you go about this?
- ◆ What barriers might there be for you or other Peers wishing to engage in this way?
- ◆ Is there a group of Peers which acts either independently or collectively as a group ('constitutional guardians') to intervene in constitutional issues?

- ◆ Do you have any contact with groups outside of the House of Lords interested in constitutional matters?
- ◆ What does 'success' on a constitutional matter look like?

Appendix 2: Further Reading

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‘Talking to the Guardians’

The Constitutional Role of the House of Lords

Lucy Atkinson

This paper builds on existing academic research suggesting that the House of Lords performs a specific ‘constitutional guardianship’ role. Based on interviews conducted with fifteen selected members of the House of Lords, it explores the constitutional work undertaken in the second chamber from the perspective of the Peers themselves. It seeks to uncover *who* is engaged in the exercise of this constitutional function, *how* they go about doing so, and *what* they hope to achieve. More specifically, it tests the hypothesis that there is a self-aware sub-group of Peers within the House of Lords performing the constitutional functions of the Lords on behalf of the House as a whole. The research reveals a multitude of formal and informal mechanisms utilised by a wide range of members of the House. Although respondents referred to the significance of the permanent and ad hoc select committees and formal debating system in constitutional oversight, they also alluded to more amorphous means and forums through which Peers involve themselves in constitutional matters. This paper stresses the importance of the informal networks utilised by a variety of Peers. The paper concludes with some suggestions for further avenues of research.

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