House of Commons

Public Administration and Constitutional Affairs Committee

The Strathclyde Review: Statutory Instruments and the power of the House of Lords

Eighth Report of Session 2015–16

HC 752

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Report, together with formal minutes relating to the report

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The Public Administration and Constitutional Affairs Committee

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1 Introduction

1. On 26 October 2015, the House of Lords was asked to approve the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015**.** This regulation would have made cuts in tax credits as part of the Chancellor's plan, outlined in the 2015 budget, to reduce the welfare budget by £12bn. While the House of Lords rejected a fatal amendment tabled by Baroness Manzoor, by a margin of 99 votes to 310, Peers did endorse amendments tabled by Baronesses Meacher and Hollis (by margins of 307-277 votes and 289-272 votes respectively), which would have suspended consideration of the regulations until the Government either published a response to the Institute of Fiscal Studies' (IFS) analysis of the regulations, or provided a scheme for a (renewable) three year transitional period.

2. In response to this vote, the Government immediately argued that Peers had breached constitutional convention and had challenged the supremacy of the House of Commons on financial matters (MPs had previously voted to approve the regulations[1]). On 4 November, the Government announced that the Rt Hon Lord Strathclyde, a former Leader of the House of Lords, would lead this review.[2] In a Written Ministerial Statement[3] the Minister for Constitutional Reform, John Penrose MP, stated that:

> By long-standing convention the House of Lords does not seek to challenge the primacy of the elected House on spending and taxation. It also does not reject statutory instruments, save in exceptional circumstances. Until last month, only five statutory instruments had been rejected by the House of Lords since World War II, none of which related only to a matter of public spending and taxation. The purpose of the review is to examine how to protect the ability of elected Governments to secure their business in Parliament in light of the operation of these conventions.
>
> The review will consider in particular how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation.[4]

The review was tasked with reporting by the end of 2015, and was published in December that year.[5] It outlined three potential options for reform:

i) To remove the House of Lords from statutory instruments procedures altogether;

ii) To retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution, to set out and recognise, in a more precise way, the restrictions on how its powers to deny approval or to annul should be exercised[6]; and

1 MPs voted to approve the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 on 15 September 2015, by 325 to 290.(HC Deb 15 September 2015 cc.964-994).

2 Sir Michael Pownall, a former Clerk of the Parliaments; Jacqy Sharp, a former senior Clerk in the House of Commons; and Sir Stephen Laws, a former First Parliamentary Counsel were also part of the Review.

3 Strathclyde Review: Written statement - HCWS292, 4 November 2015.

4 Strathclyde Review: Written statement - HCWS292, 4 November 2015.

5 HM Government,Strathclyde Review: Secondary Legislation and the primacy of the House of Commons, Cm 9177, December 2015.

6 HM Government, Strathclyde Review : Secondary Legislation and the primacy of the House of Commons, December 2015, Cm 9177, p.17.

iii) To create a new procedure, underpinned by statute, whereby House of Lords defeats of statutory instruments could be overruled by the House of Commons. Or, as Lord Strathclyde's review put it, "to provide the Lords with a new means for asking the House of Commons to think again with regards to secondary legislation".[7]

Lord Strathclyde's review recommended Option 3 be taken forward by the Government.

3. On 19 January 2016, PACAC held a one off evidence session on the Strathclyde Review, taking evidence from the Rt Hon Lord Strathclyde and Professor Meg Russell from the Constitution Unit at UCL. This session focused on the debate surrounding the constitutional propriety of the House of Lords votes on the Tax Credits Regulations, and whether these votes constituted a constitutional crisis. This session also examined the Strathclyde Review's recommendations and on the potential implications of the options for reform. We thank Lord Strathclyde and Professor Russell for their evidence.

4. In this report, PACAC examines the Strathclyde Review's proposals and whether such a review was a necessary and appropriate response to the House of Lords votes on 26 October 2015. This report begins with a brief explanation of statutory instruments (SIs) and of the role Parliament, and in particular the House of Lords, plays in scrutinising SIs. We then evaluate each of the Strathclyde Review's proposals before making recommendations on the way forward.

7 HM Government, Strathclyde Review : Secondary Legislation and the primacy of the House of Commons, December 2015, Cm 9177, p.18.

2 Context: Statutory Instruments and the debate about the role of the House of Lords

Statutory Instruments: a brief introduction

5. Acts of Parliament regularly confer powers on ministers, but sometimes on others, to make more detailed orders, rules or regulations by means of secondary or delegated legislation and, as a result of the Statutory Instruments Act 1946[8], most, though not all, secondary legislation falls within the umbrella term of 'Statutory Instruments' (SIs).

6. As the House of Commons Library Paper on Statutory Instruments explains:

> The scope of SIs varies greatly, from the technical (e.g. to set or vary the dates on which different provisions of an Act will come into force, to change the levels of fines or penalties for offences or to make consequential and transitional provisions) to the much wider-ranging, such as filling out the broad provisions in Acts. Often, Acts only contain a broad framework and SIs are used to provide the necessary detail that would be considered too complex to include in the body of an Act.[9]

7. The precise procedure for the approval, and parliamentary control, of SIs is outlined in the parent Act. Most SIs fall into one of two categories:

(a) Instruments subject to the negative resolution procedure

(b) Instruments subject to the affirmative resolution procedure.[10]

8. Under the negative resolution procedure, which applies to the majority of delegated legislation, instruments take effect unless, within a permitted time limit, "either House records its disapproval; the Address to Her Majesty praying that an instrument be annulled is colloquially known as a 'prayer'." An SI made under the affirmative resolution procedure, on the other hand, cannot take effect "unless Parliament has expressly approved it." In some instances, the Government may also be required to table the said instrument as a draft for approval by both Houses.[11] In addition, there is another, less well-used, procedure known as the 'super-affirmative procedure', which "provides for a higher level of parliamentary scrutiny, based on an initial examination of a legislative proposal, recommendations for amendment, if appropriate, and further scrutiny of a draft instrument."[12] Other and rarer categories of instrument also exist.

9. The imbalance between the volume of, and relative scrutiny afforded to, Primary and Secondary Legislation has been widely commented on. [13] For example, Professor Mark Elliott, highlighted that "in 2015, the UK Parliament passed 34 Acts, while, 1,999 statutory instruments have been made." The sheer volume is such that, according to Professor Elliott,

8 Statutory Instruments Act 1946.
9 Kelly, R., House of Commons Background Paper: Statutory Instruments, 18 December 2012, SN/PC/6509, p.3.
10 Kelly, R.,House of Commons Background Paper: Statutory Instruments, 18 December 2012, SN/PC/6509, p.5.
11 Erskine May, Twenty-Fourth Edition, 2011, p.671.
12 Erskine May, p.672.
13 Erskine May, p.667.

"Parliament could not hope to scrutinise them all in any degree of detail."[14] Robert Rogers (former Clerk of the House of Commons, now Lord Lisvane) and Rhodri Walters (former Reading Clerk in the House of Lords) note that the "volume of delegated legislation is huge, and this presents particular challenges for parliamentary scrutiny."[15]

The House of Lords and Statutory Instruments

10. Importantly, while the Parliament Acts 1911 and 1949 have limited the House of Lords ability to block primary legislation passed by the House of Commons, removing its previous outright veto to a delay of one year, they do not apply to delegated legislation. As the House of Lords Companion notes:

> The Parliament Acts do not apply to delegated legislation. So delegated legislation rejected by the Lords cannot have effect even if the Commons have approved it. Neither House of Parliament has the power to amend delegated legislation. The House of Lords has only occasionally rejected delegated legislation. The House has resolved "That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration.[16]

Successful Statutory Instruments therefore rely on either the House of Lords' active agreement (in the case of those made under the affirmative procedure), or its latent consent (in the case of those made under the negative procedure). Either way, the Upper Chamber may, with the exception of instruments whose subject is taxation[17], exercise a veto. It has done so only five times in fifty years.[18]

11. In addition, and as the Strathclyde Review's report acknowledges[19], the House of Lords has played a particular active role in the scrutiny of SIs. Not only does the House of Lords, unsurprisingly, provide half of the membership of the Joint Committee on Statutory Instruments (JCSI), but it also boasts a Secondary Legislation Scrutiny Committee (SLSC) and a Delegated Powers and Regulatory Reform Committee (DPRRC). SIs laid before both Houses are subject to scrutiny by the JCSI and SLSC. The SLSC "examines the policy merits of regulations and other types of secondary legislation that are subject to parliamentary procedure" and through its reports, the SLSC can draw to the "special attention of the House" any SI "laid in the previous week which it considers may be interesting, flawed or inadequately explained by the Government."[20] The DPRRC's role 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".[21] The SLSC and DPRRC have been described by Professor Meg Russell as "the two most important committees dealing with delegated legislation" in Parliament.[22] Robert Rogers (Lord Lisvane) and Rhodri Walters also emphasize the level of scrutiny work undertaken

14 Elliott, M. The House of Lords and secondary legislation: Some initial thoughts on the Strathclyde Review, Public Law for Everyone, 17 December 2015.
15 Rogers, R. and R. Walter, How Parliament Works (7th Ed), 2015, p.223.
16 Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, p.198.
17 Erskine May, p.672.
18 Q7
19 Strathclyde Review: Secondary Legislation and the primacy of the House of Commons, December 2015, Cm 9177, p.9.
20 Secondary Legislation Scrutiny Committee - role.
21 Delegated Powers and Regulatory Reform Committee - Role of the Committee.
22 Russell, M. The Strathclyde report: a threat or an opportunity for the Lords?, UCL Constitution Unit, December 18 2015.

in the House of Lords on SIs, highlighting that "the House of Lords spends quite an amount of its time debating secondary legislation though much of this discussion is off the floor in Grand Committee."[23]

12. **Statutory Instruments represent an important and expanding aspect of how government obtains its legislation in the United Kingdom. The increasing volume of statutory instruments (SIs) makes it difficult for Parliament to scrutinise more than a small proportion effectively and rigorously. In this context, the House of Commons relies upon the particular attention paid to SIs by the House of Lords, in particular through the Secondary Legislation Scrutiny Committee and Delegated Powers and Regulatory Reform Committee. Whatever opinions are held on the merits of the present House of Lords, it should be commended for this vital scrutiny.**

Convention, what convention?

13. As noted in paragraph 10 of this report, while the 1911 Parliament Act, as amended by the 1949 Parliament Act, has limited the House of Lords ability to block primary legislation passed by the House of Commons, the Parliament Acts do not apply to delegated legislation.

14. Nevertheless, successive governments have argued that a convention exists whereby the House of Lords does not reject Statutory Instruments. In 1968, for example, when the House of Lords rejected an Order to implement UN sanctions against Rhodesia, Government Peers warned that the defeat was "exceptional" and violated a convention whereby the "Conservative majority in your Lordships' House would not vote against an Order put forward by a Labour Government." While an identical Order was made and approved by the House of Lords a month later, the ill-fated Parliament (No.2) Bill in 1969 proposed by the then Labour Government sought, among other provisions, to curtail the House of Lords power over SIs. As Harold Wilson explained during the Bill's second reading:

> The third part of the Bill, Clauses 13, 14 and 15, breaks new ground in dealing with subordinate legislation. The general intention underlying these Clauses is stated in Clause 13, which says that in cases where each House of Parliament has power … to control the making … of an instrument … a decision of the House of Lords may be overruled by the House of Commons.[24]

15. The Joint Committee on the Conventions of the UK Parliament noted in its 2006 report that between 1983 and 1991, "the Lords never once divided on a motion fatal to a SI. Instead, there were votes on critical but non-fatal motions or amendments." As a result, by 1994 "it was beginning to be asserted as a convention not merely that the Lords did not defeat SIs, but they did not even divide against them".[25] Indeed, during a House of Lords debate on the Deregulation and Contracting Out Bill on 6 June 1994, the Government's spokesperson, Lord Strathclyde, suggested that the House of Lords had a convention "that it does not divide on secondary legislation".[26]

23 How Parliament Works, p.228.

24 HC Debates (Hansard) 3 February 1969, c.52.

25 Joint Committee on Conventions, Conventions of the UK Parliament, First Report of Session 2005–06, HL Paper 265–I/HC 1212–I, 3 November 2006, para. 195.

26 HL Deb 6 June 1994, col. 956.

16. In response to this suggestion, the Crossbench peer and former Law Lord, Lord Simon of Glaisdale tabled a motion in the House of Lords on 20 October 1994 that sought "to make clear that there is no convention which precludes your Lordships from voting on subsidiary legislation". This motion, which affirmed the House's "unfettered freedom to vote on any subordinate legislation submitted for its consideration", was carried without a vote and is now recorded in the House of Lords Companion.[27]

17. Following the election of the Labour Government in 1997, and the removal of all bar 92 hereditary peers via the House of Lords Act 1999, the question of whether a Convention existed has attracted increasing attention. In a 1999 speech, in the context of the House of Lords Act, the then Shadow Leader of the House of Lords, Lord Strathclyde, claimed that a convention had existed whereby the Opposition should not vote against SIs, before declaring this convention dead.[28] However, as Professor Meg Russell has previously noted, Lord Strathclyde's claim that the convention on secondary legislation was 'dead', "was not, as might have been expected, followed through with a string of defeats".[29]

18. Indeed, a year after Lord Strathclyde's declaration, the report of the Royal Commission on the House of Lords (Wakeham Commission), published in January 2000, showed sufficient confidence to pronounce that "in practice there has (so far) been no serious challenge since 1968 to the convention that the House of Lords does not reject Statutory Instruments".[30] It recommended that the House of Lords' power in this area be amended, moving from an absolute to a suspensory veto of three months.[31]

19. However, a month after the publication of the Wakeham Commission report, the House of Lords broke with a pattern of behaviour that had existed since 1968 and voted down SIs. Two SIs, both relating to elections to the new Greater London Authority, were rejected by Peers by margins of 215 to 150 votes (the Greater London Authority (Election Expenses) Order 2000) and 206 to 143 votes (Greater London Authority Elections Rules Order 2000) respectively..[32] These votes were highlighted by our predecessor Committee, the then Public Administration Committee (PASC), in its 2002 report, The Second Chamber: Continuing the Reform, as proof that the House of Lords was "prepared to use its veto power in appropriate cases."[33] As a result, PASC concluded that the House of Lords "should not lose that valuable right."

The Joint Committee on Conventions and the question of the House of Lords role in secondary legislation

20. In its 2006 report, the Joint Committee on Conventions highlighted evidence from the-then Conservative opposition affirming the right of Peers to reject SIs, albeit such rejection "should be exceptional in the extreme." Furthermore, they opposed the

27 House of Lords, Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2015, p.198.

28 Politeia Lecture by the Rt Hon Lord Strathclyde: Redefining the Boundaries Between the Two Houses, 30 December 1999, pp 9–10.

29 Russell, M. A, Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons of Bicameralism, Political Studies, Vol. 58, Issue 5, December 2010, p.875.

30 Royal Commission on the Reform of the House of Lords, A House for the Future, Cm 4534, January 2000, p.71.

31 Royal Commission on the Reform of the House of Lords, A House for the Future, Cm 4534, January 2000, p.77.

32 The defeated SIs were the Greater London Authority (Election Expenses) Order 2000 and the Greater London Authority Elections Rules 2000.

33 Public Administration Select Committee, The Second Chamber: Continuing the Reform, Fifth Report of Session 2001–2002, HC 494–I, 14 February 2002, paras 79–80.

Wakeham proposal of a suspensory delay. The Liberal Democrats disputed the existence of a convention, arguing that it was "not a convention so much as a habit" that peers generally do not reject SIs.[34]

21. The then Clerk of the Parliaments, Sir Paul Hayter, noted that defeated instruments can always be re-laid (though in the case of an order made under the affirmative resolution procedure a re-laid instrument "must be at least slightly different", while if it is negative "it may be re-laid with a new title") and in the extreme can be embodied in a Bill. As a result, he agreed "with the Wakeham report that rejection of an SI "in practice… would not trigger a constitutional crisis." [35]

22. On the question of whether this convention should be codified or not, Lord Norton outlined the several objections in his evidence to the Joint Committee on Conventions:

(a) It is not agreed that there is any such convention;

(b) SIs do not normally involve "great issues of principle", and any argument in Parliament is usually only about fitness for purpose;

(c) A rejected order can be re-laid;

(d) The power to reject supports the work of the SI Merits Committee;

(e) Power to reject orders under the Legislative and Regulatory Reform Bill will be even more important than power to reject mainstream SIs.[36]

23. In its conclusions, the Joint Committee agreed that it was a "convention recognised by the opposition parties" that the "House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate to do so." As such, it disagreed with the Government's position that "any defeat of an SI by the Lords is a breach of convention", noting that "it is not incompatible with the role of a revising chamber to reject an SI."[37] Since the Joint Committee's report was published in 2006 (and before the Tax Credits defeat last October), the House of Lords defeated the Government twice on SIs: once, on the draft Gambling (Geographical Distribution of Casino Premises License) Order 2007 and, secondly, the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012.[38]

24. **There is no consensus as to whether there is a convention regulating the House of Lords ability to exercise its formal powers to block secondary legislation. For example, while the Wakeham Commission suggested that a convention had developed whereby the House of Lords did not defeat Statutory Instruments, the Joint Committee on Conventions in its 2006 report suggested that a convention had developed, which**

34 Joint Committee on Conventions, Conventions of the UK Parliament, First Report of Session 2005–06, HL Paper 265–I/HC 1212–I, 3 November 2006, paras 209–215.

35 Joint Committee on Conventions, Conventions of the UK Parliament, First Report of Session 2005–06, HL Paper 265–I/HC 1212–I, 3 November 2006, para. 218.

36 Joint Committee on Conventions, Conventions of the UK Parliament, First Report of Session 2005–06, HL Paper 265–I/HC 1212–I, 3 November 2006, para. 223.

37 Joint Committee on Conventions, Conventions of the UK Parliament, First Report of Session 2005–06, HL Paper 265–I/HC 1212–I, 3 November 2006, para. 228.

38 House of Lords Secondary Legislation Scrutiny Committee, Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation, 32nd Report of Session 2015–16, HL Paper 128, 14th April 2016, para. 56.

was "recognised by the opposition parties", whereby the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate to do so. There is not universal agreement on what precise form this convention might take and this therefore indicates that no clear convention exists. Instead, it would appear more helpful to draw on the distinction between invariable and usual practice. While it is usual practice for the House of Lords not to withhold agreement to statutory instruments, it is not an invariable practice. Therefore, it cannot be satisfactorily be described as a convention that the House of Lords never rejects a statutory instrument.

The House of Lords' Tax Credits vote

25. Following the Government's defeat in the House of Lords on the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (see paragraphs 1-3), the Government accused Peers of having broken a constitutional convention and challenging the supremacy of the House of Commons on financial matters.

26. However, there was some ambiguity about the precise convention(s) the House of Lords were accused of breaking. While giving evidence to PACAC as part of our inquiry into English Votes for English Laws (EVEL) and the Future of the Union, Sir William McKay, a former Clerk of the House of Commons, and Lord Norton were asked which convention they felt was in question:

> Sir William McKay: I think the primacy of the decisions of the House of Commons in matters financial.
>
> Lord Norton of Louth: Yes, I would agree with that insofar as the convention is engaged. It is that the Commons has primacy in relation to financial matters. There is not a convention that the House of Lords does not reject statutory instruments. It variously does; it has asserted its right to do that. It is not an issue whether it is can, it is in what conditions it should.[39]

27. Former Clerk of the House, Lord Lisvane, argued that "talk of a crisis is entirely hyperbolic", and pointed to the roots of the SI in the 2002 Tax Credits Act, a measure that was "quite clearly, in 2002 and in the debate on the very first regulations, seen as being a social security measure, not a taxation and finance measure."[40] Professor Russell agreed that the House of Lords' vote on tax credits did not constitute a constitutional crisis and indeed said he did "not think it [the House of Lords' tax credits votes] was terribly constitutionally significant".[41] Lord Strathclyde concurred that this was not "a constitutional crisis" and that "everyone behaved within the law".[42]

28. **The House of Lords' votes on the tax credits regulations may have been political drama and an embarrassment for the Government, but they did not constitute a constitutional crisis. As Lord Strathclyde has acknowledged, the House of Lords was behaving well within the powers available to it on statutory instruments. The House of Lords did not vote in favour of the more provocative fatal motion tabled**

39 Q46
40 Q109
41 Q15
42 Q76

by Baroness Manzoor and instead voted for amendments that delayed consideration of the regulations. It was the Government which chose to proceed via secondary legislation, an area where the House of Lords retains a veto power, however rarely it is used. Government could have chosen to implement these changes through primary legislation where the House of Lords has no such veto power.

3 The Strathclyde Review

29. In December 2015, the Strathclyde Review published its findings as a Command Paper, Strathclyde Review: Secondary legislation and the primacy of the House of Commons. In his introduction, Lord Strathclyde argued that the review had sought to "balance the interests of proper parliamentary scrutiny and the certainty that government business can be conducted in a reasonable manner and time." Noting recent defeats in the House of Lords, Strathclyde warned against the House, despite its expertise in secondary legislation, becoming a "House of Opposition." Expressing regret that the "fine convention on statutory instruments have been stretched to breaking point," Strathclyde argued that the House of Lords' vote on Tax Credits had broken new ground, suggesting that this convention "is now so flexible that it is barely a convention at all." The Review outlined three potential options to provide MPs with a decisive role on statutory instruments, and we list them below.

Option One

30. **Removing the House of Lords from the statutory instrument (SI) procedure altogether.** Under this model, the House of Commons would be the sole chamber required to give consent to SIs made under the affirmative procedure and would be the only chamber able to pray for the annulment of a SI made under the negative procedure. As Lord Strathclyde explains, two things would be required to achieve this:

i) Primary legislation would be needed "to make a general modification of the provisions setting out the parliamentary procedure for the exercise of the powers to make those instruments. The general modification would effectively remove all references to approval by the House of Lords or to annulment in pursuance of a resolution of that House";

ii) "For powers under Acts to be passed in the future, no primary legislation would be needed. All that would be needed would be a policy decision that future Bills would be drafted with Commons-only procedures for the powers they create."[43]

31. This option has been criticised by Professor Meg Russell as "extreme" and "entirely disproportionate", leading her to speculate as to whether its inclusion in the report was "simply to make the other options appear more moderate."[44] The House of Lords Constitution Committee, in its report on the Strathclyde Review, has described Option 1 as "clearly unacceptable" and said that "it would significantly curtail the capacity and responsibility of Parliament to oversee the Executive".[45] This conclusion was supported by the House of Lords Secondary Legislation Scrutiny Committee in their report on the Strathclyde Review.[46]

43 Strathclyde Review,Cm 9177, p.16.

44 Russell, M. The Strathclyde report: a threat of an opportunity for the Lords? UCL Constitution Unit, December 18 2015; Q 19.

45 House of Lords Select Committee on the Constitution, Delegated Legislation and Parliament: A response to the Strathclyde Review, 9th Report of Session 2015–16, HL Paper 116, 23 March 2016, p.31.

46 House of Lords Secondary Legislation Scrutiny Committee, Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation, 32nd Report of Session 2015–16, HL Paper 128, 14th April 2016, p.29.

32. Lord Strathclyde warned of the "significant disadvantages in this option", and stated that this option would "remove the basis for any involvement by the House of Lords, even in an advisory capacity, in the passage of legislation in the form of statutory instruments" and as a result would be "detrimental to the quality of legislation".[47] Lord Strathclyde noted that the implementation of Option 1 would be a "clear indication for the Government to pass more and more by secondary legislation."[48]

33. **PACAC agrees with the conclusions of the House of Lords Constitution and Secondary Legislation Scrutiny Committees, and Professor Russell on Option 1. Excluding the House of Lords from the SI process altogether would be an entirely disproportionate and retrograde development, to the detriment of Parliament as a whole and to the quality of legislation.**

Option Two

34. **A non-statutory, binding resolution of the House of Lords.** According to Strathclyde, this option would retain the House of Lords' present role in relation to statutory instruments. However, there would be the addition of a resolution of the House of Lords/amendment to the House of Lords' Standing Orders that would set out "in a more precise way" restrictions on how this power should be exercised in practice.

35. Professor Russell has suggested that Option 2 may be an attractive way forward for both the House of Lords and, ultimately, the Government, pointing to the fact that unlike Options 1 and 3 it does not require primary legislation to implement. As Professor Russell notes, while a drawback of Option 2 is that it "requires different parties to get around the table and negotiate", similar negotiations would be needed for "the smooth implementation of any legislative option". Furthermore, "the benefit of option 2 is that this [cross-party negotiation] is all it requires", thus avoiding the "need for a bill, for lengthy stages through both chambers, amendments and all the rest."[49]

36. However, Professor Russell has suggested that as a quid pro quo for the House of Lords to agree to respect and endorse a renewed convention, the Government may need to tackle the wider issue of House of Lords reform and in particular the expanding size of the Chamber. In short, Professor Russell is suggesting a deal whereby the House of Lords would sign a self-denying ordinance in return for the Government doing the same (regarding the use of Prime Ministerial appointments to the House of Lords).[50] Professor Russell suggested that seeking such an agreement "is worth a try", even in a context where potential difficulty may arise from Ministers "talking up conflict" and the "more aggressive" attitude of Liberal Democrat Peers to votes on Statutory Instruments.[51]

37. Lord Strathclyde raised doubts as to the prospects of any agreement being reached on the lines outlined by Professor Russell. He explained that there is not "any great incentive for Government or Opposition to create a deal of that nature".[52] As for a renewed convention,

47 Strathclyde Review, Cm 9177, p.16.

48 Q97

49 Russell, M. The Strathclyde report: a threat of an opportunity for the Lords? UCL Constitution Unit, December 18 2015.

50 Russell, M. The Strathclyde report: a threat of an opportunity for the Lords? UCL Constitution Unit, December 18 2015.

51 Q12

52 Q105

Lord Strathclyde did speak of Option 3 laying the grounds for "what a convention could look like without the statutory backing", thus raising the prospect of the Government legislating for reform, but not immediately commencing any such legislation and instead using the latent threat of commencement to discourage the House of Lords from using their full powers in relation to Statutory Instruments.

38. **Despite Lord Strathclyde's reservations about the likelihood of Option 2 leading to a cross-party settlement along the lines suggested by Professor Russell, that does not mean that such an agreement should not be attempted. As Professor Russell suggests, Option 2 could provide an attractive way forward offering cross-party agreement on how secondary legislation will be considered in the House of Lords and resolve the problems posed by the unsustainable, ever-expanding size of the second chamber. While concluding any such deal would undoubtedly include some difficult moments, it would avoid the vastly greater problems that would face any legislative attempt at reform.** ***If the Government intends to carry forward any reform of the House of Lords' role in secondary legislation it should proceed on the lines of Option 2 and, as Professor Russell suggests, should include in negotiations the question of the size of the House of Lords and Prime Ministerial appointments to the second chamber.***

Option Three

39. **The House of Lords has power to delay SIs by asking the House of Commons to think again.** This would create a new process, underpinned by statute, whereby Peers may vote against an SI, but where the Commons would be able to override the House of Lords and insist on its primacy.[53]

40. Lord Strathclyde recommended that this third option should be pursued, arguing that it would "provide the government of the day with a degree of certainty, while maintaining for the House of Lords a simplicity of procedure in keeping with already established procedures for other forms of legislation." Finally, "it would enable the Commons to play a decisive role" in the approval of SIs.

41. Strathclyde rejected the idea of a fixed period of delay between a SI's defeat in the House of Lords and an override in the Commons, on the grounds that a specific period of delay might "overrun the time specified in the draft or instrument for its commencement" (effectively denying the Commons the intended ability to override the House of Lords) and that the Commons needs to retain the ability to override the House of Lords "rapidly in cases of urgency." According to Strathclyde:

> …the absence of any specified period of delay seems very unlikely, in practice, to reduce in any way the chances that a proper consideration of the Lords' decision, and a serious reconsideration of the instrument, will be undertaken by a government, which will still need to explain and justify to the House of Commons the motion to override the Lords. They may need to do it rapidly but they will still need to do it seriously and well. [54]

42. Alongside this recommendation, Strathclyde called for a review to be undertaken, with the involvement of the House of Commons Procedure Committee, "of the

53 Strathclyde Review, Cm 9177, December 2015, p.18.
54 Strathclyde Review, Cm 9177, December 2015, p.20.

circumstances in which statutory instrument powers should be subject to Commons-only procedures", especially on Finance Bills. Lastly, to discourage excessive use of the new process proposed for SIs, Strathclyde recommended that the Government should take steps to ensure that Bills contain "an appropriate level of detail" with less of a reliance on SIs for their implementation.

43. Professor Russell expressed reservations about Option 3 and suggested that it would only be acceptable if safeguards were put in place. For example, it is not clear, from the Strathclyde Review report, whether under Option 3 "there would have to be a debate on the Floor of the House of Commons if an instrument was rejected by the Lords", rather than "a meeting of a statutory instrument Committee on a corridor and a deferred division".[55] In addition, Professor Russell suggests that were Option 3 to be implemented, the House of Lords would "want to look more carefully in future at what powers were being delegated" and would seek better scrutiny standards in the House of Commons for secondary legislation.[56]

44. The House of Lords Constitution Committee has similarly suggested that a number of matters would need to be addressed in detail by Parliament and the Government if Option 3 were to be implemented. These matters include, the steps that would need to be taken "to ensure that delegated powers proposed in primary legislation are set out in appropriate detail, sufficiently narrow in scope, and restricted to matters of detail rather than of principle", the question of whether the exercise of Henry VIII powers (see below) would still be subject to a Lords veto or to a modified procedure and "whether and how Commons procedure would be altered to ensure that a statutory instrument rejected by the House of Lords would be given an appropriate degree of scrutiny on reconsideration".[57]

45. The issue of whether Henry VIII powers will be included under Option 3, or be subject to a Lords veto is of particular significance. Henry VIII powers refer to provisions within legislation that allow for the amendment or even repeal of primary legislation, through secondary legislation. In a recent speech, the Crossbench peer and former Lord Chief Justice of England and Wales, the Rt Hon Lord Judge warned that, "unless strictly incidental to primary legislation," every Henry VIII clause "is a blow to the sovereignty of Parliament". He therefore concluded that "save in a national emergency" only primary legislation should be used to "repeal, suspend, amend or dispense with statute".[58]

46. In its report on the Strathclyde Review, the House of Lords Secondary Legislation Scrutiny Committee made clear its opposition to Option 3, arguing that it would seriously weaken "the role and purpose of the House [of Lords] in relation to secondary legislation, leaving it with less influence over secondary legislation than it has over primary legislation". However, should the Government proceed with Option 3, the Committee recommended that any legislation introduced under this procedure "should first be published in draft and be subject to pre-legislative scrutiny in order to avoid any danger of the Government, to use Earl Howe's words, "carving out a smooth legislative path for themselves"."[59]

55 Q40
56 Q45
57 House of Lords Select Committee on the Constitution, Delegated Legislation and Parliament: A response to the Strathclyde Review, 9th Report of Session 2015–16, HL Paper 116, 23 March 2016, para.85.
58 Ceding Power to the Executive; the Resurrection of Henry VIII, transcript of speech given by Rt Hon Lord Judge, 12 April 2016, King's College London, pp.13–14.
59 House of Lords Secondary Legislation Scrutiny Committee, Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation, 32nd Reportof Session 2015–16, HL Paper 128, 14th April 2016, para.114.

47. Lord Strathclyde argued that unlike Option 1, which would be a "clear indication for the Government to pass more and more by secondary legislation", Option 3 would provide "the opportunity for the House of Lords to send something back to the House of Commons and for there to be a debate and a vote". This he contended would be "quite a powerful disincentive on something that is politically controversial, within the party of government as well as within the Opposition, and I think is quite a big deal". Used well, Lord Strathclyde suggested, Option 3 could be a "substantial new power in exchange for an old power that is rarely used".[60]

48. **Lord Strathclyde's suggestion that Option 3 could offer a more readily usable and substantial new power for the House of Lords over statutory instruments, in place of its rarely used veto, makes this option seem attractive, but there would be significant consequences if this option were adopted. Without appropriate safeguards, Option 3 could see the House of Lord's influence and role in passing statutory instruments substantially diminished, allowing a Government with a Commons majority to override any Lords rejection of SIs and would incentivise the increased use of delegated legislation. This could also lead to the House of Lords routinely defeating SIs, as a relatively harmless political gesture, but one which would amount to a significant change in the relationship between the two Houses. PACAC agrees with Professor Russell that, were the Government to proceed with Option 3, any attempts to override a Lords rejection of a SI should trigger a full debate on the floor of the House of Commons. We still do not think that this would be sufficient safeguard.**

49. **PACAC also agrees with the House of Lords Constitution Committee that there are a number of outstanding issues that would need to be addressed before Lord Strathclyde's Option 3 could or should be implemented.** ***A blanket application of Option 3 to statutory instruments would be deeply undesirable, particularly in relation to the exercise of Henry VIII powers, whereby an Act makes provision to amend or repeal primary legislation using secondary legislation. We agree with Lord Judge, that these clauses, unless strictly incidental to primary legislation, represent a blow to Parliamentary sovereignty. If the Government is minded to proceed with Lord Strathclyde's recommendations, then it must guarantee that Option 3 would not apply to instruments which amend primary statute.***

50. **The sheer size and scale of the use of statutory instruments makes scrutiny, particularly in the House of Commons, an incredibly difficult task and Parliament has relied heavily on the House of Lords for the expertise and skill it has cultivated in scrutinising SIs. Reform of the sort proposed by Option 3 could, without appropriate safeguards, serve as an incentive for the Government to pilot even more policy changes through secondary legislation.** ***We therefore agree with the Houses of Lords Secondary Legislation Scrutiny Committee's suggestion that in the event Option 3 is pursued by the Government, any legislation introduced under this reform should first be published in draft and be subject to pre-legislative scrutiny.***

51. **In his review, Lord Strathclyde recommended that the Government should take steps to ensure that Bills contain "an appropriate level of detail" with less of a reliance on SIs for their implementation.** ***The Government must publish, before it presents any legislative proposals designed to implement the Strathclyde Review, the steps it will take***

60 Q97

to ensure that Option 3 is not abused. These steps must include a guarantee that future Bills proposing delegated powers not only contain an appropriate level of detail, but include only delegated powers that are sufficiently narrow in scope.

52. **In summary, there was in fact no constitutional crisis arising from the defeat of the Tax Credits measure. There is therefore no need for change in the procedure relating to statutory instruments, least of all for a change in legislation which could have consequences- such as an increased risk of judicial intervention in the relations between both Houses of Parliament. We think the issue of the excessive size and unbalanced composition of the House of Lords is the more pressing issue, and it is wrong to consider the powers and functions of the House of Lords in isolation, on the basis of one wholly exceptional and highly political event. PACAC will hold an inquiry into the size and composition of the House of Lords later in this Parliament.**

4 Conclusion

53. PACAC is unconvinced by the case for the sort of reform envisaged by Lord Strathclyde in his review. While it would clearly be constitutionally unsustainable if the House of Lords were to frequently block the policies of the Government of the day, this has been far from the case. Over the past fifty years the House of Lords has exercised its right to block secondary legislation on only five occasions. Indeed, Lord Strathclyde conceded as much in his evidence to PACAC when he contrasted the substantial new delaying power, as he saw it, proposed by Option 3 with the existing situation of "an old [veto] power that is rarely used".

54. In our recent Report, *The Future of the Union, part one: English Votes for English Laws*, we criticised the ad-hoc approach to reform that has characterised devolution legislation since the 1990s and called for the Government to abandon this approach and instead explore a comprehensive strategy for the territorial constitution.[61] This applies equally to the question of the powers of the House of Lords in relation to secondary legislation and the broader balance of power between Parliament and the Executive. The House of Lords Constitution Committee recently concluded that the use and scrutiny of delegated legislation is at the heart of the delicate balance of power between Parliament and the Executive. Change must be the result of careful and thorough consideration, and not be undertaken in haste or for the wrong reasons.

55. It is regrettable that the Strathclyde Review proposes radical reforms to the House of Lords' influence over secondary legislation, in isolation from the broader issues of the increasing reliance of Governments on statutory instruments, the level of scrutiny afforded to SIs by Parliament and the balance of power between Parliament and the Executive.

56. ***The Government should not produce legislative proposals aimed at implementing the Strathclyde Review's recommendations. Such legislation would be an overreaction and entirely disproportionate to the House of Lords' legitimate exercise of a power that even Lord Strathclyde has admitted is rarely used. The Government's time would be better spent in rethinking the way it relies on secondary legislation for implementing its policy objectives and in building better relations with the other groupings in the House of Lords.***

61 Public Administration and Constitutional Affairs Committee, The Future of the Union, part one: English Votes for English Laws, Fifth Report of Session 2015–16, HC 523, 11 February 2016, para. 70.

Conclusions and recommendations

Context: Statutory Instruments and the debate about the role of the House of Lords

1. Statutory Instruments represent an important and expanding aspect of how government obtains its legislation in the United Kingdom. The increasing volume of statutory instruments (SIs) makes it difficult for Parliament to scrutinise more than a small proportion effectively and rigorously. In this context, the House of Commons relies upon the particular attention paid to SIs by the House of Lords, in particular through the Secondary Legislation Scrutiny Committee and Delegated Powers and Regulatory Reform Committee. Whatever opinions are held on the merits of the present House of Lords, it should be commended for this vital scrutiny. (Paragraph 12)

2. There is no consensus as to whether there is a convention regulating the House of Lords ability to exercise its formal powers to block secondary legislation. For example, while the Wakeham Commission suggested that a convention had developed whereby the House of Lords did not defeat Statutory Instruments, the Joint Committee on Conventions in its 2006 report suggested that a convention had developed, which was "recognised by the opposition parties", whereby the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate to do so. There is not universal agreement on what precise form this convention might take and this therefore indicates that no clear convention exists. Instead, it would appear more helpful to draw on the distinction between invariable and usual practice. While it is usual practice for the House of Lords not to withhold agreement to statutory instruments, it is not an invariable practice. Therefore, it cannot be satisfactorily be described as a convention that the House of Lords never rejects a statutory instrument. (Paragraph 24)

3. The House of Lords' votes on the tax credits regulations may have been political drama and an embarrassment for the Government, but they did not constitute a constitutional crisis. As Lord Strathclyde has acknowledged, the House of Lords was behaving well within the powers available to it on statutory instruments. The House of Lords did not vote in favour of the more provocative fatal motion tabled by Baroness Manzoor and instead voted for amendments that delayed consideration of the regulations. It was the Government which chose to proceed via secondary legislation, an area where the House of Lords retains a veto power, however rarely it is used. Government could have chosen to implement these changes through primary legislation where the House of Lords has no such veto power. (Paragraph 28)

The Strathclyde Review

4. PACAC agrees with the conclusions of the House of Lords Constitution and Secondary Legislation Scrutiny Committees, and Professor Russell on Option 1.

Excluding the House of Lords from the SI process altogether would be an entirely disproportionate and retrograde development, to the detriment of Parliament as a whole and to the quality of legislation. (Paragraph 33)

5. Despite Lord Strathclyde's reservations about the likelihood of Option 2 leading to a cross-party settlement along the lines suggested by Professor Russell, that does not mean that such an agreement should not be attempted. As Professor Russell suggests, Option 2 could provide an attractive way forward offering cross-party agreement on how secondary legislation will be considered in the House of Lords and resolve the problems posed by the unsustainable, ever-expanding size of the second chamber. While concluding any such deal would undoubtedly include some difficult moments, it would avoid the vastly greater problems that would face any legislative attempt at reform. (Paragraph 38)

6. If the Government intends to carry forward any reform of the House of Lords' role in secondary legislation it should proceed on the lines of Option 2 and, as Professor Russell suggests, should include in negotiations the question of the size of the House of Lords and Prime Ministerial appointments to the second chamber. (Paragraph 38)

7. Lord Strathclyde's suggestion that Option 3 could offer a more readily usable and substantial new power for the House of Lords over statutory instruments, in place of its rarely used veto, makes this option seem attractive, but there would be significant consequences if this option were adopted. Without appropriate safeguards, Option 3 could see the House of Lord's influence and role in passing statutory instruments substantially diminished, allowing a Government with a Commons majority to override any Lords rejection of SIs and would incentivise the increased use of delegated legislation. This could also lead to the House of Lords routinely defeating SIs, as a relatively harmless political gesture, but one which would amount to a significant change in the relationship between the two Houses. PACAC agrees with Professor Russell that, were the Government to proceed with Option 3, any attempts to override a Lords rejection of a SI should trigger a full debate on the floor of the House of Commons. We still do not think that this would be sufficient safeguard. (Paragraph 48)

8. PACAC also agrees with the House of Lords Constitution Committee that there are a number of outstanding issues that would need to be addressed before Lord Strathclyde's Option 3 could or should be implemented. (Paragraph 49)

9. A blanket application of Option 3 to statutory instruments would be deeply undesirable, particularly in relation to the exercise of Henry VIII powers, whereby an Act makes provision to amend or repeal primary legislation using secondary legislation. We agree with Lord Judge, that these clauses, unless strictly incidental to primary legislation, represent a blow to Parliamentary sovereignty. If the Government is minded to proceed with Lord Strathclyde's recommendations, then it must guarantee that Option 3 would not apply to instruments which amend primary statute. (Paragraph 49)

10. The sheer size and scale of the use of statutory instruments makes scrutiny, particularly in the House of Commons, an incredibly difficult task and Parliament has relied heavily on the House of Lords for the expertise and skill it has cultivated in scrutinising SIs. Reform of the sort proposed by Option 3 could, without appropriate safeguards, serve as an incentive for the Government to pilot even more policy changes through secondary legislation. (Paragraph 50)

11. We therefore agree with the Houses of Lords Secondary Legislation Scrutiny Committee's suggestion that in the event Option 3 is pursued by the Government, any legislation introduced under this reform should first be published in draft and be subject to pre-legislative scrutiny. (Paragraph 50)

12. In his review, Lord Strathclyde recommended that the Government should take steps to ensure that Bills contain "an appropriate level of detail" with less of a reliance on SIs for their implementation. (Paragraph 51)

13. The Government must publish, before it presents any legislative proposals designed to implement the Strathclyde Review, the steps it will take to ensure that Option 3 is not abused. These steps must include a guarantee that future Bills proposing delegated powers not only contain an appropriate level of detail, but include only delegated powers that are sufficiently narrow in scope. (Paragraph 51)

14. In summary, there was in fact no constitutional crisis arising from the defeat of the Tax Credits measure. There is therefore no need for change in the procedure relating to statutory instruments, least of all for a change in legislation which could have consequences- such as an increased risk of judicial intervention in the relations between both Houses of Parliament. We think the issue of the excessive size and unbalanced composition of the House of Lords is the more pressing issue, and it is wrong to consider the powers and functions of the House of Lords in isolation, on the basis of one wholly exceptional and highly political event. PACAC will hold an inquiry into the size and composition of the House of Lords later in this Parliament. (Paragraph 52)

Conclusion

15. The Government should not produce legislative proposals aimed at implementing the Strathclyde Review's recommendations. Such legislation would be an overreaction and entirely disproportionate to the House of Lords' legitimate exercise of a power that even Lord Strathclyde has admitted is rarely used. The Government's time would be better spent in rethinking the way it relies on secondary legislation for implementing its policy objectives and in building better relations with the other groupings in the House of Lords. (Paragraph 56)

Formal Minutes

Tuesday 10 May 2016

Members present:

Bernard Jenkin, in the Chair

Oliver Dowden	Mr David Jones
Mr Paul Flynn	Gerald Jones
Mrs Cheryl Gillan	Tom Tugendhat
Kate Hoey	Mr Andrew Turner
Kelvin Hopkins	

Draft Report (*The Strathclyde Review: Statutory Instruments and the power of the House of Lords*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 56 read and agreed to.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 24 May at 9.15am.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 19 January 2016	*Question number*
Professor Meg Russell, Director, Constitution Unit, University College London	Q1–66
Lord Strathclyde	Q67–110

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2015–16

First Report	Follow-up to PHSO Report: Dying without dignity	HC 432 (HC 770)
Second Report	Appointment of the UK's delegation to the Parliamentary Assembly of the Council of Europe	HC 658
Third Report	The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators	HC 431 (HC 980)
Fourth Report	The collapse of Kids Company: lessons for charity trustees, professional firms, the Charity Commission, and Whitehall	HC 433 (HC 963)
Fifth Report	The Future of the Union, part one: English Votes for English laws	HC 523 (HC 961)
Sixth Report	Follow up to PHSO Report of an investigation into a complaint about HS2 Ltd	HC 793
Seventh Report	Appointment of the Commissioner for Public Appointments	HC 869
First Special Report	Developing Civil Service Skills: a unified approach: Government Response to the Public Administration Select Committee's Fourth Report of Session 2014–15	HC 526
Second Special Report	Lessons for Civil Service impartiality for the Scottish independence referendum: Government Response to the Public Administration Select Committee's Fifth Report of Session 2014–15	HC 725
Third Special Report	Follow-up to PHSO Report: Dying without dignity: Government response to the Committee's First Report of Session 2015–16	HC 770
Fourth Special Report	The Future of the Union, part one: English Votes for English laws: Government response to the Committee's Fifth Report of Session 2015–16	HC 961
Fifth Special Report	The collapse of Kids Company: lessons for charity trustees, professional firms, the Charity Commission, and Whitehall: Government Response to the Committee's Fourth Report of Session 2015–16	HC 963
Sixth Special Report	The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators: Government response to the Committee's Third Report of Session 2015–16	HC 980