HOUSE OF LORDS

Merits of Statutory Instruments Committee

8th Report of Session 2010-11

Correspondence:

Local Land Charges (Amendment) Rules 2010

Conventions of the House Relating to Secondary Legislation

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE
The Lord Eames OM
Rt Hon. the Lord Goodlad (*Chairman*)
The Baroness Hamwee
The Lord Hart of Chilton
The Lord Lucas
The Lord Methuen
Rt Hon. the Baroness Morris of Yardley
The Lord Norton of Louth
The Lord Plant of Highfield
Rt Hon. the Lord Scott of Foscote

Registered interests

Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office. Declared interests for this Report are in Appendix 6.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Eighth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None.

OTHER INSTRUMENT OF INTEREST

Special Restrictions on Adoptions from Abroad (Haiti) Order 2010 (SI/2010/2265)

1. This Order imposes a statutory suspension on the adoption of children from Haiti by British residents. The Disasters Emergency Committee (DEC), the Hague Bureau and a number of international organisations concerned with intercountry adoption provided advice on intercountry adoption following the earthquake in Haiti in January. That advice was that priority must be given to efforts to reunite children with their own families. The Explanatory Memorandum (EM) says that information received in July indicates that the infrastructure in Haiti remains weak (EM paragraph 7.5 and 7.6). The Department for Education (DfE) will include a note on its website informing prospective adopters about the suspension and how it will affect both current and future applications. The DfE received fewer than ten applications to adopt from Haiti between 2007 and 2009. The DfE will review this policy through regular contact with Foreign Office officials in the Dominican Republic and with international organisations such as the Hague Bureau (EM paragraph 12.1).

Statement of changes in Immigration Rules (Cm7944)

2. This Statement makes a number of changes to the Immigration Rules, including: adding the definition of a refugee into the list of definitions that appear in the Immigration Rules; further enabling the use of online application forms; introducing an English language requirement for migrants applying for leave to enter or remain as the spouse or partner of a British Citizen or person settled in the UK; and enabling automatic cessation of refugee status once a refugee acquires British citizenship and preventing that person bringing in family except through the normal settlement rules. Although this is not explained in the Explanatory Memorandum, the latter change has been made in response to the Supreme Court judgment of ZN (Afghanistan) (see Appendix 1). The Committee is aware that the Immigration Law Practitioners' Association (IPLA) and the Joint Council for the Welfare of Immigrants have raised concerns with the Government about the language testing for spouses, and that the ILPA have also raised concerns with the Government about the refugee family reunion changes.

CHILDREN'S TRUST BOARD (CHILDREN AND YOUNG PEOPLE'S PLAN) (ENGLAND) (REVOCATION) REGULATIONS 2010 (SI 2010/2129) AND WATER USE (TEMPORARY BANS) ORDER 2010 (SI 2010/2231): FURTHER INFORMATION

3. At the meeting on 5 October the Committee requested further information from Departments on the Children's Trust Board (Children and Young People's Plan) (England) (Revocation) Regulations 2010 (SI 2010/2129) and the Water Use (Temporary Bans) Order 2010 (SI 2010/2231), the former of which was held pending receipt of the information. The Committee subsequently received this information from the relevant Departments, which it considered satisfactory. These sets of further information are set out at Appendix 2 and Appendix 3 respectively.

LOCAL LAND CHARGES (AMENDMENT) RULES 2010: CORRESPONDENCE

4. On 5 October the Committee wrote to Jonathan Djanogly MP, the Parliamentary Under Secretary of State for the Ministry of Justice, enquiring into the Department's delays in identifying a conflict with the Land Charges Rules. The Committee received a response from Jonathan Djanogly MP on 10 October. Both letters are printed at Appendix 4.

CONVENTIONS OF THE HOUSE RELATING TO SECONDARY LEGISLATION: INFORMATION AND CORRESPONDENCE

5. Appendix 5 includes a letter from this Committee to Lord Strathclyde, Leader of the House of Lords. The letter was written in response to correspondence between the Leader and Lord Scott of Foscote (a member of the Merits Committee). This correspondence is also printed in Appendix 5.

6. Our letter draws attention to the conclusion of the Joint Committee on Conventions of the UK Parliament, "that the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate for it to do so". The House of Lords debated this report, and took note of it with approval, on 16 January 2007.

7. The letter relates to voting against statutory instruments, but it is worth noting that there are several valuable ways for Members to engage with statutory instruments. These include tabling questions about instruments; tabling motions which are critical but are 'non-fatal' to the instrument in question; tabling a neutrally worded motion to "take note" of an instrument; and speaking in debates to approve affirmative instruments. Further advice on Lords proceedings on statutory instruments can be obtained from the Table Office.

8. Important changes to the law are regularly made by secondary legislation. In 2009, Parliament passed 27 Acts of Parliament. In the same year more than 70 times as many UK statutory instruments – over 2000 of them – were made. Most statutory instruments are never debated in either House of Parliament, though this Committee does examine every affirmative and

negative instrument laid before the House, and reports important instruments to the House for further consideration.

9. Effective scrutiny of statutory instruments is a crucial element of the House's work, to which all Members can make an important contribution in the ways outlined above.

INSTRUMENTS NOT REPORTED

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Instruments subject to annulment

SI 2010/1835 Equality Act 2010 (Offshore Work) Order 2010

SI 2010/1938 Academy Conversions (Transfer of School Surpluses) Regulations 2010

SI 2010/1940 Education (Individual Pupil Information) (Prescribed Persons) (England) (Amendment) Regulations 2010

SI 2010/2129 Children's Trust Board (Children and Young People's Plan) (England) (Revocation) Regulations 2010

SI 2010/2145 Radioactive Contaminated Land Registrations (Northern Ireland) (Amendment) Regulations 2010

SI 2010/2146 Radioactive Contaminated Land Modification of Enactments) (Wales) (Amendment) Regulations 2010

SI 2010/2147 Radioactive Contaminated Land (Enabling Powers and Modification of Enactments) (England) (Amendment) Regulations 2010

SI 2010/2153 Radioactive Contaminated Land (Scotland) (Amendment) Regulations 2010

SI 2010/2265 Special Restrictions on Adoptions from Abroad (Haiti) Order 2010

SI 2010/2280 Feed (Sampling and Analysis and Specified Undesirable Substances) (England) Regulations 2010

SI 2010/2281 Foodstuffs Suitable for People Intolerant to Gluten (England) Regulations 2010

SI 2010/2312 Food Irradiation (England) (Amendment) Regulations 2010

SI 2010/2327 Education (Prescribed Public Examinations) (England) Regulations 2010

SI 2010/2342 Safeguarding Vulnerable Groups Act 2006 (Specified Lists: Scotland) Order 2010

SI 2010/2357 Commons Registration (Amendment and Miscellaneous Revocations) Regulations 2010

SI 2010/2363 Bee Diseases and Pests Control (England) (Amendment) Order 2010

SI 2010/2389 National Health Service (General Medical Services Contracts) (Prescription of Drugs etc.) (Amendment) Regulations 2010

SI 2010/2401 Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) (Amendment) Order 2010

SI 2010/2412 Police Authority (Amendment) Regulations 2010

SI 2010/2417 Housing Renewal Grants (Prescribed Form and Particulars) (Revocation) (England) Regulations 2010

CM 7944 Statement of Changes in Immigration Rules

Instruments subject to annulment (Northern Ireland)

SR 2010/336 Safeguarding Vulnerable Groups (Barred Lists: Scotland) Order (Northern Ireland) 2010

APPENDIX 1: STATEMENT OF CHANGES IN IMMIGRATION RULES (CM 7944): CORRESPONDENCE

Information from the UK Border Agency

Q. *What bearing has the judgment of the Supreme Court in ZN (Afghanistan) & Ors v Entry Clearance Officer (Karachi) [2010] UKSC 21 on this change?*

A. The changes to the Immigration Rules on Refugee Family Reunion were made in response to the Supreme Court judgment of ZN (Afghanistan). The ruling highlighted that the current drafting of the rules did not accurately reflect the Secretary of State's policy on refugee family reunion to which they were intended to give effect.

The Secretary of State's policy has always been that, when a refugee acquires citizenship, his or her refugee status lapses by law in accordance with Article 1C (3) of the 1951 Convention and Article 11 (1) (c) of Council Directive 2004/83/EC ("the Qualification Directive"), and that accordingly he or she ceases to be entitled to benefit from the more favourable provisions on family reunion that apply to refugees.

In ZN (Afghanistan), the Supreme Court concluded that the drafting of paragraphs 352A and 352D of the Immigration Rules did not deliver this policy intention, because it merely required the family member's sponsor to be a "person granted asylum", but not necessarily currently to be a refugee.

In light of this judgment, the Secretary of State is amending the Rules to correct the position and make it clear (in accordance with the longstanding policy) that only a person who is currently a refugee or is currently a beneficiary of humanitarian protection may benefit from family reunion under Part 11 of the Immigration Rules. Other persons present and settled in the UK, including British citizens, may sponsor family members to come to the UK under Part 8 of the Immigration Rules.

Additionally, the judgment has no bearing on the changes to the procedural requirement of writing to a refugee to enable them make representations before confirming they no longer have refugee status. The Secretary of State wanted to ensure that the UK Border Agency removes this bureaucratic hurdle where a refugee voluntarily opts to have their status ceased by acquiring citizenship. Under Article 38 (4) of Council Directive 2005/85/EC ("the Procedures Directive") we are permitted to derogate from this procedure as refugee status will cease automatically.

October 2010

APPENDIX 2: CHILDREN'S TRUST BOARD (CHILDREN AND YOUNG PEOPLE'S PLAN) (ENGLAND) (REVOCATION) REGULATIONS 2010 (SI 2010/2129): CORRESPONDENCE

Questions from the Merits Committee to the Department for Education

- When this SI comes into effect, the legal position will presumably be that there will remain a duty to cooperate through Children's Trusts, but no requirement to publish a Plan?
- Have you identified any risks with this approach? If so, how are you managing them?
- How will you proceed if the particular provisions of the Education Bill do not get through Parliament?

Response from the Department for Education

When these Regulations come into force, you are correct in assuming that the duty to co-operate set out in section 10 of the Children Act 2004 will continue to apply. As part of the forthcoming Education Bill the government intends to remove schools (including Academies), colleges and other institutions within the further education sector ('FEIs') from the list of relevant partners to which that duty to co-operate applies, and to remove Jobcentre Plus from the list once a suitable legislative vehicle becomes available, but the duty to co-operate itself will continue and will still apply to all other relevant partners including PCTs and police. The aim of removing the requirement to publish a Children and Young People's Plan ('CYPP') is to reduce the level of central prescription about how local areas make their co-operation arrangements at the earliest opportunity.

The Government also intends to remove the requirement in section 12A - 12D of the Children Act 2004 to establish a Children's Trust Board once a suitable legislative vehicle becomes available.

The effect is that these planned changes will be introduced in stages. In the short term these Regulations remove the requirement for a CYPP and the duty to co-operate will still apply to all relevant partners, including schools and FEIs. The Government is also withdrawing the statutory guidance to Children's Trusts this autumn so local areas, although still required to have specific arrangements in place through which local authorities and relevant partners must co-operate to improve children's well-being, will have the flexibility to tailor the arrangements to meet their own circumstances and organise their own planning and commissioning priorities. As noted above, as part of the forthcoming Education Bill schools and colleges will no longer be required to co-operate as relevant partners in the Children's Trust arrangements. The intention is to remove the requirement to have in place a Children's Trust Board and Jobcentre Plus from the list of relevant partners in a subsequent Bill. So over a period of about three years, while the section 10 duty to co-operate will remain in place and continue to apply to local authorities and the other bodies who remain listed in section 10(4), local areas will be given increasingly more autonomy in how they organise and coordinate their services to satisfy this duty.

We do not consider that in practice it will be difficult for local areas to implement. Local areas will be at liberty to produce a CYPP or other strategic plan where it makes sense locally. So where arrangements have been put in place that are successful they can continue, and if not they can be adapted.

The main risk with this approach is that there may be some confusion, both by the reversal of the previous Government's policy which has not been fully implemented and by the staged reduction of the level of prescription. We have produced a short document which is to be published on the Department for Education's new website which sets out the Government's position and direction of travel. These proposals and the revocation of the 2010 Regulations now (which otherwise

would have required Children's Trust Boards to prepare and publish a detailed CYPP by 1 April 2011) are also fully consistent with the wider policy on reducing central prescription and promoting local innovation and creativity. We are also developing an ongoing communications strategy to support the ongoing action on deregulation.

If the provisions in the Education Bill to remove the duty to co-operate from schools, colleges and other FEIs do not gain the approval of Parliament it would make no material difference to removing the requirement for a CYPP. The revocation of the 2010 Regulations will still contribute to the Government's main aim which is to reduce the level of central prescription. Schools and colleges would continue to be required to co-operate to improve children's well-being but that does not depend on the production of a CYPP.

October 2010

APPENDIX 3: WATER USE (TEMPORARY BANS) ORDER 2010 (SI 2010/2231): CORRESPONDENCE

Further information from the Department for Environment, Food and Rural Affairs

The exception provided in Article 4(1) is intended to restrict the ability of water undertakers to prohibit the use of water when the use of water would be necessary for health or safety reasons. Specific examples of circumstances in which the Article 4(1) would apply are where a sports surface becomes so dry and impacted as to be likely to cause injury, where there has been a spillage of a harmful substance that needs to be diluted and washed away and where an area needs to be decontaminated to prevent a disease, such as foot and mouth disease, from spreading and the decontamination process involves the use of water.

Water companies may take action where they believe restrictions are being breached. In the first instance this would usually take the form of correspondence and warnings, but they are able to prosecute if necessary - and the court would then be able to decide whether the use of water was a contravention of the restriction or justified on grounds of health and safety.

We will be updating the Defra website to notify people about the Water Use (Temporary Bans) Order and will also be providing examples of kind of water uses that water undertakers would or would not be able to prohibit by virtue of the Order. In addition, the use of these powers will be kept under review and Government may amend the provisions if that is shown to be necessary.

October 2010

APPENDIX 4: LOCAL LAND CHARGES (AMENDMENT) RULES 2010 (SI 2010/1812): CORRESPONDENCE

Letter from Lord Goodlad to Jonathan Djanogly MP, Parliamentary Under Secretary of State, Ministry of Justice

The Merits Committee has today considered this instrument and has cleared it, recognising that the anomaly between the Land Charges Rules 1977 and the Environmental Information Regulations 2004 needs to be resolved. However they would like clarification on two points;

The Environmental Information Regulations came into effect in 2005, so why has it taken so long to identify this conflict with the Land Charges Rules? Surely Departmental officials have a role in monitoring proposed legislation to identify and resolve potential conflicts of policy. Why was this problem therefore not identified at a much earlier stage?

The delay in changing the Local Land Charges Rules means that overpayments have potentially been accumulating over the last 5 years and yet the Department appears to shift all responsibility for any compensation claims onto the Local Authorities, which were simply applying central policy during that time. We were surprised to see from the Explanatory Memorandum that Local Authorities will even be required to provide their own legal advice on any compensation claims, incurring further costs. We would be grateful for a more detailed explanation of why this policy line is deemed appropriate.

5 October 2010

Letter from Jonathan Djanogly MP to Lord Goodlad

Thank you for your letter of 5 October. You ask why it took so long to identify the conflict between the Environmental Information Regulations 2004 and the Local Land Charges Rules 1977. As you say, departmental officials have a role in monitoring proposed legislation to identify and resolve potential conflicts of policy. As you will appreciate, the Environmental Information Regulations are very wide in their application and, although many policy impacts were spotted at the time that the relevant Directive was negotiated and the implementing Regulations were drafted, this one unfortunately was not. As explained in the Explanatory Memorandum, my Department were only alerted to the problem as a result of guidance and decisions of the Information Commissioner in 2009.

Your second question relates to responsibility for potential claims for compensation for overpaid local land charges fees. As the fees were collected by local authorities, it is to them that any claims for repayment will be made. As this is an issue on which there is a potential conflict of interest between local and central government, we do not believe it would be appropriate for the government departments involved to provide legal advice to local authorities. We believe this is a matter on which local authorities (individually or jointly) may wish to obtain independent advice.

However, it is worth pointing out that, in assessing the loss of local land charge fee income to local authorities in the current financial year under the government process for assessing new burdens on local authorities, the government has taken into account costs arising out of potential claims for repayment. For 2011-12 and in future years, these matters will be considered as part of the spending review.

10 October

APPENDIX 5: CONVENTIONS OF THE HOUSE RELATING TO SECONDARY LEGISLATION: CORRESPONDENCE

Letter from Lord Goodlad to Lord Strathclyde, Leader of the House of Lords

I am writing further to your letter of 29 July to Lord Scott, which Lord Scott forwarded to his colleagues on the Merits of Statutory Instruments Committee.

The Committee has asked me to write in response to your suggestion that there is a "convention that the House of Lords does not reject statutory instruments by voting them down where the House of Commons has, or would have, approved them".

The Committee accepts that it is difficult to formulate a strict definition of a 'convention'. Parliamentary conventions were examined in detail by the Joint Committee on Conventions of the UK Parliament in 2006, which noted that "conventions as such are flexible and unenforceable, particularly in the self-regulating environment of the House of Lords" (Session 2005-06, HL Paper 265-I, paragraph 281).

However, even taking into account the difficulty of defining conventions precisely, we do not accept your statement about voting on statutory instruments. The best definition of the convention on voting on secondary legislation, as we understand it, is in the report of the Joint Committee on Conventions. This states "that the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate for it to do so" (paragraph 227). The Conventions Committee's report goes on to list some of the circumstances in which this might be appropriate. The Committee explicitly rejects the suggestion that the Lords' role is entirely dependent on the view of the Commons (paragraph 228). As you know the House debated this report, and took note of it with approval, on 16 January 2007.

The current edition of the *Companion to the Standing Orders* supports the convention as expressed by the Conventions Committee. It states under the heading "General powers of the House over delegated legislation" that "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 ... 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" ..." (2010 edition, paragraph 10.02).

The House's effective scrutiny of statutory instruments is an important matter, so we are printing this letter, together with your correspondence with Lord Scott of Foscote which provides the context and further information, as an Appendix to one of our regular reports to the House. If you wish to respond we will of course be pleased to publish your letter in the same way.

20 October 2010

Letter from Lord Scott of Foscote to Lord Strathclyde

I am prompted to write to you by two events. The first is your answer to given to the question I put to you when you addressed the Crossbenchers on Wednesday, 7 July. You said that it had become an important convention of the House that the House would not vote down a statutory instrument. The second event is your speech to the House on 12 July relating to "the case for reviewing the working practices of the House of Lords", and your invitation to members of the House to make suggestions about possible improvements to those working practices.

As to the "convention" point, I can find no reference in the 2010 Edition of "The Companion to the Standing Orders and Guide to the Proceedings of the House of Lords" to the convention to which you referred. Indeed, para 10.11 at p.194 of the Companion/Guide specifies a permissible

procedure whereby the House may be invited to withhold its agreement to a statutory instrument that requires an affirmative resolution (see the first bullet point to 10.11 and see also 10.12).

Moreover, in relation to a statutory instrument that requires an affirmative resolution of the House the convention appears to me to be, constitutionally, highly questionable. If primary legislation has made an affirmative resolution of the House a pre-condition of the coming into force of a statutory instrument, I do not follow on what basis there can be a legitimate convention that the House will refrain from exercising a power expressly conferred by primary legislation.

As for negative resolution procedure, the constitutional point that I have referred to does not arise and I can accept that it could become a convention that the House would not vote down a statutory instrument, and that an objector should register his/her objection by putting down a "regret" motion which, if passed, would nonetheless leave the statutory instrument intact (see para 10.17 of the Companion/Guide). But, in relation to these statutory instruments, too, the existence of the convention is not, so far as I have been able to find, mentioned in the Companion/Guide.

Bearing in mind that the vast bulk of legislation these days takes the form of secondary legislation, and, judged from my experience since last November as a member of the House's Merits Committee, it seems to me important that there should be Parliamentary procedures that enable the House, on its own account or via the Merits Committee, to advise revision, and if necessary to delay the coming into force, of secondary legislation. In the period leading up to the General Election the Committee consistently drew attention to the inclusion in S.Is of power for statutory regulators to enter private premises, including dwelling houses, without the consent of the owner/occupier and without first obtaining a warrant from a court authorising the entry. This power of entry was usually accompanied by a provision that made refusal by the owner/occupier to allow entry a criminal offence. If the House is to have an effective power of revision of secondary legislation - the statutory instruments conferring these powers of entry are good examples - it should be given the power to send the instrument back to the sponsoring Department from whence it came with proposed amendments.

One of the difficulties in relation to statutory instruments that are subject to the negative resolution procedure is that the proposed date for the statutory instrument to come into effect is often too soon to allow proper consideration by the sponsoring Department and/or the House of Commons of the proposed amendments.

It is, I think, generally accepted that the most important function of this House is to revise and, if necessary, delay and require second thoughts about legislation. I do not think that under present procedures the House can exercise this function properly in relation to secondary legislation that is subject to negative resolution procedure.

I am writing this letter in the hope that your working party can find an acceptable cure.

20 July 2010

Letter from Lord Strathclyde to Lord Scott of Foscote

The convention relating to statutory instruments that I referred to on 7 July when addressing the Crossbench group is the convention that the House of Lords does not reject statutory instruments by voting them down where the House of Commons has, or would have, approved them.

In the 2010 edition of the Companion, this is reflected in the observation that the House of Lords has only occasionally rejected delegated legislation (Companion paragraph 10.02). Since the reform of the House in 1999, the House has only twice rejected an affirmative instrument (in 2000 and 2007), and only once rejected a negative instrument (in 2000) - underlining the rarity of such occurrences.

The House has instead developed a practice of using non-fatal motions of regret to put on record its disapproval of a particular statutory instrument - whether affirmative or negative. This does

not mean that fatal motions are never tabled or - very occasionally - divided on (indeed, the House has affirmed its "unfettered freedom to vote on any subordinate legislation submitted for its consideration" by agreeing a resolution to that effect in 1994), but rather that such motions are very rarely carried, as the House almost always chooses to support a non-fatal motion instead.

The reasons why this convention has developed are manifold. The Parliament Acts do not apply to delegated legislation. Accordingly, delegated legislation rejected by the House of Lords cannot have effect even if the House of Commons has approved it. By contrast to procedures for primary legislation, there is no mechanism for a dialogue between the two Houses in relation to statutory instruments, nor is there much scope for such dialogue as each House only has the power to veto the instrument (save for the very small number of cases where the Parent Act specifically provides for amendment).

The rejection of secondary legislation would, moreover, jar with the House of Lords' role as a revising chamber: outright defeat of a statutory instrument cannot be classed as revision.

It is for these reasons that the political parties in the House have long adhered to the convention I referred to on 7 July. Although the Cross Benches do not operate collectively in the same way, my understanding is that individual Cross Bench Members would also wish to uphold the convention.

Should you wish to make a submission on this matter to the Leader's Group reviewing the working practices of the House, I would be very happy to forward your submission to Lord Goodlad, who is to chair the group.

29 July 2010

Letter from Lord Scott of Foscote to Lord Strathclyde

I am grateful to you for drawing my attention to the House's resolution in 1994 (referred to in the third substantive paragraph of your letter). The resolution accords entirely with my understanding of the legal position.

I agree with you that the rejection by the House of secondary legislation that the Commons has approved might, as you say, jar with the House's role as a revising Chamber. But that would surely only be so if the ground of rejection were on an issue of policy. If the rejection had been on a drafting point, giving rise to a question whether the instrument would achieve its intended purpose, or whether it would have an effect that was not intended, it seems to me that the rejection would be entirely consistent with the House's role as a revising Chamber. The instrument in question would have to go back to the sponsoring Department, which would have to consider the points raised in the Lords and either relay the instrument in a suitably amended form or explain why the questions raised in the Lords were thought to be misconceived and relay the instrument in its original form.

I am sure it is necessary to have some form of procedure that would enable the Lords, or the Merits Committee, to revise secondary legislation as it can revise primary legislation. I saw Alastair Goodlad a day or two ago and mentioned to him the point I had raised with you. I said I would send him copies of the correspondence between us. There is no additional submission I would wish to make that is not covered by the contents of my two letters to you.

23 September 2010

APPENDIX 6: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 19 October 2010 Members declared no interests on any of the instruments of interest.

Attendance:

The meeting was attended by B. Butler-Sloss, L. Eames, L. Goodlad, B. Hamwee, L. Hart of Chilton, L. Methuen and B. Morris of Yardley.