



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

32nd Report of Session 2015-16

**Response to the Strathclyde
Review: Effective
parliamentary scrutiny of
secondary legislation**

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to scrutinise —

(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 these specified grounds:

(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;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Andrews	Lord Hodgson of Astley Abbots	Baroness Stern
Lord Bowness	Baroness Humphreys	Rt Hon. Lord Trefgarne (<i>Chairman</i>)
Lord Goddard of Stockport	Rt Hon. Lord Janvrin	Lord Woolmer of Leeds
Lord Haskel	Baroness O'Loan	

Registered interests

Information about interests of Committee Members can be found in Appendix 1.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Information and Contacts

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Evidence is published online at <http://www.parliament.uk/slsc-strathclyde-review> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence

SUMMARY

Towards the end of 2015, Lord Strathclyde carried out a review, at the request of the Government, to “examine how to protect the ability of elected Governments to secure their business in Parliament” which would “in particular ... consider how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters and secondary legislation”. The review was prompted primarily by two successful motions on the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations, a draft affirmative instrument, which had the effect of deferring further consideration of the draft instrument until specified conditions had been satisfied.

The Strathclyde Review sets out three options: option 1 would remove the Lords from secondary legislation procedure altogether; option 2 would entail the re-framing of the convention governing the exercise of the power of the Lords so that the “veto is left unused”; and, option 3—the option recommended by Lord Strathclyde—would create a new statutory procedure which would remove the power of the Lords to reject an instrument but would allow the Lords to invite the Commons to “think again” in an unspecified way.

The Strathclyde Review asserts that the Lords convention on secondary legislation has been “stretched to breaking point”, hence the need for change. Whilst we acknowledge that opinions vary about the appropriateness of the Tax Credits Regulations votes, we do not share this view of the convention, and we recommend that the House of Lords should retain its power to reject secondary legislation—albeit to be exercised in exceptional circumstances only.

We make this recommendation on two principal grounds:

- first, that the House has demonstrated, not least by the fact that there have been only six defeats on secondary legislation since 1968, an understanding that the power should be exercised only rarely, and we take the view that, as a self-regulating House, the House can be relied upon to continue to do so; and
- secondly, that the nature of secondary legislation is such that the key issue is not, as the Strathclyde Review suggests, the “primacy of the Commons” but the role of Parliament in scrutinising and, where appropriate, challenging the Executive. Given the Government majority in the Commons and also, as a result of the many pressures on the time of MPs, the greater scope of the Lords to devote time and effort to the scrutiny of secondary legislation, the Lords has a critical part to play in the effective scrutiny of secondary legislation by Parliament.

It follows that we do not support any of the three Strathclyde options. Options 1 and 3 would, by statute, remove the Lords power to reject secondary legislation; and although, without statutory change, option 2 does not remove that power, it would it appears involve the Lords agreeing to a convention under which the power to reject would not be used.

In our report, we consider the options in some detail. We received no evidence at all, either from Lord Strathclyde or anyone else, in favour of option 1. Option 2 has the advantage of being non-statutory but it is ill-defined and appears to assume that the Lords power to reject secondary legislation will never be used. Option 3 has a number of practical problems and carries with it the risks

associated with implementation by primary legislation. More importantly, it would involve a fundamental change in the role of the Lords in scrutinising secondary legislation and would weaken the ability of Parliament as a whole to challenge the Government. If a bill were to be introduced as a result of the Strathclyde Review, we recommend that it should first be subject to pre-legislative scrutiny in order to ensure that the Government were not “carving out a smooth legislative path for themselves”.

Having reflected on the Strathclyde options and also the evidence we received, we conclude that there are strong arguments in favour of re-affirming what we consider to be the current convention as set out in the report of the Joint Committee on Conventions of the UK Parliament (under the chairmanship of the Rt Hon. Lord Cunningham of Felling), namely that the Lords should retain its power to reject an instrument but that that power should be used only in exceptional circumstances, and we recommend accordingly.

Lord Strathclyde ends his review with the comment that, “to mitigate against excessive use” of the proposed procedure under option 3, it would be appropriate for the Government “to take steps to ensure that bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. We welcome this sentiment and suggest that if the Government were, in the future, to exercise greater caution in using secondary legislation for significant policy change, then a likely concomitant would be a reduction in challenges to secondary legislation.

Finally, we make recommendations about wider issues relating to parliamentary scrutiny of secondary legislation. During the course of our inquiry we received a range of evidence about how scrutiny of secondary legislation might be improved. We recommend that further work should be undertaken by some appropriate form of collaborative group to consider what procedural changes in both Houses could be introduced to make parliamentary scrutiny more effective.

A list of our observations and recommendations is set out in Chapter 5.

Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation

CHAPTER 1: INTRODUCTION

1. On 27 October 2015, the Government announced a review to “examine how to protect the ability of elected Governments to secure their business in Parliament”. It would “in particular ... consider how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters and secondary legislation”.¹
2. The review was undertaken by Lord Strathclyde at considerable speed. He was assisted by a small panel of experts who were named in a written statement on 4 November 2015.² They were Jacqy Sharpe, former Clerk of Legislation in the House of Commons, Sir Stephen Laws, former First Parliamentary Counsel, and Sir Michael Pownall, former Clerk of the Parliaments.
3. Lord Strathclyde made his report to the Prime Minister in December 2015. Only eight weeks after the initial announcement of the review, on 17 December 2015, the report was published and presented to Parliament: *Strathclyde Review: secondary legislation and the primacy of the House of Commons* (“the Strathclyde Review”).³ The Strathclyde Review was debated in the House of Lords on 13 January 2016, two days after the return of the House after the Christmas recess. At the conclusion of the debate, the Leader of the House, the Rt Hon. Baroness Stowell of Beeston, said that the Government would be reflecting on the points raised in the debate and acknowledged that several committees, including the Secondary Legislation Scrutiny Committee (SLSC), would wish to consider the implications of the Strathclyde Review.⁴ Reports by the Constitution Committee and the Delegated Powers and Regulatory Reform Committee (DPRRC), responding to the Strathclyde Review, were published on 23 March 2016.⁵

Events prompting the Strathclyde Review

Tax Credits Regulations

4. The event which prompted the review was, first and foremost, the outcome of votes in the House of Lords on 26 October 2015 on the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (“the Tax Credits Regulations”).
5. The draft Tax Credits Regulations were laid under section 66(1) and (2) (a) of the Tax Credits Act 2002 (“the 2002 Act”). They were subject to the

1 HL Deb, 28 October 2015, cols 1175–76.

2 See Appendix A of the Strathclyde Review.

3 Cm 9177.

4 HL Deb, 13 January 2016, col 378.

5 Constitution Committee, 9th Report, Delegated Legislation and Parliament: A response to the Strathclyde Review, Session 2015–16 (HL Paper 116); Delegated Powers and Regulatory Reform Committee, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119).

affirmative procedure and required the approval of both Houses before they could be made by the Treasury. Section 66(1) of the 2002 Act states: “No regulations to which this subsection applies may be made unless a draft of the instrument containing them ... has been laid before, and approved by a resolution of, each House of Parliament”.

6. Their stated purpose was to assist the Government in delivering their manifesto commitment to reduce the welfare budget and would, according to the Government, result in £4.4 billion in savings in 2016. They would do this, first, by reducing the threshold at which working tax credits would begin to be withdrawn (from £6,420 to £3,850) and, secondly, by increasing the taper rate (that is, the rate at which tax credits are withdrawn) from 41% to 48%. They also reduced the “income disregard” from £5,000 to £2,500 (“the income disregard component”). No Impact Assessment (IA) was laid with these draft Regulations.
7. The draft Regulations were approved by the House of Commons on 15 September 2015 (by 325 votes to 290).⁶ The Commons then returned to the issue on 20 October 2015, when an Opposition motion calling on the Government “to reverse its decision to cut tax credits, which is due to come into effect in April 2016” was defeated (by 295 votes to 317).⁷ Prior to consideration in the House of Lords, therefore, the Regulations had been considered twice in the Commons. This explains why, although the Regulations needed approval by the House of Commons only once, witnesses such as the Leader of the House of Commons, the Rt Hon. Chris Grayling MP, referred to them as having “been voted on and approved twice by the Commons”.⁸
8. On 13 October 2015, this Committee reported on the draft Tax Credits Regulations. We drew them to the special attention of the House, commenting that the Explanatory Memorandum accompanying the instrument “contained minimal information” and explaining that we had asked the Government for additional information including an explanation why an IA had not been published.⁹ Prompted by our earlier inquiries, the Chancellor of the Exchequer had provided an IA on 12 October 2015, which the Committee published on its website.
9. The publication of this IA was mentioned in the Commons debate on 20 October 2015, and also on 29 October 2015 on a motion in the name of Frank Field MP calling on the Government “to reconsider the effect on the lowest paid workers of its proposed changes to tax credits due to come into force in April 2016, to carry out and publish an analysis of that effect, and to bring forward proposals to mitigate it” (the motion was carried by 215 to 0).¹⁰
10. Prior to the debate in the House of Lords on the draft Regulations, Lord Kirkwood of Kirkhope had tabled a motion as an amendment to the approval motion: “to move to resolve that this House declines to consider the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 until after the publication of an impact assessment on the Regulations”. Given that an IA had been provided shortly before we reported, Lord Kirkwood’s amendment motion was not pursued.

6 HC Deb, 15 September 2015, col 964.

7 HC Deb, 20 October 2015, cols 845-923.

8 Q4.

9 9th Report, Session 2015-16 (HL Paper 38).

10 HC Deb, 29 October 2015, cols 530-606.

11. On 26 October 2015, the House of Lords debated the draft Regulations on an approval motion in the name of the Leader of the House, the Rt Hon. Baroness Stowell of Beeston.¹¹ The motion, “that the draft Regulations laid before the House on 7 September be approved”, was debated along with the following amendment motions:
- Baroness Manzoor: to leave out all the words after “that” and insert “this House declines to approve the draft Regulations laid before the House on 7 September.”
 - Baroness Meacher: to leave out all the words after “that” and insert “this House declines to consider the draft Regulations laid before the House on 7 September until the Government lay a report before the House, detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action.”
 - Baroness Hollis of Heigham: to leave out all the words after “that” and insert “this House declines to consider the draft Regulations laid before the House on 7 September until the Government, (1) following consultation have reported to Parliament a scheme for full transitional protection for a minimum of three years for all low-income families and individuals currently receiving tax credits before 5 April 2016, such transitional protection to be renewable after three years with parliamentary approval, and (2) have laid a report before the House, detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action.”
 - The Lord Bishop of Portsmouth, at the end to insert “but this House regrets that the draft Regulations fail to take account of concerns about their short-term impact on working families and individuals currently receiving tax credits, and calls on the Government to consult further on the draft Regulations and revisit their impact.”

As far as we are aware, this was the first time deferral motions of this kind—that of Lord Kirkwood and the second and third motions which were debated—had been used.

12. Votes took place on the first three amendment motions. The first was disagreed to (by 99 to 310 votes). The second, in the name of Baroness Meacher, was agreed to (by 307 to 277 votes), as was the third, in the name of Baroness Hollis of Heigham (by 289 to 272 votes). The fourth motion in the name of the Lord Bishop of Portsmouth was pre-empted by the previous resolutions and was, therefore, not called.
13. On 14 January 2016, the Government laid the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2016 which had the effect of introducing the income disregard component of the original Tax Credits Regulations. The approval motion was debated on 7 March 2016.¹² An amendment motion, in the name of Baroness Manzoor, was also debated. It read: “but this House regrets that the draft Regulations reduce incentives for low-income working people to increase their salaries, will lead to an increase in overpayments of tax credits, and could place families

¹¹ HL Deb, 26 October 2015, cols 976-1042.

¹² HL Deb, 7 March 2016, col 1083.

in additional hardship at the end of the financial year”. The amendment was disagreed to (by 104 to 206 votes) and the approval motion was agreed to.

Electoral Registration and Administration Order

14. The second event to bear on the appointment of the Strathclyde Review was the vote on 27 October 2015 in the House of Lords on a motion relating to the Electoral Registration and Administration Act 2013 (Transitional Provisions) Order 2015 (SI 2015/1520) (“the Electoral Registration and Administration Order”).¹³
15. The Electoral Registration and Administration Order was laid on 16 July 2015 and came into force on 6 August 2015. It was a negative instrument and would remain in force unless successfully prayed against by either House. On 27 October 2015, the House debated an annulment motion in the name of Lord Tyler, with an amendment motion in the name of Lord Kennedy of Southwark to add the words “on the grounds that it goes against the advice of the Electoral Commission”. After a debate, Lord Kennedy’s amendment motion was agreed to (by 267 to 257 votes) but Lord Tyler’s motion to annul was disagreed to (by 246 to 257 votes). The Order therefore remained in force.
16. The votes on this instrument neither resulted in a defeat of the Government nor involved the use of unprecedented motions. The Rt Hon. Earl Howe, Deputy Leader of the House of Lords, however, explained to us what, in his view, was the relevance of the votes: “... if it has in practice been reasonable for a Government to expect one Lords defeat on an SI during the course of a Parliament, which has been the pattern, a serious attempt to defeat an SI on the very next day after the tax credits defeat undoubtedly called that expectation into serious question”.¹⁴ We received no other evidence in support of the view that there is an expectation of one defeat, and no more than one defeat, each Parliament.

Strathclyde Review

17. In responding to a Private Notice Question by Baroness Smith of Basildon on 28 October 2015, Baroness Stowell indicated the Government’s view of the procedural significance of the votes on the Tax Credits Regulations: first, the Lords had declined to consider (thereby deferring its approval of) a statutory instrument which had been approved by the Commons; and, secondly, the instrument dealt, “very clearly and exclusively”, with significant financial matters which had been contained in the budget. This combination meant that the decision of the Lords to vote in favour of the two deferral motions was “unprecedented”.¹⁵ Furthermore, those motions embodied a new mechanism for resisting secondary legislation. They were, according to Lord Strathclyde, “a procedural innovation”, albeit, in his view, “pretty much exactly the same as a full rejection”.¹⁶
18. In undertaking his review, Lord Strathclyde took some evidence (although it has not been published). This included a meeting between the Chairman of this Committee, with the Clerk and Committee Adviser, and Lord Strathclyde

¹³ HL Deb, 27 October 2015, col 1095.

¹⁴ [Q 75](#).

¹⁵ HL Deb, 28 October 2015, col 1177–78.

¹⁶ Lord Strathclyde, evidence to the House of Commons Public Administration and Constitutional Affairs Committee (PACAC), 19 January 2016, Q 74.

on 10 November 2015, following which a letter dated 17 November 2015 was sent by the Chairman on behalf of the SLSC to Lord Strathclyde describing the role of the Committee. The letter is set out in Appendix 4 of this Report. On 8 December 2015, Lord Strathclyde held an informal meeting with the Committee as a whole.

19. The Strathclyde Review identifies three options which are set out in the Executive Summary in the following way:
 - **Option 1** “would be to remove the House of Lords from statutory instrument procedure altogether”.
 - **Option 2** “would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused.”
 - **Option 3** “would be to create a new procedure—set out in statute—allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy.”
20. The Strathclyde Review recommends option 3 on the grounds that it would provide the Government “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”. It would also, according to the Review, “preserve and enhance the role of the House of Lords to scrutinise secondary legislation by providing for such legislation to be returned to the House of Commons”.¹⁷
21. The Review also sets out two further recommendations, neither explored in any detail:
 - The first is that, having recommended option 3, the Review states: “... in order to mitigate against any excessive use of the new process ... it would be appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”.
 - The second addresses the issue of how to restrict parliamentary scrutiny of financial matters. The Review recommends that “a review should be undertaken, with the involvement of the House of Commons Procedure Committee, of the circumstances in which statutory instrument powers should be subject to Commons-only procedures, especially on financial matters, with a view to establishing principles that can be applied in future.”¹⁸

Previous reports on parliamentary scrutiny of secondary legislation

22. The Strathclyde Review refers to three previous relevant reports. They are:
 - *A House for the Future*, the report of the Royal Commission on the Reform of the House of Lords (“the Wakeham Commission”), chaired

¹⁷ Strathclyde Review, p 5.

¹⁸ *Ibid.*, pp 5-6.

by the Rt Hon. Lord Wakeham and published in 2000 (“the Wakeham Report”).¹⁹ The Wakeham Commission examined, amongst other things, the way in which Parliament considers secondary legislation and recommended the establishment of this Committee (originally called the Merits of Statutory Instruments Committee). The Commission also considered the development of a suspensory veto based on convention but concluded that that would not be satisfactory and that what was needed was something that would “force the Government and the House of Commons to take [the House of Lords’] concerns seriously”.²⁰ The Commission therefore recommended a statutory approach whereby “where the second chamber votes against a draft instrument, the draft should nevertheless be deemed to be approved if the House of Commons subsequently gives (or, as the case may be, reaffirms) its approval within three months”; and “where the second chamber votes to annul an instrument, the annulment would not take effect for three months and could be overridden by a resolution of the House of Commons”.²¹ This proposal was, according to Lord Strathclyde, “the genesis” of his option 3.²²

- *Conventions of the UK Parliament* (“the Cunningham Report”), the report of the Joint Committee on Conventions, chaired by the Rt Hon. Lord Cunningham of Felling, which was published in 2006. The Joint Committee’s conclusions on Lords’ conventions relating to secondary legislation are described in more detail below (paragraphs 53 to 56). With regard to the Wakeham Commission proposal for a suspensory veto, the Joint Committee said that there was “no consensus” around the proposal and that it was, in any event, outside the remit of the Committee.²³
- *The Report of the Leader’s Group on Working Practices* (“the Leader’s Group”), chaired by Lord Goodlad and published in 2011 (“the Goodlad Report”). The Goodlad Report noted that “both the volume ... and importance of delegated legislation continues to grow”.²⁴ It endorsed “the spirit” of the Wakeham Commission proposal and, like the Strathclyde Review, suggested that if the House’s powers were “less draconian”, then the House might use them more often, “forcing the Government to rethink its policy and possibly amend the proposed legislation”.²⁵ Unlike the Wakeham Commission, however, the Leader’s Group did not recommend primary legislation but, instead, proposed that a new convention should be adopted by resolution to the effect that, in defeating an affirmative instrument, “the House’s intention would be to invite the Government to ‘think again’”. Then, if, after having considered the issues raised by the Lords, the Commons were to approve the instrument, the House would undertake not to vote it down a second time.²⁶ The Goodlad Report recommended a

19 A House for the Future, Royal Commission on the Reform of the House of Lords (2000), Cm 4534. <https://www.gov.uk/government/publications/a-house-for-the-future-royal-commission-on-the-reform-of-the-house-of-lords>.

20 Wakeham Report, p 77, para 7.35.

21 *Ibid.*, p 77, para 7.36.

22 Q 99.

23 Cunningham Report, p 63, para 234.

24 Goodlad Report, p 37, para 143.

25 *Ibid.*, p 39, para 152.

26 *Ibid.*, pp 39-40, para 153.

minimum interval between the House rejecting an instrument and the Government inviting the House a second time to agree it. It proposed one month.²⁷

Inquiry by the Secondary Legislation Scrutiny Committee

Purpose of the inquiry

23. The purpose of this Committee's inquiry is threefold:
- First, it is to consider the purpose of the Strathclyde Review and to examine, in the context of secondary legislation, whether the principal relationship at issue is the relationship between the two Houses, as the Strathclyde Review suggests, or whether, as several witnesses have argued, it is the relationship between Parliament and the Executive.
 - Secondly, it is to examine the implications of the three Strathclyde options for the effective scrutiny of secondary legislation by Parliament and to consider whether any of them is satisfactory.
 - Finally, building on the evidence received in response to this inquiry, it is to set out some of the practical suggestions for improving the parliamentary scrutiny of secondary legislation made to us and to propose how these might be taken forward.

Strathclyde options not a definitive list

24. In relation to the second purpose, at the outset of the inquiry the Committee decided that it would be important to keep an open mind about the possibility of further, alternative options rather than regarding the Strathclyde options as a definitive list from which a selection had to be made.

Evidence-gathering

25. The Committee published a Call for Evidence on 27 January 2016, set out in Appendix 2 to this report. We received ten written submissions and heard from 12 witnesses in person. The names of those who assisted the Committee by giving evidence, oral and written, are set out in Appendix 3 and we are very grateful to them. On 19 January 2016, Lord Strathclyde and Professor Meg Russell gave evidence to the House of Commons Public Administration and Constitutional Affairs Committee (PACAC). This evidence is available on the website of PACAC. We found the further information it provided very helpful.²⁸
26. The Strathclyde Review, as we have noted, is relevant to the work of other House of Lords committees, in particular the DPRRC and the Constitution Committee. Of interest to both this Committee and, more directly, to the DPRRC is Lord Strathclyde's concluding comment in the Executive Summary about the need "to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument".²⁹ Given our overlapping interest in this issue, we invited the Chairman of the DPRRC, Baroness Fookes, to attend this Committee's evidence sessions and we are grateful to her for assisting us in

27 *Ibid.*, p 40, para 153.

28 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/strathclyde-review/oral/27335.html>.

29 Strathclyde Review, p 6. See also "Conclusions and Recommendations", p 23.

exploring issues relating, in particular, to the boundary between primary and secondary legislation. We share with the DPRRC the view that this was “a fine example of useful collaborative working”.³⁰

27. We would also like to acknowledge, in particular, the invaluable work of the Hansard Society, namely the report by Dr Ruth Fox and Joel Blackwell entitled *The Devil is in the Detail: Parliament and Delegated Legislation* (“the Hansard Society Report”) which was published in 2014 and on which we have drawn throughout this inquiry.

Structure of the report

28. Chapter 2 begins by describing the context for the inquiry. We set out the relevant procedural arrangements, both in the Lords and the Commons—including the implications of the Lords exercising its power to reject an instrument, and we comment on the quality of scrutiny in the two Houses. We go on to examine the convention governing the exercise of the power of the Lords to reject secondary legislation, and Lord Strathclyde’s contention that it has been “stretched to breaking point”. We then consider the boundary between primary and secondary legislation, and issues relating to instruments with financial implications. In Chapter 3 we consider the Strathclyde options in detail and, in the light of our conclusions, in Chapter 4 we make suggestions about what should happen next, focusing on the importance of the House of Lords acting as a self-governing House and also on wider issues to do with improving Parliament’s capacity to scrutinise secondary legislation.

A note on terminology

29. Throughout this report we refer to “secondary legislation”, a name which helpfully distinguishes such legislation from “primary legislation” or Acts of Parliament. This is not, however, the only name given to this type of legislation. It is also called “delegated legislation” and “subordinate legislation”. On occasion, the material and sources we quote apply these alternative names. They tend to be used interchangeably. Statutory instruments (often referred to as “SIs”) are the most common form of secondary legislation.
30. When describing the power of the House of Lords in relation to secondary legislation, commentators often refer to the House having a “power of veto”. We prefer not to use this expression because it conveys an impression of finality, whereas, as we show in paragraphs 33 to 36 below, if the House were to reject an instrument, it is in fact open to the Government to re-lay an almost identical instrument immediately. For this reason, throughout this report, we refer to the House of Lords having a “power to reject” an instrument, rather than its having a power of veto.

30 DPRRC, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119), p 8, para 11.

CHAPTER 2: CONTEXT OF THE INQUIRY

Parliamentary scrutiny of secondary legislation

31. Secondary legislation is law made by Ministers (and certain public bodies such as regulators) using powers that have been conferred by primary legislation (the relevant Act of Parliament is sometimes referred to as “the parent Act”). It usually takes the form of statutory instruments. Statutory instruments are not amendable.³¹

Affirmative and negative procedure

32. Not all statutory instruments are subject to Parliamentary scrutiny. Some are laid before Parliament without any subsequent procedure, and some are not laid before Parliament at all.³² Of those which are subject to some sort of scrutiny procedure, they are for the most part either affirmative or negative instruments:
- Affirmative instruments usually require the approval of both Houses of Parliament although a proportion (about 10%)—those which involve central government taxation, for example—require House of Commons approval only.
 - Negative instruments will come into effect (or remain in effect) unless either House resolves to pray for their annulment.

The negative procedure is less rigorous than the affirmative procedure since the default position is that an instrument which is subject to the negative procedure will not be debated. Mr Grayling described the difference between the two types of instrument as follows:

“If you compare affirmative and negative resolutions, affirmative resolutions are already debated in Committee and there is a full vote on the Floor of the House [of Commons] if people disagree with the measure. ... The matters that come forward on a negative resolution are often very mundane and very technical. Parliament tends to pass them through without debate unless there is a reason for concern.”³³

Although Mr Grayling’s characterisation of negative instruments may be *generally* correct, Lord Hunt of Kings Heath argued that there were exceptions: whilst many were mundane and technical, “some of the negative SIs on which there have been prayers, full debates and sometimes votes in the Chamber [of the House of Lords] have been about pretty important things, such as legal aid ...”³⁴

What the Government can do if an instrument is rejected

33. If either House declines to approve an affirmative instrument or resolves to pray against a negative instrument, it is open to the Government to re-lay a second, substantially similar instrument immediately. The Cunningham Report refers to the evidence of the (then) Clerk of the Parliaments which includes the following explanation:

31 Except in very rare instances: for example, section 1(2) of the Census Act 1920 and section 27(3) of the Civil Contingencies Act 2004.

32 For example, commencement orders are not laid before Parliament.

33 [Q 2](#).

34 [Q 41](#).

“If it is affirmative, it may be re-laid, though it must be at least slightly different. If it is negative, it may be re-laid with a new title. If the Lords rejected it again (which has never happened), the Government could in the last resort embody it in a Bill.”³⁵

Re-laying the same order, or moving the same motion, would breach a rule of both Houses against putting a decided question for a second time in the same session.³⁶ The Cunningham Report notes how the order re-laid after the defeat of the draft Southern Rhodesia (United Nations Sanctions) Order 1968 was “cosmetically different”.³⁷

34. The two successful motions on the Tax Credits Regulations were, as we have said, unprecedented in that they departed from the binary decision of “approve” or “decline to approve” and appeared to interpose a delay by making consideration of an approval motion conditional on specified events.
35. If the conditions set out in Baroness Hollis’ amendment motion could have been met easily and without undue delay, then we suspect the Strathclyde Review may not have been commissioned at all. Lord Strathclyde, however, in evidence to the PACAC, described the motion as, in effect, taking the Tax Credits Regulations “hostage for three years” and so was “in practice and in effect a reject motion.”³⁸
36. This difference, however, between the usual fatal motion of declining to approve and a deferral motion is that, with a deferral motion, the original draft instrument remains “live” (in the sense that it continues to lie before the House, awaiting approval, until it is withdrawn). It appears, in these circumstances, that the options available to the Government, should they wish to proceed with the instrument, would be as follows:
 - We assume—but this was not tested—that it would have been open to the Government, procedurally if not politically, to withdraw the original Tax Credits Regulations and to re-lay a “slightly different” instrument immediately after. (As it was, the Government re-laid a very much reduced version of the original instrument (see paragraph 13 above).)
 - Alternatively, and again this is a political rather than a procedural issue, it would have been possible for the Government, in theory, to have reported to the House that it had satisfied the conditions of the deferral motion and to have re-tabled the approval motion. It would then have been a matter for the House to decide whether the Government’s report in fact met the conditions. Again, this option has not been tested.

It would not have been open to the Government to re-table the motion on the original instrument *without* reporting that they had satisfied the conditions of the deferral motion.

37. **Given the unprecedented nature of deferral motions, we recommend that the Procedure Committee should consider the implications of such motions. (Recommendation 1).**

35 Cunningham Report, p 60, para 218. Footnotes omitted.

36 *Ibid.*, p 60, n329. See Companion to the Standing Orders and Guide to Proceedings of the House of Lords (2015), para 6.53.

37 Cunningham Report, p 60, n329.

38 Evidence to the PACAC, Q 69.

Additional scrutiny procedures

38. For completeness, we should mention that, in addition to affirmative and negative instruments, Parliament has determined that some instruments should be subject to a level of scrutiny more rigorous than that required even under the affirmative procedure. Such procedures—for example, the super-affirmative procedure—in effect, give Parliament the opportunity to propose amendments to secondary legislation. They involve a two-stage procedure and take one or other of the following forms:
- a proposal containing a draft order is laid and then, after a specified scrutiny period, the draft order itself may be laid (for example, instruments laid under section 17 of the Local Government Act 1999); or
 - a draft order (rather than a proposal) is laid and then, after a specified scrutiny period, a revised draft order may be laid (for example, instruments laid under the Legislative and Regulatory Reform Act 2006 (see paragraph below)).
39. In 2012, the DPRRC published a report entitled *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* which contains an exhaustive list of these other procedures.³⁹ Relatively few instruments attracting these procedures have been laid. Legislative Reform Orders (LROs), laid under the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”), are the most common and provide an example of the super-affirmative procedure.⁴⁰ If an LRO is subject to the super-affirmative procedure, then an opportunity is provided under the 2006 Act for the relevant scrutiny committees in the two Houses (the DPRRC in the Lords and the Regulatory Reform Committee in the Commons) to comment on the draft instrument, and the Government are required to “have regard to” those comments and any other representations. If the Government decide to proceed with the LRO, the relevant Minister must lay before Parliament a statement about the representations made. The LRO then continues as an affirmative instrument. The scrutiny committees may recommend that that the LRO should not proceed. In that case, it may not do so unless the House concerned rejects the recommendation in the same session. LROs, which may amend Acts, can only be used if they satisfy certain conditions set out in Part 1 of the 2006 Act.

Financial instruments and Commons-only procedure

40. The Tax Credits Regulations had significant financial consequences and, during exchanges in the House about the Strathclyde Review, many commented on this. On 28 October 2015, for example, Baroness Stowell said: “The reason we need the review ... is that one of the conventions that ... the Joint Committee [on Conventions of the UK Parliament] discussed and highlighted as important to the effective role of Parliament has now been put in doubt by the actions of this House on Monday. On Monday, this House withheld its approval from a financial measure”.⁴¹ Baroness Hayman queried the meaning of “financial measure”: “ ... I understand the meaning of a Finance Bill. I understand financial SIs that are considered only by the House of Commons. What I do not understand is the term “financial measure”,

39 3rd Report, Session 2012–13 (HL Paper 19).

40 Section 18 of the 2006 Act.

41 HL Deb, 28 October 2015, col 1177.

because most of the legislation that we pass has financial consequences”.⁴² In reply, the Leader said that the Tax Credits Regulations were “very clearly and exclusively about a financial matter, to the tune of £4.4 billion in terms of the savings it would deliver in the first year of its implementation”.⁴³

41. The term “budgetary measure” or “budgetary matter” also featured in the House’s consideration of the Tax Credits Regulations. Lord Lawson of Blaby, for example, during the debate on the Regulations referred to them as a “budgetary matter” over which the Commons had prerogative.⁴⁴ Lord Butler of Brockwell made a similar point.⁴⁵
42. “Financial measure” is not a technical term but appears to be being used to describe an instrument which has significant financial effect, and only that effect. “Budgetary measure” appears to be used to describe an instrument which implements an aspect of the budget. They can both be distinguished from “financial instrument” which has a technical meaning and is defined in House of Commons Standing Orders (HC SO 83T(4)) as an instrument which “is made or proposed to be made in exercise of powers conferred by (and only by): (a) an Act which resulted from a Finance Bill; or (b) a provision of an Act which would have been within the ordinary scope of a Finance Bill.” The ordinary scope of a Finance Bill is understood to mean any provision about central government taxation and other matters which relate to the raising of money by central government to meet government expenditure generally. Finance Bills can, in reliance on a procedure resolution, contain other measures that are outside their normal scope. Financial instruments are subject to Commons-only procedure.

Scrutiny procedures in the two Houses

43. All statutory instruments laid before Parliament (including those not subject to any parliamentary procedure)⁴⁶ and instruments not laid before Parliament (but not local instruments) are considered by the Joint Committee on Statutory Instruments (JCSI) which examines the technical and legal aspects of an instrument. Commons-only statutory instruments are considered by the Commons membership of the JCSI sitting separately as the Commons Select Committee on Statutory Instruments.

Procedure in the House of Lords

44. In the House of Lords, almost all instruments subject to a parliamentary procedure are also considered by this Committee, for which there is no equivalent in the House of Commons. The SLSC and the JCSI are complementary in that the SLSC considers the policy aspects of instruments. The DPRRC, alongside its principal work of considering the delegations in Bills (for which there is also no equivalent in the House of Commons), examines LROs and certain other instruments subject to strengthened scrutiny procedures. The Joint Committee on Human Rights examines

42 *Ibid.*, col 1177.

43 *Ibid.*, cols 1177–78.

44 HL Deb, 26 October 2015, col 1005.

45 *Ibid.*, col 1006.

46 But excluding local statutory instruments unless they are subject to a parliamentary procedure.

proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of the Human Rights Act 1998.⁴⁷

45. Motions and amendments to motions on affirmative instruments may be debated in Grand Committee or in the House, but motions to approve an affirmative instrument can only be decided by the House. Approval motions may not be moved until a report on the instrument from the JCSI has been made (this is called the JCSI “scrutiny reserve”) and, although the SLSC does not have a “scrutiny reserve”, invariably such debates are not scheduled until the SLSC has also made its report. Annulment motions and critical amendments or motions relating to negative instruments are taken in the House. Neutral “take note” motions may be debated either in the House or in Grand Committee.

Procedure in the House of Commons

46. In the House of Commons, affirmative instruments are considered in Delegated Legislation Committees (DLCs). DLCs are appointed on an *ad hoc* basis by the Committee of Selection with a membership of between 16 and 50 MPs. The motion before them is “that the instrument be considered”. Formal approval of the instrument usually happens in the Chamber on the following day but may be done by a deferred division if the instrument is opposed. There is no routine scrutiny of negative instruments in the Commons by a committee equivalent to the SLSC. They can only be debated if a prayer motion is tabled which, in the Commons, is done using an Early Day Motion (EDM). The Hansard Society Report notes that very few prayer motions are tabled in the Commons: in 2013–14, 882 negative instruments were laid but only ten prayer motions tabled. The last time the Commons rejected an instrument was in 1979,⁴⁸ and it appears that that may have been a mistake.⁴⁹
47. According to the Hansard Society Report,⁵⁰ in the 2013–14 session, 1,185 statutory instruments were laid before the House of Commons. Although up to 90 minutes is allocated for consideration, the average length of a DLC debate was 26 minutes, two minutes less than the average in the previous session. In evidence, Dr Fox and Joel Blackwell provided some figures for the current session so far (that is, up to the beginning of February 2016): 766 instruments had been laid before the Commons, 12 EDMs (negative instrument motions) tabled of which four have been debated in DLC, and ten affirmatives (five of which were grouped) debated in the Chamber.⁵¹ Scrutiny in the Chamber is largely reserved for those instruments that raise greatest concern: in 2013–14, the Commons spent, in total, 5 hours and 58 minutes debating such instruments. The Lords, by contrast, spent 31 hours and 34 minutes.⁵²

47 Remedial orders are a form of secondary legislation which seek to correct breaches of human rights, identified by either domestic courts or the European Court of Human Rights, between UK law and the European Convention on Human Rights.

48 Paraffin (Maximum Retail Prices) (Revocation) Order 1979 (SI 1979/797).

49 Goodlad Report, p 38, para 147.

50 Hansard Society Report, pp 174–78.

51 [Q 10](#).

52 We note that in its response to the Strathclyde Review, the Constitution Committee has included detailed information about the total number of UK SIs from 1950 to 2015, SIs subject to fatal motions from 1997 to 2016, and Lords business relating to SIs from 2004–05 to 2014–15. See, Constitution Committee, 9th Report, Delegated Legislation and Parliament: A response to the Strathclyde Review, Session 2015–16 (HL Paper 116), Appendix 1.

Comments on the different level of scrutiny in the two Houses

48. When asked about the current contribution of the House of Commons to the scrutiny of secondary legislation, Mr Grayling said:

“It is a question that, in a sense, depends very much on the statutory instrument concerned. There are statutory instruments that get very detailed and exhaustive debate, discussion and scrutiny in the Commons. There are those that are uncontroversial and pass through relatively undebated But where Commons Members believe that there is an issue with a statutory instrument, it gets vigorous debate.”⁵³

This positive view was not shared by other witnesses.

49. Dr Fox of the Hansard Society, for example, said: “Having spent two years looking at scrutiny at the Commons end, we think it is inadequate”.⁵⁴ The Hansard Society Report concluded: “MPs are treated as cannon fodder in the process and a huge amount of time is wasted, particularly in Delegated Legislation Committees. Scrutiny procedures are used in which MPs have little faith and confidence and in many cases do not fully understand”.⁵⁵ Dr Adam Tucker of York Law School, University of York, told us: “... as is well known, the House of Commons presently plays essentially no role in the scrutiny of delegated legislation. For (obvious) reasons, it acts purely as a rubber stamping chamber, if at all”.⁵⁶
50. Lord Lisvane, former Clerk of the House of Commons, when asked about the “asymmetry of consideration” of secondary legislation in the two Houses said: “Ruth Fox said ... that [the Lords] has the mechanisms, the appetite and the time, and I do not think the Commons has any of that, particularly the time”. But, he continued, he was not being “in any sense critical”: “it is about the extraordinary press of competing priorities which Members of the Commons have to deal with”.⁵⁷ Lord Cunningham suggested that “... the treatment of secondary legislation in the House of Commons is minimal to the point of being superficial,⁵⁸ and Lord Butler said that the Lords “does a very valuable job” and “makes up for the deficiencies” of the Commons.⁵⁹ Lord Hunt of Kings Heath said: “... the Commons involvement in statutory instruments is so scant that it hardly comes into it”,⁶⁰ and Lord Wallace of Tankerness, who, like Lord Cunningham, has experience as a member of each House, commented that, although there used to be regular debates on secondary legislation in the House of Commons, they “tend not to happen now”: “I do not think that the same level of attention is given in the House of Commons now, which makes our job in the House of Lords all the more important”.⁶¹ This evidence reflects the view of the Wakeham Commission in 2000 which commented that “very little time [was] made available for debates on statutory instruments in the House of Commons”.⁶²

53 [Q 1.](#)

54 [Q 8.](#)

55 Hansard Society Report, p 7.

56 Written evidence from Dr Adam Tucker ([RSR0006](#)).

57 [Q 17.](#)

58 [Q 47.](#)

59 [Q 54.](#)

60 [Q 39.](#)

61 [Q 68.](#)

62 Wakeham Report, p 71, para 7.12.

51. **The evidence we received suggests that the scrutiny of secondary legislation is judged to be more thoroughly undertaken in the Lords than in the Commons. In making this observation, our intention is not to be critical. The relationship between the two Houses—with their different characteristics and functions, and with the multiple competing pressures on the time of Members of the House of Commons—should, as Lord Lisvane said, “be one of complementarity and not competition”.⁶³ But acknowledging that this asymmetry exists is important, as we shall see, in the context of the debate about parliamentary scrutiny of secondary legislation.**

Relationship between the two Houses and the convention on secondary legislation in the House of Lords

Joint Committee on Conventions of the UK Parliament

52. The Joint Committee on Conventions of the UK Parliament was appointed in May 2006 and reported at the end of October 2006. It was chaired by Lord Cunningham and had 22 members, drawn from both Houses and all parties, who agreed the report by consensus. The Joint Committee’s terms of reference were: “... accepting the primacy of the House of Commons, ... to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation”.
53. The Report includes a chapter on secondary legislation in which it notes that:

“By 1994 it was beginning to be asserted as a convention not merely that the Lords did not defeat SIs, but that they did not even divide against them. In response, Lord Simon of Glaisdale initiated a debate on the proposition ‘That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration’. The motion was carried without a vote, and is recorded in the *Companion*.”⁶⁴

The Joint Committee concluded 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 Government appear to consider that any defeat of an SI by the Lords is a breach of convention. We disagree. It is not incompatible with the role of a revising chamber to reject an SI, since (a) the Lords (rightly or wrongly) cannot exercise its revising role by amending the SI or in any other way, (b) the Government can bring the SI forward again immediately, with or without substantive amendment, as described by the Clerk of the Parliaments, and (c) the power to reject SIs gives purpose and leverage to scrutiny by the Joint Committee on SIs, and by the new Lords Committee on the Merits of SIs.⁶⁵ The Government’s argument that “it is for the Commons, as the source of Ministers’ authority, to withhold or grant their endorsement of Ministers’ actions” is an argument against having a second chamber at all, and we reject it.”⁶⁶

63 Q 17.

64 Cunningham Report, p 55, para 195.

65 Now the SLSC.

66 Cunningham Report, p 62, para 228.

54. The Report continues: “There are situations in which it is consistent both with the Lords’ role in Parliament as a revising chamber, and with Parliament’s role in relation to delegated legislation, for the Lords to threaten to defeat an SI.” A non-prescriptive list of examples is set out in the Report which includes: (a) where special attention is drawn to the instrument by the JCSI or the SLSC (then called the Merits Committee) and (b) when the parent Act was a “skeleton Bill”, and the provisions of the SI are of the sort more normally found in primary legislation. Both Houses noted the Report with approval.⁶⁷

55. The Goodlad Report notes, however, the modification of the practical effect of a “convention” by “political agreement”:

“Although the 1994 resolution asserting the House’s ‘unfettered freedom’ to vote on SIs was adopted without a vote, the two main parties, when in opposition, continued to observe self-restraint until 1999. This was never a House-wide convention, but a political agreement between the two main parties, as was acknowledged by Lord Strathclyde himself when, in a 1999 lecture, he described the convention as having been ‘agreed between the front benches of the major parties 20 years and more ago—but, it is important to note, never accepted by the Liberal Democrats or the Cross-benchers’.”⁶⁸

Number of defeats on secondary legislation in the Lords

56. In 1968, the Lords rejected the draft Southern Rhodesia (United Nations Sanctions) Order 1968 (by 193 to 184 votes).⁶⁹ Since then, the House of Lords has defeated the Government on six motions relating to five statutory instruments—four involving motions to reject and two by motions to defer:

- the Greater London Authority (Election Expenses) Order 2000 (215 to 150 votes) and the Greater London Authority Elections Rules Order 2000 (206 to 143 votes) (under a Labour Government)
- the draft Gambling (Geographical Distribution of Casino Premises Licences) Order 2007 (123 to 120 votes) (under a Labour Government)
- the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012 (201 to 191 votes) (under the Coalition Government)
- the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (Baroness Meacher’s motion, 307 to 277 votes, and Baroness Hollis of Heigham’s motion, 289 to 272 votes) (under the current Conservative Government).

57. The following figures give an indication of how very few defeats there have been: since this Committee’s first report in April 2004 we have considered 2,180 affirmative and 10,104 negative instruments, a total of 12,284.⁷⁰ During that 12-year period, therefore, 99.976% of such instruments have not been rejected.

67 HL Deb, 16 January 2007, cols 573-638, and HC Deb, 17 January 2007, cols 808-87.

68 Goodlad Report, p 38, para 148.

69 HL Deb, 18 June 1968, cols 515-97.

70 This total updates the figure of 11,603 SIs scrutinised by the Committee to the end of 2014–15 Session. Figures correct up to the end of March 2016.

Lords convention on secondary legislation: “stretched to breaking point”?

58. Given the relative infrequency of Government defeats on secondary legislation in the House of Lords, we asked witnesses for their assessment of the significance of the Tax Credits Regulations votes. No-one took the view that they amounted to a constitutional crisis. Mr Grayling said that they had not given rise to a constitutional crisis but had “raised issues about the relationship between the two Houses”.⁷¹ Dr Fox said that “... fundamentally the breakdown was not constitutional or procedural but political”,⁷² and Professor Russell said that the situation was “... neither constitutional nor a crisis”—but “a row” and “a bit of a mess”.⁷³ Lord Cunningham commented: “To call what happened with one vote in this House a crisis frankly beggars belief”.⁷⁴
59. Despite this and despite the fact that an infrequent defeat “in exceptional circumstances” is envisaged in the Cunningham Report, the Strathclyde Review asserts that the convention “has been stretched to breaking point”.⁷⁵ We asked Lord Strathclyde to explain and he told us, after setting out the history of the various defeats prior to the Tax Credits Regulations, that the votes on the Tax Credits Regulations were the first time since 1968 “when the House of Lords ever used [the] power [to reject an instrument] in a way that was politically motivated or expedient”—the votes, he said, had been on “a crudely political issue that went to the heart of the Government’s financial strategy and that dealt with an enormous amount of money”.⁷⁶ Lord Strathclyde made a similar remark to PACAC: “When you looked at the political breakdown of the votes, it was all Labour and Liberals on one side and Conservatives on the other. This was clearly a political expression of the House of Lords”.⁷⁷ He contrasted the Tax Credits Regulations votes with earlier defeats. The defeat in 2000 was, he said, “on a very unserious issue”, the vote on casinos in 2007 “was completely apolitical” and the 2012 vote on legal aid “passed by with no great interest”.⁷⁸ They were, he told the PACAC, “pretty minor defeats”.⁷⁹
60. In her written statement on 4 November 2015, Baroness Stowell emphasised the financial aspect of the Tax Credits Regulations as the critical difference between those defeats and earlier defeats: “Until last month, only five statutory instruments had been rejected by the House of Lords since World War Two, none of which related only to a matter of public spending and taxation”.⁸⁰
61. Lord Strathclyde also argued that the procedural device of the deferral motion also set the Tax Credits Regulations votes apart from earlier defeats. He was asked by the PACAC to explain his assertion that the convention on secondary legislation had been “stretched to breaking point”. He replied that the motions—which he described as a “procedural innovation”⁸¹—had “proved fatal” because they had taken the instrument “hostage”: “that”, he said “is

71 [Q 3](#).

72 [Q 12](#).

73 [Q 30](#).

74 [Q 46](#).

75 Strathclyde Review, p 4.

76 [Q 90](#).

77 Evidence to PACAC, Q 71.

78 [Q 90](#).

79 Evidence to PACAC, Q 69.

80 See Appendix A of the Strathclyde Review.

81 Evidence to PACAC, Q 74.

the thing that changed in October”. Opinions, he said, had subsequently differed about whether the deferral motions were in accordance with the convention and so “you have to then have a debate ... about what to do next”.⁸²

62. It would appear from this evidence that the Review was commissioned because of the particular nature of the Tax Credits Regulations defeat—both in terms of the policy content of the instrument and the mechanism used—and a belief that even if an occasional defeat in exceptional circumstances were acceptable, *this* defeat did not fall within those exceptional circumstances. The fact that a large number of members of the House did not share that view was, it seems, evidence, as far as Lord Strathclyde was concerned, that the convention “has been interpreted in different ways, has not been understood by all, and has never been accepted by some members of the House”.⁸³
63. In evidence to the PACAC, Lord Strathclyde went a step further. He asserted that since 1968 even an occasional defeat fell outside the convention: “ ... since 1968 when the House of Lords unwisely rejected Harold Wilson’s Rhodesia sanctions order, the convention was created *not to do this ever again*” (emphasis added);⁸⁴ and, so he said to us, “if, since 1968, there had been any realistic, long period of time where the House of Lords was threatening to use its veto, it would have been abolished a long time ago. It was purely because there was this self-denying ordinance that it has not been”.⁸⁵
64. In contrast, Lord Norton of Louth argues that the basis of the Strathclyde Review that “there is a convention of the constitution that the House of Lords does not reject (or fail to approve) statutory instruments” is a “false premise”. A “convention”, he suggests, involves a precedent which is “followed without exception”, and although “it may be the usual practice that the House of Lords does not reject statutory instruments, ... it is not the invariable practice”. Lord Norton concludes that “there is no convention of the constitution that the House does not reject statutory instruments”.⁸⁶
65. The Goodlad Report, in 2011, refers to an argument made by Lord Strathclyde, then Leader of the House of Lords, that the Lords should not vote down an instrument where the Commons had, or would have, approved it. Given that the Commons had not voted down an instrument since 1979 (see paragraph 46 above), the Goodlad Report suggests that such a convention would be “tantamount to a convention that Parliament as a whole does not reject statutory instruments. This would defeat the purpose of subjecting SIs to parliamentary control in the first place”.⁸⁷ We agree.
66. It follows therefore that, unlike Lord Strathclyde who, in asking himself the question, “should the Lords retain [the] veto power?” concluded that “the answer was no”,⁸⁸ we take the view that the House of Lords should retain the power to reject secondary legislation as an essential part of the power of Parliament to scrutinise and, where appropriate, to challenge secondary legislation effectively. We return to this conclusion in the next chapter since

82 *Ibid.*, [Q 72](#).

83 Strathclyde Review, p 15.

84 Evidence to PACAC, [Q 70](#).

85 [Q 91](#).

86 Written evidence from Lord Norton of Louth ([RSR0007](#)).

87 Goodlad Report, p 38, para 147.

88 HL Deb, 13 January 2016, col 277.

it has, of course, a fundamental bearing on our assessment of the Strathclyde options.

67. **The contentious issue is not how often the House of Lords defeats statutory instruments but when it is appropriate for the Lords to defeat an instrument. This is a matter of judgement. But it is a judgement that the House, as a self-regulating institution, can be expected to make. That the House makes this judgement reasonably is evidenced by the very small number of defeats since 1968. In asserting this view, we acknowledge that opinion in the House of Lords varies as to whether it was appropriate for the House to vote in favour of the deferral motions in respect of the Tax Credits Regulations.**
68. **We recommend that the House of Lords should retain the power to reject secondary legislation, albeit to be exercised in exceptional circumstances only, as an essential part of Parliament’s power to scrutinise and, where appropriate, challenge Government legislation. (Recommendation 2)**

The boundary between primary and secondary legislation

69. Lord Norton argues that the Strathclyde Review is based on a second “false premise” in assuming that “the mischief to be addressed is the behaviour of the House of Lords rather than the scope of the statutory instrument in question”. “The mischief” was, he says, “the extent to which government uses unamendable secondary legislation to achieve policy goals that should more appropriately be embodied in primary legislation. The focus should therefore be on ensuring that secondary legislation is not employed to avoid the rigours of scrutiny through primary legislation”.⁸⁹
70. This raises the question of when legislative material should be put into primary legislation and when it can be left to secondary legislation. *Erskine May* refers to secondary legislation “as essentially subsidiary or procedural in character”.⁹⁰ The Tax Credits Regulations, in contrast, were cast by the Government themselves in terms of being of very substantial significance. Earl Howe, for example, referred to them as “a major plank of the Government’s economic and fiscal strategy under which a reshaping of tax credits would contribute swiftly and substantially to a reduction in the public sector deficit”.⁹¹ When pressed about why such a major policy change could be thought suitable for secondary legislation, Earl Howe prayed in aid the JCSI: “that Committee could, if it had chosen to, have flagged up the tax credits SI as one that made inappropriate use of a delegated power”.⁹²
71. This is, however, to misunderstand the role of the JCSI and also the nature of the criticism being levelled. The remit of the JCSI includes drawing special attention to an instrument which “appears to make an unusual or unexpected use” of a power, but that is a technical judgement and not the same as forming a view about appropriateness. No-one has argued that the Tax Credits Regulations were procedurally incorrect. The issue is whether, given the function of secondary legislation as described in *Erskine May*, it would have been more appropriate for the legislative material contained in the

89 Written evidence from Lord Norton of Louth ([RSR0007](#)).

90 *Erskine May’s Treatise on the Law, Privileges and Usage of Parliament* (2011) (24th Edition), p 667.

91 [Q 75](#).

92 [Q 79](#).

Tax Credits Regulations to have been put into primary legislation. Arguably, if the convention has been “stretched to breaking point” because of the particular nature of the instrument, then the “stretch” has been caused by the use of secondary legislation to implement such significant policy change in the first place.

72. In this context, it is of particular interest that Lord Strathclyde makes the following proposal in relation to his option 3:

“... in order to mitigate against any excessive use of the new process ... it would be appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”.⁹³

No detail is provided about what these steps should be.

73. Lord Hunt of Kings Heath said that, for him, “the most important part” of the Strathclyde Review was the reference to “the appropriate use of statutory instruments”.⁹⁴ Several other speakers during the debate on the Strathclyde Review also spoke of their concern that currently too much is being “left for implementation by statutory instrument” as a result of the use of “skeleton” (or framework) bills. Lord Goodlad, for example, said: “I strongly support the report’s suggestion that future Governments should ensure that Bills contain more detail.”⁹⁵ Baroness Williams of Crosby referred to the “deep and profound undesirability of statutory instruments replacing primary legislation”.⁹⁶ Lord Strathclyde also said: “We should question very strongly when framework bills are put before us whether the requirements for ministerial powers are necessary”.⁹⁷ In evidence to this Committee, Lord Lisvane said: “This business of the threshold between what should be the subject of primary legislation and in secondary legislation is really a much bigger question than any of the others that we have been trying to deal with. In a sense, the others are symptomatic of that basic problem”.⁹⁸
74. The House has considered a number of Bills and provisions in Bills this session which have been strongly criticised by the DPRRC for the breadth of the powers being taken. For example, the DPRRC described the Childcare Bill [HL] as containing “virtually nothing of substance beyond the vague ‘mission statement’ in clause 1(1)”,⁹⁹ and the Cities and Local Government Devolution Bill [HL] as “in essence an enabling Bill”.¹⁰⁰ Further examples are set out in the report of the DPRRC on the Strathclyde Review.¹⁰¹
75. We challenged Mr Grayling, as Chairman of the Parliamentary Business and Legislation Committee (PBL Committee), a Cabinet Committee which looks at bills before introduction into Parliament, about whether that Committee was doing enough to ensure that “too much is not left for implementation by statutory instrument”. He agreed that the PBL Committee needed to be

93 Strathclyde Review, p.6.

94 HL Deb, 13 January 2016, cols 370-71.

95 *Ibid.*, col 362.

96 *Ibid.*, cols 305-06.

97 *Ibid.*, col 276.

98 [Q 19](#).

99 DPRRC, 2nd Report, Session 2015–16 (HL Paper 12), para 8.

100 DPRRC, 1st Report, Session 2015–16 (HL Paper 8), para 2.

101 DPRRC, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119), pp 14-16.

“more rigorous”.¹⁰² Earl Howe described the PBL Committee as one of the “checks and balances against inappropriately framed Bills”. He felt that it did “an effective job” although he appreciated that this Committee “might come to the conclusion that it could do better”.¹⁰³

76. **The boundary between primary and secondary legislation is the foundation of any consideration of the scrutiny by Parliament of secondary legislation. We welcome Lord Strathclyde’s acknowledgement of the importance of this issue.**
77. **We are aware that the DPRRC, in responding to the Strathclyde Review, has examined ways to ensure that the appropriate boundary between primary and secondary legislation is observed. We support the approach taken by the DPRRC, including a recommendation that draft secondary legislation, where it is “of considerable substance without which Parliament cannot give proper consideration to the bill itself”, should be made available to the Houses early in a bill’s passage through Parliament.**
78. **We support those who caution against the use of skeleton bills and skeleton provision in bills. In taking this view, we bear in mind, in particular, the fact that although the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments. We welcome Mr Grayling’s commitment to ensuring that the PBL Committee will be more rigorous about challenging the use of skeleton bills and skeleton provision in bills.**

Instruments with a financial implication

79. The Tax Credits Regulations had significant financial implications. The Strathclyde Review proposed that “a review should be undertaken, with the involvement of the House of Commons Procedure Committee, of the circumstances in which statutory instrument powers should be subject to Commons-only procedures, especially on financial matters, with a view to establishing principles that can be applied in future.”¹⁰⁴
80. We asked many of our witnesses whether there was an argument for restricting Lords powers in relation to what Baroness Stowell described as “financial measures”. Most concluded that it would be too difficult to define what was meant by a “financial measure”. Lord Lisvane, for example, said:

“Here you need to be very careful, because if you are going to go down this road then the criteria need to be as exacting as in section 1(2) of the 1911 Parliament Act. ... It would be essential to avoid, as it were, the Trojan horse hazard of a department thinking, ‘Whoopee, an SI is going to be easier to get through. Let’s make it a financial SI, but let’s stick all these other provisions in as well’. If you have a mechanism for deciding whether something is a financial instrument or not, the criteria have to be exacting and there has to be the concept of spoiling it as a financial instrument.”¹⁰⁵

102 [Q 7](#).

103 [Q 84](#).

104 Strathclyde Review, p.6.

105 [Q 25](#).

Dr Fox made a similar point: “I do not think there is anything stopping this Committee, on its own or working with the Procedure Committee in the House of Commons for example, from reaching an agreement about financial privilege in relation to statutory instruments and how the scope of that should be drawn ...The danger would be whether the Government would utilise that to get things through the Commons only.”¹⁰⁶ Lord Wallace of Tankerness also warned: “You would have to be very careful, because the temptation for governments to try to slip things into secondary legislation that had the look of a money resolution might be considerable.”¹⁰⁷

81. David Beamish, Clerk of the Parliaments, acknowledged that a definition could be attempted, but said: “... drawing a line that, first, people will agree to, and, secondly, when it comes to deciding which side of the line a particular case falls that everybody can agree on, is far from simple, I suspect”.¹⁰⁸ Earl Howe said: “If you wanted to carve out a special category [of financial instrument], the difficulty is deciding where the line should be drawn. I do not think that we need to go there”.¹⁰⁹ And, although the Strathclyde Review was commissioned to consider, in particular, “how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters” (as well as secondary legislation),¹¹⁰ Lord Strathclyde said that he had found it increasingly difficult to divide instruments between the purely financial and non-financial ones: “The broad description of financial privilege, which might have seemed attractive on day one, became less attractive as time went by—not least because of the pure bureaucratic burden. Can you imagine parliamentary authorities having to examine every piece of secondary legislation and taking a view as to whether it attracted financial privilege? It just was not helpful to go down that route, and much better to treat all statutory instruments the same”.¹¹¹
82. **We agree that any attempt to classify instruments as financial and non-financial is not straightforward and likely to present difficulties.**
83. The Strathclyde proposal to develop new criteria for the application of Commons-only procedure is an extension of the current practice of parent Acts designating certain sorts of instruments as Commons-only. But broadening the category of Commons-only instruments would, in effect, amount to incremental adoption of Strathclyde option 1, and we advise caution—although there is, of course the safeguard that the delegation and associated scrutiny procedure would have to be set out in a bill which would have to go through the usual primary legislative scrutiny procedure and would be subject to scrutiny by the DPRRC. **If such a review, as proposed by Lord Strathclyde, were to proceed, we have no doubt the House of Lords would wish to participate and we recommend accordingly. (Recommendation 3)**

106 [Q 13](#).

107 [Q 72](#).

108 [Q 65](#).

109 [Q 88](#).

110 See Appendix A of the Strathclyde Review.

111 [Q 93](#).

CHAPTER 3: THE STRATHCLYDE OPTIONS

Constitutional context

84. The title of the Strathclyde Review refers to “the primacy of the House of Commons”, and when asked about the problem which the Review was intended to address, Earl Howe explained that it was twofold: “the primacy of the House of Commons”, and “the absence of a mechanism for dialogue between the two Houses on SIs”.¹¹² Given our constitutional arrangements, however, it appeared to many of our witnesses that the issues raised by the Review concern not the relationship between the two Houses but the relationship between Parliament and the Executive.
85. Daniel Greenberg, former Parliamentary Counsel, now in private practice, expressed the point succinctly in his written evidence to the Committee:
- “When the House of Lords moves to annul a statutory instrument or fails to approve one in draft under the affirmative resolution procedure, it is not the House of Commons that it is defying, but the Government. When a bill passes from the Commons to the Lords, that is an expression of the will of the elected House that the unelected House should respect; but when a statutory instrument is laid before both Houses, that is the will of the Executive and it is the equal responsibility of both Houses of Parliament to scrutinise it and challenge it.”¹¹³
86. Lord Hunt of Kings Heath made a similar point: “We need to be very clear that a debate about statutory instruments and scrutiny is about how Parliament exerts influence and scrutiny over the Executive, and because the Commons’ role in statutory instruments is so limited, the Lords’ role is crucial”.¹¹⁴ Dr Tucker of the University of York argued that “each of the Review’s three recommendations would involve a shift of responsibility for the scrutiny of delegated legislation from the House of Lords to the House of Commons”; it was therefore “important to recognise that their main effect would therefore be an increase in the Executive’s power to make law”.¹¹⁵ Professor Philip Cowley, Professor of Politics, Queen Mary University of London, said that all three options “weaken Parliament’s power to scrutinise secondary legislation”.¹¹⁶ Lord Norton commented along similar lines: “The review is mistitled. It is not so much concerned with ‘secondary legislation and the primacy of the House of Commons’, but rather ‘secondary legislation and empowering the Executive’. Limit the role and powers of the House of Lords in respect of secondary legislation and you strengthen not the House of Commons, but the Executive.”¹¹⁷ And Lord Strathclyde’s comments to us appear to reflect this when he said: “... when I looked at this I looked at the relationship between the two Houses, obviously anticipating or accepting that the House of Commons is controlled by the Government”.¹¹⁸

112 [Q 75](#).

113 Written evidence from Mr Daniel Greenberg ([RSR0001](#)).

114 [Q 39](#).

115 Written evidence from Dr Adam Tucker ([RSR0006](#)).

116 Written evidence from Professor Philip Cowley ([RSR0002](#)).

117 Written evidence from Lord Norton of Louth ([RSR0007](#)).

118 [Q 89](#).

87. **We do not share the view which underlies the Strathclyde Review that the central issue is the “primacy of the House of Commons”. The nature of secondary legislation is such that the debate should be framed in terms of the relationship between the Parliament and the Executive, and not between the two Houses. We note that this view is shared by both the Constitution Committee and the DPRRC.**¹¹⁹

The Strathclyde options

88. All three options entail the House of Lords either being prohibited by statute from using (options 1 and 3), or agreeing not to exercise (option 2), its “unfettered freedom to vote on”¹²⁰ and to reject secondary legislation. For this reason, we do not support them (see paragraph 68 and Recommendation 2 above). We also have specific comments on each of the options.

Strathclyde option 1

89. Option 1 would remove the House of Lords from the scrutiny of secondary legislation altogether. When speaking to the PACAC, Lord Strathclyde explained why option 1 had been included: “there are a whole bunch of reasons” why option 1 was not the “right thing to do”—“not least ... that we would not get the scrutiny that Parliament demands”, but, he said, “it is quite a good way of looking at one very unattractive option to see the attraction of the other two”.¹²¹
90. The Strathclyde Review itself cites, alongside the purported advantages of “simplicity and clarity”,¹²² the “significant disadvantages” of option 1: it would “go way beyond establishing Commons primacy”, it would be “detrimental to the quality of legislation generally”, and “might also lead to arguments that more detail should be inserted” on the face of bills.¹²³ In setting out these disadvantages, as Professor Russell suggested, the Strathclyde Review makes its own case for not adopting option 1.¹²⁴ Other witnesses were also strongly critical. Dr Fox, for example, suggested that “... it would drive a coach and horses through the concept of having a system of parliamentary government ... [It] would not ensure the primacy of the House of Commons ... it would ensure the primacy of the Government to drive through whatever it wanted.”¹²⁵ Lord Hunt of Kings Heath said that “... option 1 would effectively mean that you would be getting rid of scrutiny of secondary legislation in Parliament”,¹²⁶ and Lord Cunningham suggested that “the consequences for scrutiny would be appalling”.¹²⁷ Lord Strathclyde himself conceded that a consequence of option 1 might be to “encourage the Government to legislate more with secondary legislation” which, he said, “would not be a positive move”.¹²⁸

119 Constitution Committee, 9th Report, Delegated Legislation and Parliament: A response to the Strathclyde Review, Session 2015–16 (HL Paper 116), p 15, para 35; DPRRC, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119), p 27, para 74.

120 Motion by Lord Simon of Glaisdale, carried without a vote. HL Deb, 20 October 1994, col 356.

121 Evidence to the PACAC, [Q 90](#).

122 Strathclyde Review, p 5.

123 *Ibid.*, pp 16 and 17.

124 [Q 32](#).

125 [Q 11](#).

126 [Q 41](#).

127 [Q 47](#).

128 [Q 94](#).

Conclusion

91. **We received no evidence at all in support of this option. We support the Constitution Committee in its conclusion that option 1 is “clearly unacceptable” and would “significantly curtail the capacity and responsibility of Parliament to oversee the Executive”.**¹²⁹

Strathclyde option 2

92. Option 2 is described in the main part of the Strathclyde Review as follows:

“The second option would be 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*.”¹³⁰ (emphasis added)

93. This description of option 2 appears to envisage circumstances where the House of Lords would retain (and occasionally exercise) its power to reject a statutory instrument. The description of option 2 in the Executive Summary, however, is different—a point noted by Lord Wallace of Tankerness.¹³¹ The Executive Summary states (additional words are underlined and omitted words are in square brackets):

“The second option would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, [in a more precise way] in a clear and unambiguous way, the restrictions on how its powers to [deny] withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused .”¹³²

94. In evidence to us, Lord Strathclyde offered some clarification: that, given that it would not involve a change in the law, the power to reject would remain, *but* “with the understanding ... that it would never be used”—although his subsequent reference to changes to Standing Orders reflecting “in as strong and purposeful a manner as possible that the intention of the House would be not to reject *ultimately*”¹³³ (emphasis added) reintroduces the uncertainty.
95. Comments by Mr Beamish confirm that option 2 is open to interpretation: “... there are a lot of different flavours of option 2 that you could go for”,¹³⁴ and he cited the Goodlad Report proposal as providing one example—namely, that, if the power to reject an instrument were used but the instrument were re-laid by the Government in similar terms and agreed again by the Commons, the Lords would undertake not to vote it down a second time (see paragraph 22 above).
96. A second uncertainty about option 2 arises from the reference in the Executive Summary to seeking “to *codify* the convention” (emphasis added)¹³⁵. The Strathclyde Review gives no indication about what codification means in this

129 9th Report, Delegated Legislation and Parliament: A response to the Strathclyde Review, Session 2015–16 (HL Paper 116), para 72.

130 Strathclyde Review, p 17.

131 [Q 70](#).

132 Strathclyde Review, p 5.

133 [Q 95](#).

134 [Q 61](#).

135 Strathclyde Review, p 5.

context. It may include defining more precisely the exceptional circumstances in which it would be acceptable to use the power to reject although, as we have pointed out, it appears that the Strathclyde Review version of option 2 does not envisage any exceptional circumstances.

97. The Strathclyde Review is pessimistic about the workability of option 2. Referring to the votes on the Tax Credits Regulations, Lord Strathclyde says that they provided “strong evidence that no agreement on vague principles contained in a resolution of the House could safely be relied on in future” and he concludes that he was “doubtful about whether a solution can be devised by which the House can qualify its powers by convention alone”.¹³⁶

Conclusion

98. **Option 2 has the advantage over both options 1 and 3 in being non-statutory. But, although it involves, therefore, the retention of the House of Lords power to reject secondary legislation, importantly, it appears to assume an agreement by the House never to use that power. For this reason and on the grounds of the evidence set out above, we do not support option 2 as proposed by Lord Strathclyde.**
99. **We do not, however, share Lord Strathclyde’s pessimism that the House would be unable to reach a consensus on how the power to reject secondary legislation should be exercised in the future.** As we have already said, the House of Lords has, in our view, over the years, demonstrated its capacity, as a self-regulating House, to judge the appropriateness of exercising the power (see paragraph 67 above). Furthermore, we are not wholly persuaded by Lord Strathclyde in his assertion that the votes on the Tax Credits Regulations can be said to provide “strong evidence” to the contrary. On the Government’s own admission, the Tax Credits Regulations implemented significant policy change (see paragraph 70 above).
100. **If the Government were, in the future, to exercise greater caution in using secondary legislation for this scale of change, then a likely concomitant would be a reduction in challenges to secondary legislation.** As the DPRRC, in its response to the Strathclyde Review, comments: “If delegated powers were highly prescribed and dealt only with the mundane and technical aspects of legislation, then one could speculate that the Strathclyde Review would never have taken place”.¹³⁷ Baroness Williams of Crosby made a similar point when she said in the debate on the Strathclyde Review: “... we would be unwise to give up at this stage the concept of losing a veto over a statutory instrument, rare though its operation is, because we do not yet have the reassurance that we would need that the Government on their own side would be responsible for changing the ways in which legislation is drawn up”.¹³⁸

Strathclyde option 3

101. As we set out in paragraphs 31 and 32 above, secondary legislation is law made by Ministers using powers conferred by primary legislation, with affirmative instruments requiring the approval of both Houses (except for those requiring House of Commons approval only) and negative instruments

¹³⁶ Strathclyde Review, p 18.

¹³⁷ Delegated Powers and Regulatory Reform Committee, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119), p 11, para 20.

¹³⁸ HL Deb, 13 January 2016, col 306.

coming into effect unless either House resolves to pray for their annulment. In simple terms, the approval or acceptance by both Houses of Parliament is required. The House of Lords has the power to reject most secondary legislation subject to a parliamentary procedure should it so decide.

102. Option 3 would create a new statutory procedure so that;

- in the case of affirmative instruments, where the Lords does not approve a draft instrument (or, where the instrument has already been made, the instrument itself), the Commons should have the ability, by a resolution of that House, to override the Lords decision and to authorise that the draft instrument be made (or the instrument to come into force or to continue in force) without Lords approval; and
- in the case of negative instruments, where the Lords has resolved that an instrument should be annulled, the effect would be that the instrument would be subject to indefinite suspension which the Commons could, by resolution, lift.¹³⁹

103. The procedure is described as a “power to *delay* by asking the House of Commons to think again” (emphasis added)¹⁴⁰ although a fixed period of delay is not recommended on the grounds that there will be cases where an instrument may need to be dealt with urgently. In any event, according to the Strathclyde Review:

“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.”¹⁴¹

104. The Strathclyde Review recommends option 3 on the grounds that it provides “certainty ... while maintaining a simplicity of procedure in keeping with already established procedures for other forms of legislation”,¹⁴² by which is meant the Parliament Acts 1911 and 1949 (for primary legislation) and section 20 of the Constitutional Reform and Governance Act 2010 (for international treaties).

105. Witnesses raised a number of concerns about aspects of option 3 including, in particular, how to ensure that the House of Commons had a genuine opportunity to “think again”, the absence of a fixed period of delay and the risks of implementing procedural change by primary legislation.

“Thinking again”

106. Instruments subject to proceedings in both Houses are laid before the two Houses at the same time. There is no requirement for an approval motion for an affirmative instrument to be taken in the Commons before it is considered in the Lords. And, for negative instruments, there is no certainty that a prayer motion if taken in one House will also be taken in the other, or, if prayer motions are debated in both Houses, that the first debate will be in the Commons. If an instrument is rejected in the Lords before it

139 Strathclyde Review, p 19.

140 *Ibid.*, p 18.

141 *Ibid.*, p 20.

142 *Ibid.*, p 23.

has been considered in the Commons, then, as Lord Lipsey told us, “the Commons cannot be asked to ‘think again’ as it has not yet thought”.¹⁴³ Lord Lisvane made a similar point: “... the phrase ‘think again’ is predicated on the Commons looking at an affirmative SI before the Lords, so you get a ‘think again’”;¹⁴⁴ and Dr Fox commented: “In order for the Commons to think again, it has to have already thought”.¹⁴⁵ We put this matter to Mr Beamish who suggested that the practicalities were not “show-stoppers” and that current procedures could be adapted by the primary legislation.¹⁴⁶

107. Several witnesses also queried how, even if an instrument had already been considered by the Commons, there could be certainty about whether the opportunity to “think again” would be a genuine one, given the evidence we received about the quality of scrutiny of secondary legislation in the Commons. In the debate on the Strathclyde Review, for example, Lord Naseby commented: “I should like to know what safeguards there are to ensure that the other place does think again and does not just nod through a measure, producing exactly the same result.”¹⁴⁷ Lord Lisvane said: “If Commons standing orders allow a second Commons motion to be decided without debate, perhaps decided by a deferred Division, there is not much thinking involved”.¹⁴⁸¹⁴⁹

Fixed period of delay

108. Linked to the issue of whether the Commons would have a genuine opportunity to “think again” is the question whether there should be a fixed period of delay. Without a fixed period, it would be open to the Government to seek to override the Lords rejection immediately; on the other hand, as the Strathclyde Review suggests, there will be instances where urgency requires proceedings on an instrument to conclude quickly. Witnesses had mixed views. Lord Butler did not favour a “prescribed period of delay” but simply “a reasonable delay” and, if there could be no delay, then the Government would have to argue their case.¹⁵⁰ Dr Fox said that she did not want to “put an exact time on it”,¹⁵¹ and Lord Lisvane suggested that “a week or two ought to be enough”.¹⁵² In contrast, the Goodlad Report suggested a minimum time interval of one month between the House rejecting an instrument and the Government inviting the House a second time to agree it.¹⁵³

Primary legislation

109. Some witnesses expressed concern about using primary legislation to implement procedural change in Parliament. Lord Wallace of Tankerness, for example, said that it would be “important to avoid the need for legislation. ... Once you go down the route of primary legislation, the law of unintended consequences can sometimes kick in”, and he drew attention, in particular, to the risk of a bill changing unexpectedly during its passage through Parliament: “... you start with a bill that you as the Government

143 Written evidence from Lord Lipsey ([RSR0004](#)).

144 [Q 24](#).

145 [Q 14](#).

146 [Q 64](#).

147 HL Deb, 13 January 2016, col 304.

148 [Q 24](#).

149 [Q 87](#).

150 [Q 55](#).

151 [Q 14](#).

152 [Q 24](#).

153 Goodlad Report, p 40, para 153.

wish to see, but before you know where you are the genie is out of the bottle, amendments are tabled and you have something that does not quite match what you originally intended.”¹⁵⁴ Other witnesses, Lord Lisvane in particular,¹⁵⁵ referred to the consequence of drawing the judiciary into the resolution of disputes under the new Act and to possible implications for Article 9 of the Bill of Rights. Professor Russell saw a need for clarity about what the Commons procedures would be under option 3 and commented that it would be very difficult to specify them in legislation, rather than in a convention.¹⁵⁶ Lord Hunt of Kings Heath said that, if the Government chose to implement option 3, “clearly they would have to use primary legislation and we would have a huge constitutional crisis”.¹⁵⁷

110. Earl Howe agreed “there would be considerable difficulties in the framing of legislation”. However, he did not see a particular Bill of Rights issue: “... amending or expanding the procedures set out in the [Statutory Instruments Act 1946], if that were the means chosen to legislate for option 3, would not necessarily lead to an encroachment of statute on the exclusive cognisance of Parliament nor, indeed, a diminution of Article 9 in the Bill of Rights”.¹⁵⁸ Lord Strathclyde said that he saw the legislation needed under option 3 as “a very small, very simple and very clear-cut Bill”;¹⁵⁹ and, as regards Bill of Rights concerns, he said: “I do not remove the ability of clever lawyers, once there is a law, to test it in the courts. I think it is undesirable, obviously, but if the Bill is well drafted, clear and simple enough and the intention of Parliament is there to see, a lot of people would spend a great deal of time and money to no great effect.”¹⁶⁰

Conclusion

111. **We acknowledge that there may well be legislative and procedural solutions to the various practical problems that have emerged in relation to option 3. The fact, however, that the proposal entails having to engineer a solution so that all instruments are considered by the Commons first demonstrates the inappropriateness of treating secondary legislation as if it were, in principle, the same as primary legislation.**
112. **There are also significant risks associated with implementing procedural change in Parliament using primary legislation, both in terms of managing a bill during its passage through Parliament and, once a bill is enacted, its possible consequences for the relationship between Parliament and the Judiciary.**
113. **More importantly, any such change in the law would result in a fundamental alteration of the role of the House of Lords in relation to Parliament’s control of the use made by Ministers of delegated powers to make secondary legislation. It would also weaken parliamentary scrutiny of the Executive. The effect of option 3 would be to change the law so that:**

154 [Q 70](#).

155 [Q 23](#).

156 [Q 34](#).

157 [Q 44](#).

158 [Q 87](#).

159 [Q 97](#).

160 [Q 98](#).

- **it would no longer require both Houses to approve affirmative instruments or not to resolve to pray for the annulment of negative instruments; and**
 - **it would take away the power of the House of Lords to reject statutory instruments, seriously weakening the role and purpose of the House in relation to secondary legislation, leaving it with less influence over secondary legislation than it has over primary legislation.**
114. **Because of the many issues we have set out in the paragraphs above, we do not support option 3. We recommend that, if a bill is introduced under option 3, it 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”. (Recommendation 4)**

CHAPTER 4: NEXT STEPS

A self-governing House

115. We agreed at the outset of this inquiry that we were keeping an open mind about whether any of the Strathclyde options should be adopted. We have concluded that they should not because, at root, they each involve the House of Lords losing its power to reject secondary legislation. Options 1 and 3 also fundamentally change by statute the constitutional relationship between the House of Lords and the Executive—and thus between Parliament and the Executive—and between the House of Lords and the House of Commons. We have considered what course should be pursued. We note for example the evidence of the British Academy: “It should not be forgotten that there is a fourth option—to leave things as they are”.¹⁶¹
116. The House of Lords has a strong and valued tradition as a self-governing Chamber. It has a long established preference for handling relationships with the Executive and the House of Commons by conventions rather than by statute. The Cunningham Committee set out its understanding of the conventions in respect of secondary legislation; and, as we have said, the Cunningham Report was noted with unanimous approval by both Houses of Parliament. Conventions must be able to respond flexibly where necessary to take account of changes in circumstances. They cannot deal exhaustively, definitively and immutably with all possible scenarios, some of which may be unknown. We do not agree that conventions can be rigorously codified in inflexible detail but neither do we believe this to be a barrier to identifying and agreeing the principles and spirit of conventions.
117. The Strathclyde Review was intended, according to Lord Strathclyde, to “balance the interests of proper parliamentary scrutiny and the certainty that government business can be conducted in a reasonable manner and time”.
118. **In this context, we think that there are strong arguments in favour of re-affirming what we consider to be the current convention as set out in the Cunningham Report, that the Lords should retain its power to reject an instrument but that it should be used only in exceptional circumstances, and we recommend accordingly. (Recommendation 5)**
119. **Furthermore, building on our observations (in paragraphs 76 to 78 above) on the boundary between primary and secondary legislation, we recommend that, in order—to use Lord Strathclyde’s words—“to mitigate against excessive use” of the power to reject, the Government should ensure that secondary legislation procedure is used appropriately and is not used to implement significant policy changes. (Recommendation 6)**
120. We have already noted that the deferral motions used in connection with the Tax Credits Regulations were unprecedented as a mechanism for exercising power in relation to secondary legislation and, for that reason, we have recommended that the use of deferral motions should be considered by the Procedure Committee (see paragraph 37 and Recommendation 1 above).

161 Written evidence from the British Academy for the humanities and social sciences ([RSR0005](#)).

Wider issues relating to parliamentary scrutiny of secondary legislation

121. The focus of this report has been the implications of the Strathclyde options for the effective scrutiny of secondary legislation. The Strathclyde Review has, however, prompted a collateral debate about whether there are practical steps which can be taken to improve the current parliamentary scrutiny arrangements for secondary legislation. Lord Lipsey put this point to us in robust terms: “The whole process for the scrutiny of secondary legislation is a mess: inadequate, inefficient and ultimately largely futile. ... What is needed is not a quick-fix response to one aspect of the problem, such as is the purpose of Lord Strathclyde’s report, but a holistic look”, and he goes on to recommend the Hansard Society Report as a “good starting point”.¹⁶²
122. We also note that, while Lord Strathclyde told us that “the effective scrutiny that takes place in the House of Lords takes place in this committee ... on behalf of the whole of Parliament”,¹⁶³ other evidence we received has shown an undoubted desire, both inside and outside Parliament, for looking again at current scrutiny arrangements. Lord Wallace of Tankerness, for example, said: “The ball having been kicked around the park, it is an opportunity to see whether there are ways in which we can improve our consideration of statutory instruments.”¹⁶⁴ Lord Butler said that the Strathclyde Review was an “opportunity for Parliament, and for the House of Lords, to do something about its treatment of statutory instruments, which for a long time many people have regarded as unsatisfactory”;¹⁶⁵ and the Hansard Society Report made the trenchant assertion that:

“The complexity of the process, the lack of understanding among parliamentarians and the public, the uneven application of processes and procedures, and the extent to which the procedures now undermine the principle of and time-saving purpose of delegation all point to a system that is unfit for purpose.”¹⁶⁶

123. We note that the Constitution Committee, in its response to the Strathclyde Review, concluded:

“Both Houses of Parliament ..., either together or separately, need to play an active role in considering how powers should be delegated appropriately in primary legislation, how those powers should be exercised by Government and the way in which both Houses scrutinise and approve delegated legislation”.¹⁶⁷

The DPRRC also concluded that further work needed to be carried out - “by the two Houses working together, most appropriately as a Joint Committee, to consider the scrutiny of delegated legislation by Parliament as a whole.”¹⁶⁸

124. During the debate on the Strathclyde Review, a number of members made a similar call. Baroness Taylor of Bolton, for example, argued that the

162 Written evidence from Lord Lipsey ([RSR0004](#)).

163 [Q 92](#).

164 [Q 74](#).

165 [Q 54](#).

166 Hansard Society Report, p 223.

167 Constitution Committee, 9th Report, Delegated Legislation and Parliament: A response to the Strathclyde Review, Session 2015–16 (HL Paper 116), p 29, para 90.

168 Delegated Powers and Regulatory Reform Committee, 25th Report, Special Report: Response to the Strathclyde Review, Session 2015–16 (HL Paper 119), p 28, para 80.

“next stage” should be “a comprehensive look” at what she identified as the “three problems” of framework bills, the number and scope of statutory instruments and the level of scrutiny of secondary legislation in the House of Commons.¹⁶⁹ Lord Clement-Jones said that he urged “all sides to consider some of the ideas suggested to do far more effective scrutiny of legislation and to have far more effective primary legislation in terms of the way in which powers are delegated, perhaps through another Joint Committee ...”.¹⁷⁰ Lord Crickhowell called for a Joint Committee,¹⁷¹ as did Lord Lisvane,¹⁷² Lord Howarth of Newport¹⁷³ and Lord Tyler.¹⁷⁴ Lord Forsyth of Drumlean regarded option 3 as probably offering a way forward but did not accept that it should be done by primary legislation. He said:

“The conduct of Parliament is a matter for Parliament, not the Executive. The Executive is accountable to Parliament, not the other way around. I believe that we need to have a Joint Committee to review those procedures and agree them.”¹⁷⁵

125. During the course of the inquiry we received a range of comments about the quality of parliamentary scrutiny of secondary legislation and proposals for reform. We have already mentioned some of them in our discussion about the scrutiny procedures in the two Houses (paragraphs 49 to 51). Other comments included, for example, the following:

- Lord Lucas proposes a three-tier procedure that would allow for the amendment of instruments and include an element of dialogue with the House of Commons.¹⁷⁶
- Lord Wallace of Tankerness suggests a form of parallel debate mechanism where the difficult aspects of the legislation could be discussed separately prior to the actual approval motion.¹⁷⁷
- Lord Norton proposes that the recommendation of the Goodlad Report should be accepted with the refinement that the House of Lords should not reject an instrument unless following a report of the SLSC—“this” he said “would help allay fears that the power may be used for partisan purposes”.¹⁷⁸

On the question of a wider review, comments included the following:

- Joel Blackwell suggested that there should be an independent inquiry along the lines of the Report of the Renton Committee on the Preparation of Legislation (1975) that would also include the way legislation is prepared in Whitehall.¹⁷⁹ Lord Cope of Berkeley, in the debate on the Strathclyde Review, made a similar proposal.¹⁸⁰

169 HL Deb, 13 January 2016, col 325.

170 *Ibid*, col 347.

171 *Ibid*, col 344.

172 *Ibid*, col 364.

173 *Ibid*, col 361.

174 *Ibid*, col 369.

175 *Ibid*, col 359.

176 Written evidence from Lord Lucas ([RSR0003](#)).

177 [Q 70](#).

178 Written evidence from Lord Norton of Louth ([RSR0007](#)).

179 [Q 16](#).

180 HL Deb, 13 January 2016, col 354.

- Lord Hunt of Kings Heath told us that he would like to see a fundamental review of legislation generally and the role of Parliament in it.¹⁸¹
- Lord Wallace,¹⁸² Lord Cunningham¹⁸³ and the Campaign for an Effective Second Chamber¹⁸⁴ all felt a Joint Committee of both Houses should take a wider look at parliamentary procedures relating to statutory instruments. The Campaign for an Effective Second Chamber, added: “It is important that any proposals to change existing procedures are within the ownership of the relevant House and do not derive solely from a review commissioned by the head of the Executive”.¹⁸⁵

126. **Arrangements for the proper scrutiny of secondary legislation are primarily a matter for Parliament rather than for the Government. It is also a matter for the two Houses working together. We therefore recommend that further work should be undertaken, by some appropriate form of collaborative group, to consider what procedural changes in both Houses could be introduced to make parliamentary scrutiny of secondary legislation more effective. (Recommendation 7)**
127. We anticipate that the collaborative group would wish to take up some of the ideas that have been prompted by the Strathclyde Review. Furthermore, we have already referred (in paragraph 22) to the three recent reports relevant to this inquiry: the Wakeham Report, the Cunningham Report and the Goodlad Report, each of which at various points addresses the issue of the scrutiny of statutory instruments. Their proceedings and the conclusions reached provide a wealth of relevant evidence and experience.

181 [Q 45](#).

182 [Q 74](#).

183 [Q 53](#).

184 Written evidence from the Campaign for an Effective Second Chamber ([RSR0009](#)). The Chairman of the Campaign is Lord Cormack and the Convenor is Lord Norton.

185 Written evidence from the Campaign for an Effective Second Chamber ([RSR0009](#)).

CHAPTER 5: LIST OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 2

1. **Given the unprecedented nature of deferral motions, we recommend that the Procedure Committee should consider the implications of such motions. (Recommendation 1)** (paragraph 37)
2. The evidence we received suggests that the scrutiny of secondary legislation is judged to be more thoroughly undertaken in the Lords than in the Commons. In making this observation, our intention is not to be critical. The relationship between the two Houses—with their different characteristics and functions, and with the multiple competing pressures on the time of Members of the House of Commons—should, as Lord Lisvane said, “be one of complementarity and not competition”. But acknowledging that this asymmetry exists is important, as we shall see, in the context of the debate about parliamentary scrutiny of secondary legislation. (paragraph 51)
3. The contentious issue is not *how often* the House of Lords defeats statutory instruments but *when* it is appropriate for the Lords to defeat an instrument. This is a matter of judgement. But it is a judgement that the House, as a self-regulating institution, can be expected to make. That the House makes this judgement reasonably is evidenced by the very small number of defeats since 1968. In asserting this view, we acknowledge that opinion in the House of Lords varies as to whether it was appropriate for the House to vote in favour of the deferral motions in respect of the Tax Credits Regulations. (paragraph 67)
4. **We recommend that the House of Lords should retain the power to reject secondary legislation, albeit to be exercised in exceptional circumstances only, as an essential part of Parliament’s power to scrutinise and, where appropriate, challenge Government legislation. (Recommendation 2)** (paragraph 68)
5. The boundary between primary and secondary legislation is the foundation of any consideration of the scrutiny by Parliament of secondary legislation. We welcome Lord Strathclyde’s acknowledgement of the importance of this issue. (paragraph 76)
6. We are aware that the DPRRC, in responding to the Strathclyde Review, has examined ways to ensure that the appropriate boundary between primary and secondary legislation is observed. We support the approach taken by the DPRRC, including a recommendation that draft secondary legislation, where it is “of considerable substance without which Parliament cannot give proper consideration to the bill itself”, should be made available to the Houses early in a bill’s passage through Parliament. (paragraph 77)
7. We support those who caution against the use of skeleton bills and skeleton provision in bills. In taking this view, we bear in mind, in particular, the fact that although the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments. We welcome Mr Grayling’s commitment to ensuring that the PBL Committee will be more rigorous about challenging the use of skeleton bills and skeleton provision in bills. (paragraph 78)

8. We agree that any attempt to classify instruments as financial and non-financial is not straightforward and likely to present difficulties. (paragraph 82)
9. The Strathclyde Review proposes a review to develop new criteria for the application of Commons-only procedure. **If such a review, as proposed by Lord Strathclyde, were to proceed, we have no doubt the House of Lords would wish to participate and we recommend accordingly. (Recommendation 3)** (paragraph 83)

Chapter 3

10. We do not share the view which underlies the Strathclyde Review that the central issue is the “primacy of the House of Commons”. The nature of secondary legislation is such that the debate should be framed in terms of the relationship between the Parliament and the Executive, and not between the two Houses. We note that this view is shared by both the Constitution Committee and the DPRRC. (paragraph 87)

Option 1

11. We received no evidence at all in support of this option. We support the Constitution Committee in its conclusion that option 1 is “clearly unacceptable” and would “significantly curtail the capacity and responsibility of Parliament to oversee the Executive”. (paragraph 91)

Option 2

12. Option 2 has the advantage over both options 1 and 3 in being non-statutory. But, although it involves, therefore, the retention of the House of Lords power to reject secondary legislation, importantly, it appears to assume an agreement by the House never to use that power. For this reason and on the grounds of the evidence set out above, we do not support option 2 as proposed by Lord Strathclyde. (paragraph 98)
13. We do not ... share Lord Strathclyde’s pessimism that the House would be unable to reach a consensus on how the power to reject secondary legislation should be exercised in the future. (paragraph 99)
14. If the Government were, in the future, to exercise greater caution in using secondary legislation for this scale of change, then a likely concomitant would be a reduction in challenges to secondary legislation. (paragraph 100)

Option 3

15. We acknowledge that there may well be legislative and procedural solutions to the various practical problems that have emerged in relation to option 3. The fact, however, that the proposal entails having to engineer a solution so that all instruments are considered by the Commons first demonstrates the inappropriateness of treating secondary legislation as if it were, in principle, the same as primary legislation. (paragraph 111)
16. There are also significant risks associated with implementing procedural change in Parliament using primary legislation, both in terms of managing a bill during its passage through Parliament and, once a bill is enacted, its possible consequences for the relationship between Parliament and the Judiciary. (paragraph 112)

17. More importantly, any such change in the law would result in a fundamental alteration of the role of the House of Lords in relation to Parliament's control of the use made by Ministers of delegated powers to make secondary legislation. It would also weaken parliamentary scrutiny of the Executive. The effect of option 3 would be to change the law so that:
- it would no longer require both Houses to approve affirmative instruments or not to resolve to pray for the annulment of negative instruments; and
 - it would take away the power of the House of Lords to reject statutory instruments, seriously weakening the role and purpose of the House in relation to secondary legislation, leaving it with less influence over secondary legislation than it has over primary legislation. (paragraph 113)
18. **Because of the many issues we have set out in the paragraphs above, we do not support option 3. We recommend that, if a bill is introduced under option 3, it 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". (Recommendation 4) (paragraph 114)**

Chapter 4

19. **In this context, we think that there are strong arguments in favour of re-affirming what we consider to be the current convention as set out in the Cunningham Report, that the Lords should retain its power to reject an instrument but that it should be used only in exceptional circumstances, and we recommend accordingly. (Recommendation 5) (paragraph 118)**
20. **Furthermore, building on our observations (in paragraphs 76 to 78 above) on the boundary between primary and secondary legislation, we recommend that, in order—to use Lord Strathclyde's words—"to mitigate against excessive use" of the power to reject, the Government should ensure that secondary legislation procedure is used appropriately and is not used to implement significant policy changes. (Recommendation 6) (paragraph 119)**
21. **Arrangements for the proper scrutiny of secondary legislation are primarily a matter for Parliament rather than for the Government. It is also a matter for the two Houses working together. We therefore recommend that further work should be undertaken, by some appropriate form of collaborative group, to consider what procedural changes in both Houses could be introduced to make parliamentary scrutiny of secondary legislation more effective. (Recommendation 7) (paragraph 126)**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Andrews
Lord Bowness
Lord Goddard of Stockport
Lord Haskel
Lord Hodgson of Astley Abbotts
Baroness Humphreys
Lord Janvrin
Baroness O’Loan
Baroness Stern
Lord Trefgarne
Lord Woolmer of Leeds

Declared interests

No relevant interests declared.

A full list of Members’ interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

APPENDIX 2: CALL FOR EVIDENCE

Following the vote in the House of Lords on 26 October 2015 on the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, the Government commissioned Lord Strathclyde to conduct a review of Parliamentary procedure relating to secondary legislation. In his report, Lord Strathclyde set out the following three options for reform and recommended the third:

- To remove the House of Lords from statutory instrument procedure altogether (Option 1).
- To retain the present role of the House of Lords in relation to statutory instruments but to codify the convention on how its powers should be used (Option 2).
- To retain the present role of the House of Lords in relation to statutory instruments but to set out in an Act of Parliament how its powers should be used and, in particular, replacing the House's power of veto with a power of delay (Option 3).

The Secondary Legislation Scrutiny Committee is conducting a short inquiry into the implications of each of the three options for the effective scrutiny of secondary legislation. With this focus in mind, the Committee is seeking views on:

- The advantages and disadvantages of each option.
- What, if any, procedural changes in the House of Commons will be needed to compensate for any diminution of power of the House of Lords over secondary legislation.
- Whether the change in the quality of Parliamentary scrutiny of secondary legislation implicit in each of the options should be reflected in a compensatory change in the criteria applied by the Government in setting the boundary between primary and secondary legislation.
- What additional consequences, including unintended consequences, may result from each of the options.

The deadline for written evidence is 19 February 2016.

APPENDIX 3: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/slsc-strathclyde-review> and available for inspection at the Parliamentary Archives (020 7219 3074).

Oral evidence in chronological order

Rt Hon. Chris Grayling, MP, Lord President of the Council and Leader of the House of Commons	QQ 1–7
Dr Ruth Fox and Mr Joel Blackwell, The Hansard Society	QQ 8–16
Lord Lisvane KCB DL, former Clerk of the House of Commons and Member of the House of Lords	QQ 17–28
Professor Meg Russell, Professor of British and Comparative Politics and Director of the Constitution Unit	QQ 29–38
Rt Hon. Lord Hunt of Kings Heath OBE, Shadow Deputy Leader of the House of Lords	QQ 39–45
Rt Hon. Lord Cunningham of Felling DL, Chairman of the former Joint Committee on Conventions	QQ 46–53
Rt Hon. Lord Butler of Brockwell KG GCB CVO, former Secretary of the Cabinet and Head of the Civil Service	QQ 54–59
David Beamish, Clerk of the Parliaments	QQ 60–66
Rt Hon. Lord Wallace of Tankerness QC, Liberal Democrat Leader in the House of Lords	QQ 67–74
Rt Hon. Earl Howe, Deputy Leader of the House of Lords	QQ 75–88
Rt Hon. Lord Strathclyde CH, former Leader of the House of Lords	QQ 89–101

Written evidence in numerical order

Mr Daniel Greenberg, former Parliamentary Counsel	RSR0001
Professor Philip Cowley, Professor of Politics, Queen Mary, University of London	RSR0002
Lord Lucas	RSR0003
Lord Lipsey	RSR0004
The British Academy for the humanities and social sciences	RSR0005
Dr Adam Tucker, Lecturer in law, University of York	RSR0006
Lord Norton of Louth	RSR0007
Sir William Dale Centre for Legislative Studies	RSR0008
Campaign for an Effective Second Chamber	RSR0009
Law Society of Scotland—Constitutional Law Subcommittee	RSR0010

APPENDIX 4: CORRESPONDENCE

A letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee to Lord Strathclyde, former Leader of the House and author of the Strathclyde Review: Secondary Legislation and the primacy of the House of Commons.

House of Lords: Government Review

As you know, the Secondary Legislation Scrutiny Committee (SLSC) has a keen interest in your review of procedure in the House of Lords relating to secondary legislation. As a result, I wrote to you on behalf of the Committee on 3 November and you kindly agreed to meet me, accompanied by the Committee's Clerk and Adviser, on 10 November. At that meeting, you indicated that you would find it helpful if I provided you with a short description of the role of the SLSC.

I have set out a brief historical note and the Committee's terms of reference in the attached document.

Put simply, the purpose of the Committee is to scrutinise all instruments laid before Parliament (and which are subject to proceedings in Parliament), and to draw to the attention of the House those instruments which give rise to some sort of substantive policy issue or are poorly explained or have been subject to inadequate consultation. The Committee is purely advisory. It is a matter for individual members of the House to decide whether to raise an objection to an instrument, whether or not prompted by a Committee report.

In doing this, the Committee complements the work of the Joint Committee on Statutory Instruments which looks at technical issues associated with an instrument (such as drafting and *vires*). It can also be said to complement the work of the Delegated Powers and Regulatory Reform Committee (DPRRC) which scrutinises all bills introduced into the House of Lords and comments on the delegations of powers the exercise of which result in the instruments which come before the SLSC.

The House of Commons has neither a DPRRC nor an SLSC. At our meeting, I drew your attention to a publication by the Hansard Society, entitled "The Devil is in the detail: Parliament and Delegated Legislation" (2014). The following comment is made in that report (at page 222) about the relative efficacy of the two Houses in scrutinising secondary legislation:

"The process of scrutiny for delegated legislation in the House of Commons is weak and the procedures used ... convey a sense that MPs barely take the issues seriously.

A heavy burden of scrutiny responsibility falls in consequence upon the House of Lords. Its committees are more engaged in the process, more influential with government, and Peers generally have more appetite for the detail and technical scrutiny required than do MPs".

The weight of that burden is clearly demonstrated by the sheer volume of instruments laid before Parliament. In the 2014–15 Session, the SLSC considered 1,152 instruments at 28 meetings, publishing 33 reports. In the 2013–14 Session, it considered 998 instruments at 35 meetings, publishing 42 reports. Since its inception in 2003 until the end of the 2014–15 Session, the Committee has considered a grand total of 11,603 instruments. (Further figures are set out on

the attached note.) Each one of those instruments is read and assessed by the Committee - importantly a cross-party committee - and its Advisers. We have no doubt that this must be source of reassurance to the House.

We believe that the SLSC performs a valuable function, not only in advising the House, but also in acting as a discipline to departments. Departments are aware, for example, that a poor explanatory memorandum may well lead to supplementary questions from the Committee and possibly a request for the memorandum to be re-laid in fuller form; and recently the Committee has published a report on the incidence of correcting instruments with a view to encouraging departments to take more care in preparing the original instruments. The Committee has also taken evidence on the Government's approach to consultation, because of its relevance to the formulation of secondary legislation: its reports have been welcomed by the Cabinet Office and have resulted in adjustments to consultation policy which have been helpful to consultation respondents as well as to Government.

Your Review is at an early stage. If the Committee can be of further assistance, we shall be happy to provide it. The Committee's Advisers can, in particular, offer a range of statistics on the work of the Committee. We will, of course, consider any further issues raised by your Review in the context of your terms of reference and respond, as appropriate, in due course.

Historical note

In January 2000, the Royal Commission on the Reform of the House of Lords (Cm 4534) said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended a "sifting" mechanism to identify those statutory instruments (SIs) which merited further consideration. As a result, the Merits of Statutory Instruments Committee was set up in December 2003. At the start of the 2012–13 Session, the Committee was renamed the Secondary Legislation Scrutiny Committee (SLSC).

Terms of reference

The purpose of the Committee is to draw instruments to the special attention of the House on one (or more) of six grounds:

- that it is "politically or legally important" or gives rise to "issues of public policy likely to be of interest to the House"
- that it is "inappropriate in view of the changed circumstances since the passage of the parent Act"
- that it "inappropriately implemented EU legislation",
- that it "imperfectly achieves its policy objectives",
- that the explanatory material accompanying the instrument was insufficient, and
- that there appeared to be inadequacies in the consultation process.

In addition, the Committee publishes information paragraphs on instruments which do not warrant formal reporting but which are likely to be of interest.

Statistics

Session	Sis considered	Meetings held	Reports published
2014–15	1,153	28	33
2013–14	998	35	42
2012–13	893	31	35
2010–12	1,447	59	60
2009–10	660	16	17
2008–09	1,111	28	31
2007–08	1,154	33	34
2006–07	1,179	29	32
2005–06	1,731	46	49
2004–05	620	14	16
2003–04	657	27	25