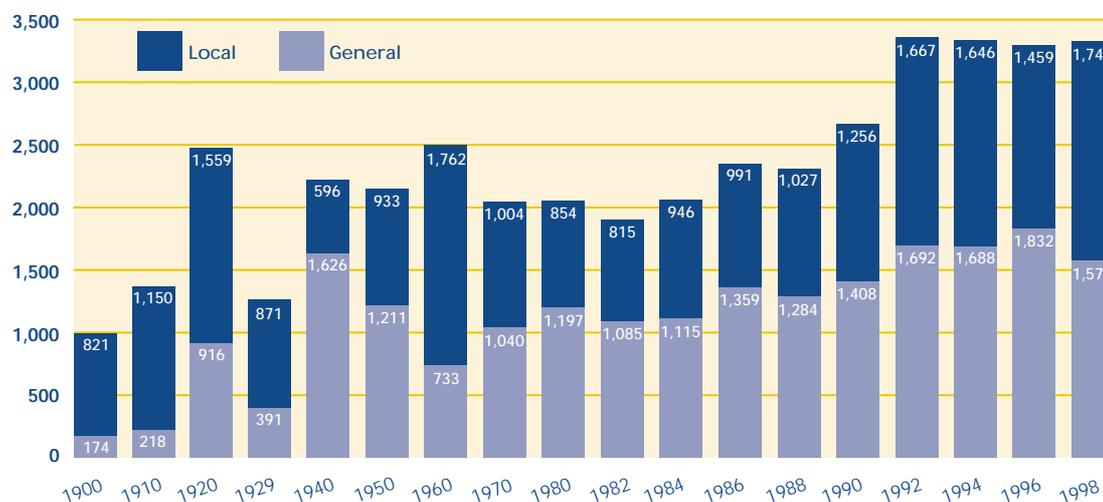


Chapter 7 – Scrutinising Statutory Instruments

7.1 We have already commented (in Chapter 4) on the role played by the Delegated Powers and Deregulation Committee of the present House of Lords in scrutinising the grant of delegated powers. Once granted, those powers are used by Ministers and a whole range of statutory authorities to make secondary legislation, in the form of Statutory Instruments, which affects virtually every aspect of society. During this century there has been a huge growth in the numbers of Statutory Instruments made each year, and an even larger growth in their volume and complexity.



Growth in the number of Statutory Instruments since 1900

The figure for 1940 includes a large number of wartime regulations; those for 1920 and 1950 include many arising from the post-war situation.

Advantages of secondary legislation

7.2 Several of the written submissions expressed concern that the growth in the number of Statutory Instruments represented a substantial shift of legislative power away from Parliament and towards the executive. That concern was compounded by the perceived shortcomings of the arrangements for scrutinising Statutory Instruments. The Delegated Powers and Deregulation Committee, in its Memorandum of Evidence, commented that “the increased importance of secondary legislation in recent years means that parliamentary procedures which may have been satisfactory in the past are no longer adequate, and there is already a pressing need to change them”. We concur with that view. The reformed second chamber can and should play a useful role in improving Parliamentary scrutiny of Statutory Instruments.

7.3 It is important to remember the advantages which Government, Parliament and society derive from the existence of delegated powers. Ministers and other statutory authorities are able to legislate on detailed points within the limits of the original delegated power. In consequence:

- Bills can be restricted to their essentials. There is a saving in Parliamentary time, Parliament can concentrate on the key principles underlying legislation, and Acts can be better understood by those who may be affected;
- there is no need to wait until the fine detail of every practical implication of a policy has been worked out before legislating. Such details can be filled in later;
- there is less need for corrective amendments to primary legislation. Secondary legislation can be amended or replaced much more easily than primary legislation;
- it allows for flexibility to adapt to changing circumstances over time, without the delay which would result from having to wait for a suitable Bill; and
- it is easier to tailor the legislative requirements in the parent Act to the different circumstances which may apply in particular cases.

7.4 Other pressures seem likely to tilt the balance between primary and secondary legislation even further towards the use of secondary legislation in future. There is growing pressure to simplify the drafting of primary legislation to produce clearer statements of the overall policy intention, leaving secondary legislation to fill in an even greater proportion of the detail. Welsh MPs and the National Assembly for Wales may also press for more ‘skeleton’ Bills. The National Assembly for Wales can only make secondary legislation but has the opportunity to debate and vote on amendments to such legislation. An increase in the use of ‘skeleton’ Bills would therefore give the National Assembly greater discretion to adapt the principles of ‘England and Wales’ Bills to the particular circumstances of Wales. Similar points might also arise in respect of legislation in the ‘reserved’ category: the Scottish Parliament and the Northern Ireland Assembly might reasonably ask that more should be left to delegated powers exercisable by Scottish or Northern Ireland authorities.

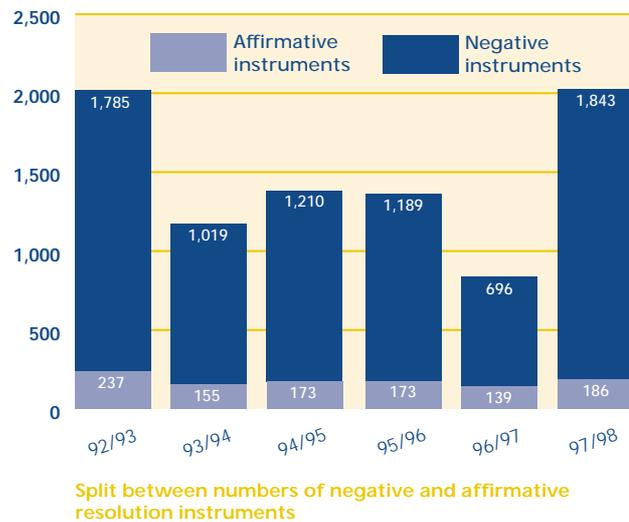
7.5 In addition, the operation of the Human Rights Act may well reveal that much potential incompatibility between the European Convention on Human Rights (ECHR) and United Kingdom law arises from secondary legislation. The Delegated Powers and Deregulation Committee Memorandum drew attention to this point. It argued that scrutiny of draft secondary legislation on ‘compatibility’ grounds would be highly desirable and “could be a very considerable task”.

7.6 These factors reinforce the case for enhanced Parliamentary scrutiny of secondary legislation.

Recommendation 35: There is a strong case for enhanced Parliamentary scrutiny of secondary legislation. The reformed second chamber should make a strong contribution in this area.

Current scrutiny arrangements

7.7 The current scrutiny arrangements depend on the distinctions drawn between different categories of delegated powers. These distinctions have been drawn on the basis of principles which are somewhat arbitrary and imprecise. More than half of the 3,000 Statutory Instruments made each year are subject to no Parliamentary procedure at all. Most of the rest (see chart) are subject to ‘negative resolution’: they could in theory be overturned by a negative vote in either House of Parliament. A minority – usually the most significant ones – require the positive approval of both Houses of Parliament before they can be made. Although the Delegated Powers and Deregulation Committee has ensured greater consistency of approach since 1992, before then it was often a matter of chance or political circumstances which determined whether particular delegated powers were made subject to affirmative or negative resolution procedure. The situation is further complicated by the range of different procedures that govern the exercise of existing delegated powers (some dating from the last century); and by the practical requirement for some powers to be exercisable, in an emergency, without prior Parliamentary approval.



7.8 When delegated powers are exercised, technical scrutiny of those Statutory Instruments which are subject to scrutiny by Parliament is carried out by the Joint Committee on Statutory Instruments (JCSI).¹ The JCSI reviews the *vires*, drafting and certain other technical aspects of Statutory Instruments, such as whether they are retrospective. It may draw attention to any ‘unusual or unexpected’ use of a delegated power, but is not allowed to consider the merits of any particular Statutory Instrument.

Obstacles to effective scrutiny

7.9 Parliament does have opportunities to consider the merits of those Statutory Instruments which are subject to affirmative or negative resolution procedure, but there remain a number of obstacles to effective scrutiny.

7.10 Statutory Instruments cannot be amended. Affirmative resolution instruments can only be approved or rejected. As they rarely raise major issues of principle, there is a natural reluctance to go to the length of rejecting the whole Instrument when most of it gives rise to no cause for concern.

¹ There is also a House of Commons Committee on Statutory Instruments, which scrutinises those few Statutory Instruments that deal with financial matters, which are subject to proceedings in the House of Commons alone.

7.11 There is no realistic prospect of a Statutory Instrument being defeated in the House of Commons. Although in 1994 the House of Lords (on a motion from Lord Simon of Glaisdale) asserted its “unfettered freedom to vote on any subordinate legislation”,² in practice there has (so far) been no serious challenge since 1968³ to the convention that the House of Lords does not reject Statutory Instruments. Nevertheless, members of the House of Lords have found various ways in which to indicate their concern about particular Statutory Instruments. These have occasionally resulted in Ministers adjusting their proposals.

7.12 Very little time is made available for debates on Statutory Instruments in the House of Commons. Affirmative resolution instruments are routinely referred to Standing Committees, rather than debated on the floor of the House. The Committees cannot consider amendments or debate substantive motions: They are required to report that they have ‘considered’ the Statutory Instrument, which is then moved formally in the House. Negative resolution instruments may be ‘prayed against’ within 40 sitting days but only a minority of those ‘prayed against’ are referred (by agreement between the Party Whips) to a Standing Committee, where in any case the same conditions apply. The pressure of time is less acute in the House of Lords. Affirmative resolution instruments and *all* ‘prayers’ against negative resolution instruments are debated, and all are taken on the floor of the House; but they have accounted for only about 5 per cent of the time of the House in recent years.

7.13 Negative resolution instruments usually come into effect about 40 days after being made and laid before Parliament. Members may therefore feel that there is little point in seeking to negate something which has already come into effect, especially given all the attendant practical and legal difficulties.

7.14 The sheer volume of Statutory Instruments and their level of detail. This makes it difficult for any individual MP or member of the second chamber to get to grips with the substantive issues.

Proposals for change

7.15 The report on Delegated Legislation by the House of Commons Procedure Committee, published in June 1996,⁴ detailed concerns about the arrangements for scrutinising Statutory Instruments and offered some proposals for improvement. Its main recommendations were that:

- **there should be a new category of ‘super affirmative’ instruments**, subject to scrutiny before they are formally laid in draft;
- **a Sifting Committee should be established to make recommendations on the handling of particular Statutory Instruments** (for example, to refer them to the relevant Departmental Select Committee or recommend debate in a Standing Committee) and that the period for ‘praying against’ negative resolution instruments should be extended from 40 to 60 days; and

² Hansard (HL), 20 October 1994.

³ When the House of Lords voted not to approve the Southern Rhodesia (United Nations Sanctions) Order 1968, precipitating the collapse of the inter-party talks on Lords reform. The House of Lords approved a virtually identical order some weeks later.

⁴ Fourth Report, Session 1995/96, HC152.

- **debates in Standing Committee should be on a substantive motion**, perhaps beginning with an opportunity for members to ask questions. The House should not consider a Statutory Instrument until after the JCSI had reported on it, and there should be at least a 1½ hour debate on any Statutory Instrument which was either not approved or recommended for annulment by the relevant Committee.

7.16 These recommendations from the Procedure Committee are of course matters for the House of Commons, but our proposals are very much in line with the spirit of the Procedure Committee’s report. The two could be considered in parallel. Our proposals build on those strengths of the present House of Lords which we believe should be preserved in the reformed second chamber. They may provide another example of the way in which the two Houses could play complementary roles in bringing the Government to account more effectively.

7.17 There are a number of factors which should make it appropriate for the reformed second chamber to make an important contribution to the scrutiny of Statutory Instruments:

- such scrutiny would be a natural development of the interest which the present House of Lords has taken in the granting and subsequent exercise of delegated powers;
- the reformed second chamber will, we hope, continue to contain people with a range of skills suited to discharging a technical scrutiny function;
- our proposals also envisage that members of the second chamber will often have direct knowledge of the areas affected by particular pieces of secondary legislation, and be able to speak authoritatively on their likely effect; and
- such technical scrutiny is unlikely to attract public attention. As the Delegated Powers and Deregulation Committee put it when describing their existing tasks, “the largely invisible nature of a Committee which usually sits in private and whose work is ill-designed to grab headlines is particularly appropriate for a second chamber”.

7.18 Our specific proposals in this area involve both ‘procedural’ changes and changes to the powers of the second chamber in relation to Statutory Instruments.

Pre-publication scrutiny

7.19 We strongly support the proposal that more proposed Statutory Instruments should be published in draft so that they can be subjected to detailed comment by interested parties and members of both Houses of Parliament before being formally laid before Parliament.

7.20 ‘Pre-legislative’ scrutiny of proposed Statutory Instruments has a limited but respectable pedigree:

- Deregulation Orders under the Deregulation and Contracting Out Act 1994 (which often arise from a process of external consultation) are subject to a statutory period of formal consultation and must be laid before Parliament in draft for a period of at least 60 days. They are referred for consideration to the Deregulation Committee in the House of Commons and the Delegated Powers and Deregulation Committee in the House of Lords. When the final draft Order is presented for approval it must be accompanied by a Memorandum setting out the points raised on the original draft and any changes made as a result;

- a similar procedure to that covering Deregulation Orders has been established for remedial Orders under the Human Rights Act 1998 (following expressions of concern in the House of Lords); and
- successive Governments have made an administrative practice of publishing ‘Proposals’ for draft Orders in Council under the Northern Ireland Act 1974, along with an Explanatory Memorandum, and allowing a six to ten week consultation period. This procedure has been put on a statutory basis in the Northern Ireland Act 1998. Now that the Act has come into effect the procedure will apply to legislation on certain ‘reserved’ matters.

7.21 All these examples relate to Statutory Instruments which amend (or, in the latter case, are, in effect) primary legislation and where a specific statutory requirement for formal consultation has been seen to be appropriate. In other instances, Departments, as an administrative practice, publish Statutory Instruments in draft as a basis for consultation with experts and interested parties. Additionally, the Delegated Powers and Deregulation Committee occasionally recommends that certain delegated powers should not be exercised without prior consultation. The potential advantages of consulting on Statutory Instruments by publishing them in draft are obvious. Interested parties welcome the consultation and have an opportunity to influence and improve the drafting of the Statutory Instrument concerned. The overall result should be better legislation. The Delegated Powers and Deregulation Committee’s view, arising from its experience, is that, “We consider the experiment of pre-legislative processes inherent in the deregulation procedure to have been a considerable success, and one which could be usefully built on by extending the exercise to selected public Bills and Statutory Instruments”.



7.22 The Delegated Powers and Deregulation Committee is itself in a position to encourage such prior consultation. It could recommend a statutory requirement for prior consultation on the exercise of particular delegated powers or seek assurances from Ministers as the delegated power concerned is being debated that such consultation will be undertaken. We would also encourage Ministers and Departments to consider publishing particularly significant Statutory Instruments in draft wherever there seems to be benefit in doing so. We see no advantage in requiring prior consultation on defined categories of Statutory Instrument because the existing categories, especially in respect of delegated powers granted before 1992, do not necessarily reflect the significance of the substantive issue concerned.

Recommendation 36: The Delegated Powers and Deregulation Committee should encourage the practice of publishing particularly significant Statutory Instruments in draft so that they can be subjected to detailed comment by interested parties and members of both Houses of Parliament before being formally laid before Parliament. Ministers and Departments should consider doing so wherever that would be beneficial.

A ‘sifting’ mechanism

7.23 We believe it would strengthen Parliamentary scrutiny of Statutory Instruments if a ‘sifting’ mechanism could be established. This would be designed to look at the significance of every Statutory Instrument subject to Parliamentary scrutiny; call for further information from Departments where necessary; and draw attention to those Statutory Instruments which are important and those which merit further debate or consideration. Such a mechanism, perhaps in the form of a Committee, could be established by either House, or jointly, as a procedural matter. Its value would lie in focusing Parliamentary attention on those few Statutory Instruments which were of real significance. Its judgement would depend on not only the intrinsic significance of the issue concerned, but also its current political salience (which might vary over time).

Recommendation 37: A ‘sifting’ mechanism should be established to look at the significance of every Statutory Instrument subject to Parliamentary scrutiny; call for further information from Departments where necessary; and draw attention to those Statutory Instruments which are important and those which merit further debate or consideration.

7.24 Depending on what decisions are taken on the Procedure Committee report referred to above, the logical course could be to establish a Joint Sifting Committee. There could be some complications in practice, although these should not be insuperable. For example:

- as with the JCSI, there would need to be a Commons-only Committee to deal with Statutory Instruments on financial matters;
- only members of the relevant House would be able to decide which Committee of that House should be asked to scrutinise a particular Statutory Instrument; and
- only the members of the relevant House would be able to decide whether to recommend a particular Statutory Instrument for debate in that House.

7.25 Nevertheless, such an arrangement would ensure consistency of approach between the two Houses, avoid any potential for duplication of staff effort and build on the experience of the JCSI.

7.26 Alternatively, we recommend that the reformed second chamber should consider setting up some machinery to sift Statutory Instruments in the way proposed. This task would have a number of parallels with the work of the Delegated Powers and Deregulation Committee. It would involve making judgements about the significance of particular proposals to exercise delegated powers and categorising them accordingly. The existing Committee’s role in scrutinising draft Deregulation Orders has given it experience of commenting on the exercise of delegated powers. This is a valuable addition to the Committee’s experience in making recommendations about the basis on which delegated powers should be granted. The reformed second chamber might therefore wish to consider whether the Delegated Powers and Deregulation Committee could take on this task.

Recommendation 38: A joint Committee should be established to sift Statutory Instruments. Alternatively, the second chamber should consider setting up machinery to sift Statutory Instruments, perhaps inviting the Delegated Powers and Deregulation Committee to take on the task.

7.27 Where any sifting mechanism identified a Statutory Instrument as being worthy of consideration and debate, it might be considered either by the whole second chamber or – in the absence of a structure of Departmentally-related Committees – by *ad hoc* Committees. Such Committees would provide opportunities for members to question Ministers about the proposals and for Ministers to explain and justify them. A Committee recommendation to oppose an affirmative resolution instrument or annul a negative resolution instrument would obviously need to be debated by the whole chamber. If no such recommendation were made, a convention might arise that the relevant instrument should be approved without debate.

Other procedural changes

7.28 As far as other procedural improvements are concerned, we endorse the view of the Procedure Committee that neither House should consider a Statutory Instrument until the JCSI has reported on it.⁵ We also agree that the statutory ‘praying time’, in respect of negative resolution instruments, should be extended from 40 days to 60 days by amending the Statutory Instruments Act 1946.

Recommendation 39: Neither chamber should consider a Statutory Instrument until the JCSI has reported on it. The Statutory Instruments Act 1946 should be amended to extend the statutory ‘praying time’ in respect of negative resolution instruments from 40 days to 60 days.

7.29 We see no case for making it possible to amend Statutory Instruments once they have been formally laid before Parliament. Any comprehensive system for considering detailed amendments to secondary legislation would negate the advantages of secondary legislation. On the other hand, any attempt to limit the scope for amendments in some arbitrary way (for example, by setting an upper limit on how many amendments could be debated) would be difficult to justify. Changes to proposed Statutory Instruments have occasionally been secured when Ministers have agreed to withdraw draft instruments or introduce replacement provisions. These options would remain open. The practice of consulting on proposed Statutory Instruments, which we hope to encourage, would reduce the number of occasions on which serious criticisms might be levelled at the drafting of Statutory Instruments.

Conclusion: There is no case for making it possible to amend Statutory Instruments once they have been formally laid before Parliament.

⁵ The House of Lords already observes such a rule in relation to affirmative resolution instruments.

7.30 More generally, we see scope for the second chamber to adopt an open-minded, flexible and innovative approach to the consideration of Statutory Instruments within the present procedural arrangements. The Delegated Powers and Deregulation Committee already interacts with Departments and any Sifting Committee could do likewise. Where Ministers can choose between affirmative or negative resolution procedures, the Committee might seek to influence that choice or it might request drafts of particular instruments on an informal basis, irrespective of the statutory requirements.

Recommendation 40: The reformed second chamber should adopt an open-minded, flexible and innovative approach to the consideration of Statutory Instruments within the present procedural arrangements.

Powers in relation to secondary legislation

7.31 The powers of the present House of Lords in respect of Statutory Instruments are more absolute than those it has in respect of primary legislation. On the other hand, as we noted in paragraph 7.11, there has since 1968 been no serious challenge to the convention that the House of Lords does not reject Statutory Instruments. Its *influence* over secondary legislation is therefore paradoxically less than its influence over primary legislation.

7.32 This may all seem anomalous. The formal explanation is that the two kinds of legislation are not comparable. Primary legislation is the result of a Bill being passed by the two Houses of Parliament and receiving Royal Assent. Secondary legislation is made by Ministers under powers generally conferred by primary legislation. It is not itself the product of Parliament at all. But on a less theoretical level, the reality is that the Government is the prime mover in relation to nearly all legislation, both primary and secondary. If the second chamber is to have the role we envisage for it, it should have real influence over both kinds of legislation.

7.33 On the face of it the present arrangements give the second chamber some powerful weapons. It can refuse to approve draft instruments (under the affirmative procedure) or strike down instruments already made (under the negative procedure). These powers should enable the second chamber to bring irresistible pressure to bear on the Government. But they are too drastic. That is the reason why they are not in practice used now and we would not suggest that a reformed second chamber should be more willing than the present House of Lords to persist in blocking an instrument altogether.

7.34 One way forward might be to leave the powers as they are, but to develop a convention that they would be used in much the same way as a suspensory veto, so as to delay rather than block. This might be achieved by establishing a practice of adjourning the debate on a motion to approve a draft, or to annul an instrument, until the House of Commons and Ministers had had an opportunity to consider the objections raised. If a satisfactory solution could be agreed, a revised instrument or draft could be put forward. Otherwise the Government's proposals, supported by the House of Commons, could be allowed to prevail, the reservations of the second chamber having been considered.

7.35 In our view a system of broadly this kind is desirable, but it would not be satisfactory to rely on its developing informally. The second chamber should be given a tool which it can use to *force* the Government and the House of Commons to take its concerns seriously. There is, in our view, not much point in the second chamber having a theoretically greater power which it does not in reality exercise. It should have powers which it can actually exercise, and which would require the Government and the House of Commons to take some positive action either to meet its concerns or override its reservations.

7.36 We therefore recommend that changes be made by legislation, so that:

- 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.

7.37 In both cases we envisage that the Minister concerned would be expected to publish an Explanatory Memorandum within a stated period. It would also be open to the Minister to withdraw a draft Statutory Instrument and substitute a replacement or, as appropriate, to make a new negative resolution instrument to supersede the previous one. In either case, the second chamber would have the opportunity to reconsider its position and, if appropriate, to lift its 'suspended sentence'. However, if it chose not to do so, the House of Commons should have the decisive voice and be able to determine on an affirmative vote that the Statutory Instrument should be approved or remain in force. In doing so, the members of the House of Commons would be fully aware of the second chamber's concerns, the Minister's response and any wider public and media reactions. The proposal is therefore entirely in line with our view of the second chamber's overall role. It would give it greater scope to challenge Government proposals for secondary legislation and draw the issues to the attention of the House of Commons, who would take the final decision.

Recommendation 41: 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.

Recommendation 42: Where the second chamber votes to annul an instrument, the annulment should not take effect for three months and could be overridden by a resolution of the House of Commons.

Recommendation 43: In both cases the relevant Minister should publish an Explanatory Memorandum, giving the second chamber an opportunity to reconsider its position and ensuring that the House of Commons is fully aware of all the issues if it has to take the final decision.

7.38 A proposal on these lines would not require any recategorisation of Statutory Instruments to make it work. Nor would it require any amendment of the Parliament Acts. It could be achieved by amendments to the Statutory Instruments Act 1946, supplemented if necessary by changes to Standing Orders. At the cost of weakening the formal power of the second chamber, in comparison with that of the present House of Lords, we believe it would actually strengthen its influence and its ability to cause the Government and the House of Commons to take its concerns seriously. It therefore strikes an appropriate balance between the power of the two Houses of Parliament in relation to Statutory Instruments. It illustrates a further way in which the functions of the reformed second chamber could complement those of the House of Commons. In the terminology of the Labour Party’s written evidence, our proposal seeks to govern the operation of the second chamber’s powers in respect of secondary legislation in a way which fairly reflects the House of Commons’ pre-eminence.

Conclusion: Changing the nature of the second chamber’s powers in relation to Statutory Instruments would actually strengthen its influence and its ability to cause the Government and the House of Commons to take its concerns seriously.



Retention of the current absolute veto

7.39 We did consider the option of retaining the second chamber’s present absolute veto over Statutory Instruments, particularly in relation to specific delegated powers (for example, those in the Human Rights Act or others with constitutional implications). We concluded that this was less likely to achieve the desired result. In practice, the vetoing or annulment of a Statutory Instrument by the second chamber would not trigger a constitutional crisis. The Government would probably reintroduce an identical or similar instrument and secure the support of the House of Commons, and the second chamber would need to think very carefully about challenging the instrument for a second time. In theory, retaining an absolute veto might place the second chamber in a stronger position to enforce its opposition, but in practice we doubt that this would be the case. The absolute nature of the House of Lords’ powers in relation to secondary legislation is more apparent than real. A contested item of secondary legislation could always be reintroduced in the form of a Bill and enacted, if necessary, under Parliament Act

procedures. Moreover, it would be easy to misrepresent any use of the second chamber's current power to veto secondary legislation as a challenge to the democratically-elected Government, which should be resisted for that reason alone. Our proposal would provide a better context for enabling the two Houses to work together in scrutinising Statutory Instruments more effectively, guided by their considered views of the substance of the issues.