Strathclyde Review: Secondary legislation and the primacy of the House of Commons

Presented to Parliament
by the Chancellor of the Duchy of Lancaster
by Command of Her Majesty

December 2015

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Foreword

Conventions in Parliament are a cornerstone of our Constitution. In part, they oil the hidden moving parts of parliamentary process and keep it all flowing; and in part they are the glue which commits those with differing objectives to act in accordance with agreed practice. They are non-statutory but binding on those who come to agree them. Those of us interested in how Parliament works in practice should only give up on conventions with the heaviest of hearts. Sadly, Parliament itself sometimes forgets why particular conventions exist or the implications of casting them aside.

On October 26, the Lords withheld agreement to the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. The following day, a motion was moved and narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Orders 2015. Therefore, the Prime Minister invited me to conduct a review of statutory instruments and to consider how more certainty and clarity could be brought to their passage through Parliament.

The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto.

In this review, I have tried to balance the interests of proper parliamentary scrutiny and the certainty that government business can be conducted in a reasonable manner and time. At the heart of my recommendations is a new procedure which does not involve the loss of a proposed regulation on the back of a single Lords defeat but which allows the Commons, having thought again, to vote a second time and insist on its primacy.

The Lords has built up considerable expertise on secondary legislation scrutiny. Of course, the Government suffers defeats in the Lords, but the patience of the Commons is not unlimited and as the Lords has developed its revising and scrutinising role it may wish to keep in mind that its primary purpose is to complement the work of the Commons and not to block its will – too often. It would be regrettable if the Lords simply became a highly politicised ‘House of Opposition’.

It is a regret to me that the fine convention on statutory instruments has been stretched to breaking point. Conventions exist because they provide a basis for orderly government. They will survive only so long as there is a continued understanding of why they were originally brought into being. But when they go, Parliament and the people we serve will, I believe, come to miss their value.

The Rt Hon the Lord Strathclyde CH
December 2015

Executive Summary

Since 1968, a convention has existed that the House of Lords should not reject statutory instruments (or should do so only rarely), but it has been interpreted in different ways, has not been understood by all members of the House, and has never been accepted by others. The rejection of the Tax Credits Regulations broke new ground. It suggests that the convention is now so flexible that it is barely a convention at all.

I have suggested three options to provide the House of Commons with a decisive role on statutory instruments.

- One option would be to remove the House of Lords from statutory instrument procedure altogether. This has the benefit of simplicity and clarity. However, it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.

- 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 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. This option seeks to codify the convention. However, since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application.

- A third option 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. This would better fit with the established role of the House of Lords as regards primary legislation.

Recommendations

I recommend the third option of creating a new process, set out in statute, for the Lords to ask the Commons to think again about a statutory instrument. This would provide the government of the day with a degree of certainty, while maintaining for the House of Lords a simplicity of procedure in keeping with already established procedures for other forms of legislation. It would preserve and enhance the role of the House of Lords to scrutinise secondary legislation by providing for such legislation to be returned to the Commons. In the event of a further Commons vote to approve a statutory instrument, it would enable the Commons to play a decisive role.

I also recommend 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.

Finally, in order to mitigate against excessive use of the new process which I have proposed under option 3, I believe 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.

Background

1. Statutory Instruments

1.1 What statutory instruments are and the different forms of statutory parliamentary procedure applied to them

Proposed laws are presented to Parliament in the form of Bills. Once a Bill has been approved by both Houses of Parliament and has received Royal Assent it becomes an Act of Parliament. Acts of Parliament are primary legislation.

Acts of Parliament often confer powers on ministers, but sometimes on others, to make more detailed orders, rules or regulations by means of secondary or delegated legislation. Delegated legislation which comes before Parliament consists mostly of statutory instruments (SIs). The scope of SIs varies greatly, ranging from commencement orders for bringing into force all or part of an Act and orders with purely local effect (most of which are not laid before Parliament), to much wider-ranging instruments, such as those which fill out the broad provisions in Acts.

The parent Act makes clear which procedures apply to the delegated legislation made under its provisions. The most common forms of parliamentary procedure for SIs are the "negative resolution procedure" and the "affirmative resolution procedure". An SI subject to the negative resolution procedure does not have effect, or ceases to have effect, if either House (or the Commons in the case of certain instruments dealing with financial matters) passes a motion within a specified time calling for its annulment.[1] Most of the instruments subject to the affirmative resolution procedure are instruments that cannot be made unless a draft of the instrument has been approved by each House (or, again in some cases involving financial matters, by the House of Commons alone). There are also some instruments subject to a different form of affirmative resolution procedure under which they will not come into force, or not remain in force, unless approved by both Houses (or, in some cases, just by the House of Commons).

Details of the various forms of statutory instrument and the parliamentary procedures attached to them are set out at appendix B and in more detail in a House of Commons Background Paper.[2]

[1] There is also another rare form of negative resolution procedure instrument covered by section 6 of the Statutory Instruments Act 1946 which is laid in draft and cannot be made if a resolution against making it is passed, for example, the Local Democracy, Economic Development and Construction Act 2009, s 59(9). Any legislation resulting from this review will need to take into account any cases where this procedure is resorted to.

[2] House of Commons Background Paper: Statutory Instruments Standard Note SN/PC/6509 http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06509

1.2 Statutory procedures

SIs, as a category of legislation, were created by the Statutory Instruments Act 1946. The long title of the Act is "An Act to repeal the Rules Publication Act 1893, and to make further provision as to the instruments by which statutory powers to make orders, rules, regulations and other subordinate legislation are exercised". Section 1(1) (Definition of 'Statutory Instrument') provides two ways in which a piece of delegated legislation becomes a statutory instrument. First, SIs include all instruments resulting from the exercise of any power that is exercisable by Order in Council. Secondly, other powers to make orders, rules or regulations that are conferred on ministers result in SIs if the powers are expressed, as is the usual practice, to be exercisable by SI.

The Statutory Instruments Act 1946 contains provisions which supplement and are attracted by the provisions that provide for the affirmative or negative resolution procedure to apply to an instrument.

1.3 Parliamentary scrutiny of SIs

Statutory Instruments laid before both Houses are subject to scrutiny by two Parliamentary Committees: the Joint Committee on Statutory Instruments (JCSI) (which in session 2013-14 considered some 1,200 SIs) and the House of Lords Secondary Legislation Scrutiny Committee (SLSC) (formerly the Merits of Statutory Instruments Committee dating from 2003). The SIs which are subject to procedures only in the House of Commons are scrutinised by the Select Committee on Statutory Instruments (in effect, the Commons' half of the JCSI), but not by the JCSI or the SLSC.

The JCSI checks, amongst other things, that a minister's powers are being carried out in accordance with the provisions of the enabling Act and that those powers are not being exercised in an unexpected or unusual way. Where it thinks these tests have not been satisfied, or the SI has been drafted defectively, the JCSI, after consultation with the Department concerned, will report to both Houses. The work of the SLSC complements that of the JCSI by considering the merits of all instruments and drawing to the attention of the House those which are politically or legally important, which give rise to issues of public policy likely to be of interest to the House of Lords or which appear in some way inappropriate.

In addition, the House of Lords Delegated Powers and Regulatory Reform Committee considers all Bills during their passage through the Lords and reports whether any provisions inappropriately delegate legislative power or whether they subject the exercise of delegated powers to an inappropriate degree of parliamentary

scrutiny. The Committee's recommendations are usually accepted by the Government.

Delegated powers in Bills and subsequently SIs themselves are therefore subject to a range of scrutiny procedures, particularly in the House of Lords which in recent years has devoted considerable resources to this scrutiny.

Further details of parliamentary consideration of Statutory Instruments in both Houses of Parliament are also set out in the House of Commons Background Paper.[3]

2. Relations between the two Houses

2.1 The Parliament Acts, 1911 and 1949

The Parliament Act 1911 asserted the primacy of the House of Commons following the constitutional crisis of 1909, arising from the House of Lords' rejection of the Liberal Government's 'People's Budget'.

Section 1 of the 1911 Act defined a Money Bill[4] and provided that if a Money Bill is passed by the Commons and sent up to the House of Lords at least one month before the end of the session it must be presented for Royal Assent if it is not passed by the Lords within one month of being sent up to that House and the House of Commons does not direct to the contrary. The Act provides for the Speaker to certify Money Bills before they are sent up to the Lords.

The Parliament Act also replaced the Lords' power of veto over all other Bills which start in the House of Commons by a power of delay. The delay specified was subsequently shortened by the Parliament Act 1949. The effect of the Parliament Acts is that the Lords can delay enactment of a Bill until the parliamentary session after that in which it was first introduced and until at least 13 months have elapsed from the date of second reading in the Commons in the first session.

Royal Assent was given under the terms of the 1911 Act on only three occasions, in respect of the Government of Ireland Act 1914, the Welsh Church Act 1914 and the Parliament Act 1949. Since 1949 a further four Acts have been passed in this way:

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[3] *Ibid*

[4] "A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expression "taxation", "public money", and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes." Subsection 1(2) of the Parliament Act 1911.

the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004.

Except in a very few cases, Parliament does not have the power to amend delegated legislation. Furthermore, the Parliament Acts do not apply to delegated legislation, so if an SI is rejected by the Lords it cannot have effect even if the Commons have approved it.

Further details of the procedures governing the use of the Parliament Acts are set out in a House of Commons Library Paper.[5]

2.2 The Constitutional Reform and Governance Act 2010

As well as the Parliament Acts, a further example of the primacy of the House of Commons is the rule for the approval of international treaties under section 20 of the Constitutional Reform and Governance Act 2010. In this case, a treaty may be ratified even where the House of Lords has resolved not to ratify it, if "a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why".

2.3 House of Commons privilege on financial matters

Although the Civil War involved disputes on the respective roles in financial matters of Parliament and the Crown, the primacy in those matters of the House of Commons over the House of Lords was already a long established convention when it was formalised by two resolutions of the Commons in 1671[6] and 1678[7], the first of which stated that the Lords should not be able to change the rate of a tax, and the second of which stated that all bills of "aids and supplies" should be "the sole gift of the Commons".

This long established convention affords the House of Commons a legislative privilege in relation to financial matters in all Bills. If a Bill is amended by the Lords in a way that has financial implications, the Commons can reject the Lords' amendments on the grounds that they involve "privilege" and there is a convention that the Lords will not insist on an amendment that has been rejected on those grounds. With regard to the charges in respect of which they claim privilege, "the Commons treat as a breach of privilege by the Lords not merely the imposition or increase of such a charge but also any alteration, whether by increase or reduction of its amount or of its duration, mode of assessment, levy, collection, appropriation or management; and, in addition, any alteration in respect of the persons who pay,

[5] House of Commons Library Paper: The Parliament Acts SN/PC/675 http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00675
[6] House of Commons Journal Volume 9: 13 April 1671
[7] House of Commons Journal Volume 9: 3 July 1678

receive, manage, or control it, or in respect of the limits within which it is leviable"[8]. In such cases, the Lords do not insist on their amendment.

Further information can be found in the note on Financial Privilege by the then Clerk of the House and the Clerk of Legislation (2012)[9].

2.4 Conventions on the relationship between the two Houses

Other than the Parliament Acts and financial privilege, there are a number of important established conventions which apply to the relationship between the two Houses and which are relevant to the consideration of delegated legislation. In 2006, a Joint Committee was appointed to consider the practicality of codifying the key conventions which affect the consideration of legislation.[10] Two of the conventions can be mentioned briefly. The first is the Salisbury-Addison convention which relates to Bills that implement Government manifesto commitments. The Committee identified it as a convention that a manifesto Bill is accorded a second reading in the Lords, is passed and sent (or returned) to the Commons and is not the subject of "wrecking amendments" which change the Government's manifesto commitment as proposed in the Bill. The second convention is simply that the Lords should consider government business in reasonable time.[11]

A third convention considered by the Joint Committee is central to the current review and relates to secondary legislation. The Committee noted that assertions had been made in debate in the Lords since the 1950s that it would be wrong for the Lords to reject delegated legislation. When the Committee considered the matter, there had only been two occasions on which the House of Lords had rejected an SI (in 1968 and 2000, in the cases mentioned below). The Committee concluded that "the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it might be appropriate for it to do so"[12]. A number of specific circumstances were identified, for example, when the provisions of an SI were of the sort more normally found in primary legislation or in the case of certain specific orders. If these or other particular circumstances did not apply, then "opposition parties should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it"[13].

[8] Erskine May Parliamentary Practice, 24th edition, p 787
[9] http://www.parliament.uk/documents/commons-commission/Financial-Privilege-note.pdf
[10] See Report of the Joint Committee on Conventions of the UK Parliament, HL Paper 265-I, HC 1212-I, Session 2005-06
[11] *Op cit*, p 4
[12] *Ibid*, para 228
[13] *Ibid*, para 229

Since the Joint Committee reported in 2006, and the Lords and Commons noted the report with approval,[14] the Lords have rejected SIs on the three further occasions mentioned below at section 2.6.

2.5 Other relevant reports

Two other reports, which are relevant to this review because they have expressed views on the approach of the House of Lords towards delegated legislation, are *A House for the Future,* the report of the Royal Commission on the Reform of the House of Lords chaired by Lord Wakeham and published in 2000 (the Wakeham Report)[15], and *the Report of the Leader's Group on Working Practices*, chaired by Lord Goodlad and published in 2011 (the Goodlad report)[16].

The Wakeham report recommended that where the reformed second chamber voted against an affirmative instrument, the draft should nevertheless be deemed to be approved if the Commons subsequently gave its approval within three months. The annulment of a negative instrument by the second chamber could similarly be overridden by a resolution of the Commons.[17] The report made the point that "[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"[18].

The Goodlad report recommended that the House should adopt a resolution asserting its freedom to vote on delegated legislation, and affirming its intention to use such votes to delay, rather than *finally* defeat, such legislation. Such a resolution would establish the House's role as a revising chamber in respect of delegated legislation as well as primary legislation. Another of its recommendations was, "that in the event that the House has declined to approve an affirmative instrument, and the Government has laid a substantially similar draft instrument, and this instrument has been approved by the House of Commons, the House will agree to the approval motion without amendment"[19].

[14] HL Deb (2006-07) 688, cc 573-638; HC Deb (2006-07) 455, cc 808-887
[15] *A House for the Future,* the report of the Royal Commission on the Reform of the House of Lords Cm 4534 (2000) https://www.gov.uk/government/publications/a-house-for-the-future-royal-commission-on-the-reform-of-the-house-of-lords
[16] *The report of the Leader's Group on Working Practices, HL Paper 136, Session 2010-12* http://www.publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13602.htm
[17] *Op cit*, para 7.36
[18] *Op cit*, para 7.38
[19] *Op cit*, List of Recommendations, para 27

2.6 How the House of Lords considers Statutory Instruments

After scrutiny by the committees mentioned in section 1.3 above, the drafts of affirmative instruments, or the instruments themselves, are considered and approved in each House. In the Commons the debate usually takes place in a delegated legislation committee followed by formal approval on the floor of the House. In the Lords the debate takes place either in the House or in a Grand Committee with subsequent approval (usually formal) in the House. Given the convention that the Lords rarely reject delegated legislation, a number of methods have been developed by which Members can express concern about, or opposition to, an affirmative instrument:

- Members may, by amendment or separate motion, call upon the Government to take specified action (which will not, even if agreed, prevent the approval of the instrument). Such motions are described as "non-fatal".
- Members may, in a similar way, invite the House to put on record a particular point of view relating to the instrument but without calling on the Government to take any specific action. Such motions are also non-fatal.
- Members may give notice of direct opposition by means of an amendment to the approval motion, the effect of which would be to withhold agreement of the instrument. Although potentially fatal motions such as these have been successful on only a very few occasions as described below, over fifty "fatal" motions were pressed to a division between 1955 and 2014.[20] This was often done in the reasonably sure expectation that the motions would be defeated. There is often now no such sure expectation.

Since 1968, SIs have been rejected by the House of Lords on only five occasions: the Southern Rhodesia (United Nations Sanctions) Order (1968); the Greater London Authority (Election Expenses) Order (2000) and the Greater London Authority Elections Rules Order (2000); the draft Gambling (Geographical Distribution of Casino Premises Licences) Order (2007); the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order (2012); and the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations (2015). The House of Lords Library Note, LLN 2012/012 issued on 10 April 2012[21] and the 'Lords In Focus' note (LIF 2015/0037) issued on 22 October 2015[22] are useful sources of detail.

2.7 The Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015

On 26 October 2015, the House of Lords debated a motion in the name of the Lord Privy Seal (the Leader of the House) to approve the Draft Tax Credits (Income

[20] *How Parliament Works*, Rogers and Walters (Routledge, 7th edition, 2015)
[21] http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2012-012
[22] http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2015-0037

Thresholds and Determination of Rates) (Amendment) Regulations 2015, which had been made under the Tax Credits Act 2002.

The House of Commons had debated the Regulations on 15 September and approved them on division (Ayes 325, Noes 290). On 20 October, the result of another division in the Commons following a backbench business debate on the motion "That this House calls on the Government to reverse its decision to cut tax credits, which is due to come into effect in April 2016" was Ayes 295, Noes 317.

The Regulations proposed that, from April 2016, the income threshold for Working Tax Credit (WTC) should be reduced to £3,850; and the income threshold for Child Tax Credit (CTC) to £12,125. They also proposed that the income rise disregard should be reduced to £2,500; and that the taper rate should be increased to 48%.

Four amendments were tabled to the Lord Privy Seal's motion:

- an amendment by Baroness Manzoor which would have the effect of the House declining to agree the Regulations. This amendment was disagreed to by 310 votes to 99;
- an amendment by Baroness Meacher which would have the effect of the House declining to consider the regulations until the Government laid a report before the House detailing their response to the analysis of the regulations by the Institute for Fiscal Studies and considering possible mitigating action. This amendment was agreed to by 307 votes to 277;
- an amendment by Baroness Hollis of Heigham similar to that of Baroness Meacher but with the added requirement that the Government report 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, such protection to be renewable after three years with parliamentary approval. This amendment was agreed to by 289 votes to 272; and
- an amendment by the Bishop of Southwark expressing regret at aspects of the Regulations and calling on the Government to consult further. It was pre-empted by other amendments and therefore was not moved.

Because part of Baroness Hollis's amendment was in the same terms as Baroness Meacher's amendment, Baroness Hollis's amendment was in effect substituted for Baroness Meacher's. This was the first time that an amendment has been passed to decline to consider an SI.

3. Where we are

The effect of the decisions made by the House of Lords on 26 October was to withhold the approval of the House of Lords to a Statutory Instrument of very considerable importance relating to a matter contained in the budget which was central to the Government's fiscal policy. Approval of the Regulations was to be

withheld until the Government submitted a scheme involving a major change in Government policy.

The convention that the House of Lords should not, or should not regularly, reject SIs is longstanding but has been interpreted in different ways, has not been understood by all, and has never been accepted by some members of the House. Even after the Joint Committee in 2006 listed specific circumstances when it might be appropriate to reject SIs, nothing has been done to agree those circumstances or properly to define the convention. The rejection of the Tax Credits Regulations broke new ground and the votes divided along conventional political lines. It suggests that the convention is now so flexible that it is barely a convention at all.

The time has come to put in place new procedures to clarify the relationship between the two Houses on delegated legislation and to confirm that the role of the House of Lords in respect of delegated legislation is to ask the House of Commons to think again, similar to how it is in the case of primary legislation.

Where next?

Option 1 - Remove the House of Lords from the statutory instrument procedure

One option would be to remove the House of Lords from the formal parts of statutory instrument procedure altogether. In the case of instruments subject to affirmative resolution procedure, this would mean that the only requirement would be for the draft or the instrument to be approved by a resolution of the House of Commons before it is made, or (in the rarer cases where approval of an instrument is required) either before it comes into force or to allow it to remain in force beyond a specified period. In the case of negative resolution procedure instruments, it would mean that only the House of Commons would have the power to resolve that the instrument should be annulled.

Two things would be needed to achieve this. First, for instruments under existing Acts, it would be necessary, by primary legislation, to make a general modification of the provisions setting out the parliamentary procedure for the exercise of the powers to make those instruments. The general modification would effectively remove all references to approval by the House of Lords or to annulment in pursuance of a resolution of that House. For powers under Acts to be passed in the future, no primary legislation would be needed. All that would be needed would be a policy decision that future Bills would be drafted with Commons-only procedures for the powers they create. However, the consequence of these two changes would also make it unnecessary to have the references to the House of Lords in the provisions of the Statutory Instruments Act 1946 that relate to the use of the affirmative resolution and negative resolution procedures. Therefore, it would make sense to remove those references by consequential amendments in the primary legislation that would be needed to make the general modification for past Acts; and doing so would have the advantage of providing some parliamentary recognition for the change of policy for the future.

There are significant disadvantages to this option. It would go way beyond establishing Commons primacy, because it would remove the basis for any involvement by the House of Lords, even in an advisory capacity, in the passage of legislation in the form of statutory instruments. It would also be detrimental to the quality of legislation generally if the foundation were removed for the very valuable role currently carried out by the House of Lords in the scrutiny of secondary legislation at a technical level. The presence of Lords on the Joint Committee on Statutory Instruments (JCSI) and the existence and work of the Secondary Legislation Scrutiny Committee (SLSC) are dependent on the role of the House of Lords in the affirmative and negative resolution procedures. Commons-only instruments would, as now, be referred to the House of Commons Committee on Statutory Instruments, but input from the Lords on the JCSI and the SLSC would be

lost. It is possible that a way could be devised for preserving these committees, (perhaps by ensuring that relevant instruments were laid before the Lords as well as the Commons, even though they would not be subject to any procedure in the Lords, and by changing the terms of reference for the committees); but the rationale for Lords involvement would have been removed.

Another potential disadvantage of this approach would arise when Bills with statutory instrument powers are passing through the Lords in future. The proposal in option 1 would be very likely to give rise to arguments for exceptions to be made to the policy of having Commons-only procedures in all Bills. It might also lead to arguments that more detail should be inserted in the Bill, rather than left to be spelt out in statutory instruments on which the House of Lords would have no say.

Option 2 - A non-statutory, binding resolution of the House of Lords

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. First, however, agreement would have to be reached on what the resolution should say, and that would not be straightforward in the light of an apparent absence of consensus on what the convention currently requires.

As indicated above, the existing convention on statutory instruments has been the subject of debate for many years. The 2006 Joint Committee on Conventions, in examining the case for codification, provided a thorough account of the history of the convention and the different ways in which it has been articulated and applied by the parties over the past 65 years. Since that report, there have been the three further occasions on which approval for SIs has been withheld, as detailed above at section 2.6.

In the debates surrounding the defeat of the Tax Credits Regulations, a wide range of different views has been expressed about what the convention is and consequently about when the use of a veto by the House of Lords is appropriate. Therefore, as things stand, it is difficult to envisage any agreement being reached or accepted widely enough to be an effective inhibition in future, however desirable that outcome might be.

The 2006 Joint Committee report 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’. It also listed some circumstances that might be considered to be exceptional. However, there again seems to be no clear agreement on such exceptions and any list is unlikely to prove exhaustive and its application could be disputed. A literal reading of the exceptions set out in this way

would seem to have the potential to create cases that conflict with the spirit of the convention.

The draft Tax Credits Regulations were at the very high end of the categories of instruments where any existing convention might be expected to require Commons primacy to prevail without question. They were relevant to a central element of the Government's political programme and electoral mandate, they were financial in nature and a very large amount of public funds was at stake. The decision of the Lords not to approve the draft regulations is strong evidence that no agreement on vague principles contained in a resolution of the House could safely be relied on in future.

I am aware that there are discussions taking place in the House of Lords about a new convention. Any such convention would require cross-party support and resolutions in both Houses. I am doubtful whether a solution can be devised by which the House can qualify its powers by convention alone.

Option 3 - The House of Lords has power to delay SIs by asking the House of Commons to think again

A third option would be to provide the Lords with a new means for asking the House of Commons to think again with regards to secondary legislation. This option could make the ability of the House of Lords to deny approval to a draft SI (or, in some cases, the SI itself), or to resolve that an instrument should be annulled, better fit the recognised role of the House of Lords in relation to legislation as a revising chamber. This could be achieved by allowing the Commons to override a vote by the House of Lords to reject an instrument. This would bring the procedure for statutory instruments more into line with the existing rule for statutes under the Parliament Acts 1911 & 1949 and the rule for the approval of international treaties under section 20 of the Constitutional Reform and Governance Act 2010.

The Wakeham Commission proposed a similar model which maintained the ability of the House of Lords to reject SIs but provided a mechanism for the House of Commons to exert its supremacy by overriding the Lords actions. The report recommended that changes be made to 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, re-affirms) 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.

The third option being proposed here takes account of this model but differs from it in some of its detail. It would need primary legislation to implement it, but the legislation need not be lengthy.

The proposal in the case of affirmative resolution procedure instruments is that, where the House of Lords does not approve a draft of an instrument, or (in the cases where the approval is required after the instrument has been made) the instrument itself, the House of Commons should be given the ability, by a resolution of that House, to override the House of Lords decision and to authorise the draft instrument to be made, or the instrument to come into force or to continue in force, without Lords approval.

The proposal in the case of negative resolution procedure instruments is that where the House of Lords has resolved that an instrument should be annulled, that resolution should initially take effect in accordance with section 5(1) of the Statutory Instruments Act 1946 so that no further proceedings may be taken under the instrument, but that the operation of that section should amount only to an indefinite suspension of the operation of the order (which in a great many of the cases is unlikely to be in force yet). It should then be possible for the Commons by a resolution to lift the suspension. The Commons resolution, in lifting the suspension, would also cancel the power of Her Majesty in Council to revoke the instrument (which is triggered under section 5(1) of the 1946 Act by the Lords resolution).

Some further questions of detail arise about these proposals.

First, a question arises about whether the new procedures should trigger messages between the Houses or, in the case of the negative resolution procedure, an address to Her Majesty in Council (that being the outcome of the vote against an instrument in the House of Lords). This question does not need to be resolved or considered now. It might usefully be considered by the Procedure Committees of the two Houses, and resolved without the need for anything in the legislation needed to implement option 3. There is definitely a case for a mechanism by which the House of Commons would convey its reasons to the Lords for disagreeing with the Lords' decisions on an instrument or draft instrument. That is secured in the case of amendments to Bills by the reasons produced by reasons committees; and, in the case of treaties, it is secured by the reasons required to be laid before Parliament by the Secretary of State under section 20 of the Constitutional Reform and Governance Act 2010. In cases where the Commons financial privilege had been engaged, a mechanism for conveying the Commons reasons to the Lords would also provide an opportunity for saying so.

A second question arises about what, in the case of the affirmative resolution procedures, should amount to a denial of approval. Clearly if the House of Lords votes down a motion to approve, that should count. But the legislation will also need to ensure that its intentions cannot be circumvented by amendments to the motion making an approval conditional on certain events or otherwise postponing it, or by adjournments of the motion for approval or by other methods of postponing a decision on the motion.

Thirdly, some have suggested that there should be a fixed period of delay after the House of Lords has withheld its approval, or passed a resolution for annulment, before the House of Commons can pass a resolution to override the House of Lords. The difficulty here is that whatever period of delay is specified, it might in a particular case overrun the time specified in the draft or instrument for its commencement. In practice, that, in the absence of any power to amend the draft or instrument, would effectively deny the Commons the intended ability to override the House of Lords and would be fatal to the instrument or draft instrument in question. The Government's only option would be to start again with a new instrument with a new commencement date. The Commons needs the ability to override the Lords rapidly in cases of urgency and the extent to which decisions of the House of Lords should be fatal to a particular instrument should not depend on arbitrary factors, such as the commencement arrangements for the instrument. The absence of any specified period of delay seems very unlikely, in practice, to reduce in any way the chances that a proper consideration of the Lords' decision, and a serious reconsideration of the instrument, will be undertaken by a government, which will still need to explain and justify to the House of Commons the motion to override the Lords. They may need to do it rapidly but they will still need to do it seriously and well.

It is these reasons for not having a fixed period of delay that have led to the conclusion that it would be better, in the case of a negative resolution procedure instrument, for section 5 of the Statutory Instruments Act to suspend the operation of the instrument, rather than for the effect of the resolution to be delayed, as recommended by the Wakeham report. For practical reasons, it is highly undesirable that an instrument should continue in operation for any length of time subject to the possibility that it will be annulled (with a need for what may be more complex transitional savings and effects if the Commons do not override the Lords decision).

This option gives rise to one other question. Would it have the consequence of significantly increasing the number of occasions on which the House of Lords would reject an SI? If that became a frequent occurrence, and the House of Commons had to override Lords decisions on a regular basis, that would have a potentially adverse effect on the business in the House of Commons. If that were to happen, there are a number of ways in which it might be dealt with. The House of Commons might need to find ways to expedite its override procedures, which would have the effect of reducing the consideration given to the Lords rejections or it might lead to demands to proceed with option 1. In practice, I do not believe that there would be any significant increase in rejections by the House of Lords, any more than there was an increase in Bills rejected by the House of Lords following the enactment of the Parliament Acts. What is important is that the capacity of the House of Lords to differentiate between different SIs in its response to them should be preserved, and that any legislation to enact option 3 should not prejudice the continuance of the

practice under which the House of Lords can put on record its views about an instrument by way of a “non-fatal” motion.

In addition to preserving the current practice of ‘regret’ motions it might be considered good practice for the government in any case to respond, by means of a Written Ministerial Statement, on all occasions when such a motion has been passed.

Financial Privilege

There is nothing in the history or practice of the claims by the House of Commons to a special privilege in relation to taxation and spending and connected financial matters that would justify any argument that it should be regarded as irrelevant to statutory instruments. It has been a significant and central feature of the constitutional relationship between the two Houses since the 17th century and can be traced to practices that developed as early as the mid-14th century.

The question that arises is whether any additional provision should be made for statutory instruments the contents of which are of a sort to attract Commons financial privilege either in the same way as a Lords amendment to a Bill or where, like the draft Tax Credits Regulations, their inclusion in a Bill would probably result in the Bill’s certification as a Money Bill under section 1 of the Parliament Act 1911.

Option 3 above already contains a suggestion for allowing financial privilege to feature in any reasons the House of Commons puts forward in a message to the Lords for overriding the Lords’ decision. It would also be open for the House of Commons to change its procedures, without the need for legislation, to provide for a more attenuated process for overriding an adverse Lords decision on an instrument or draft instrument in cases where the Speaker had advised the House that it engaged Commons privilege.

Apart from these relatively minor proposals, there is already a way of recognising Commons financial privilege in relation to statutory instruments. It is on the basis of the inevitable financial nature of the instruments made under particular powers that those powers are sometimes made subject to Commons-only procedures.

As the case of the draft Tax Credits Regulations illustrates, however, there is some inconsistency in the way Commons-only procedures are provided for in Bills. There may be a number of reasons for this. Some departments, HMRC for example, may be more conscious of the availability of the Commons-only procedures as an option when legislating on financial matters and of when they would be appropriate. Departments may also sometimes be influenced not to ask for Commons-only procedure by foreseeing a desire to combine the exercise of financial powers and the exercise of non-financial powers in the same instrument, or sometimes by not

wanting to complicate the task of justifying the appropriate form of parliamentary procedure, in particular to the Delegated Powers and Regulatory Reform Committee in the Lords. Hitherto, at least, it has been a reasonable assumption that there are unlikely to be any disadvantages for allowing a theoretical right of veto to the Lords in the case of an instrument to which financial privilege might attach.

It seems that under current circumstances, which have put that assumption in doubt, it would be sensible for the Government to carry out a review of the principles on which it is appropriate for powers with financial implications to be made subject to Commons-only procedures. It would then be possible, in consultation perhaps with the Procedure Committee of the House of Commons, to develop a protocol to apply in the drafting of all Bills containing delegated powers. As things stand, it is a Lords Committee - the Delegated Powers and Regulatory Reform Committee - that is most interested, and most influential, when it comes to the question of whether a power to make SIs should be treated as one, the exercise of which would attract a claim to Commons financial privilege[23]. Following recent events the current practice and the extent to which financial privilege should affect the way the parliamentary procedures for different powers to make delegated legislation should be framed is something that the House of Commons may need to consider.

I have received representations from the Commons Treasury Select Committee which reinforce the points and proposals I have made on Financial Privilege.

Other Matters

In the course of my deliberations, I have received many letters with ideas on composition of the House of Lords. I am aware that the Leader of the Lords is holding discussions with the Leaders of the Opposition parties and the Convenor of the Crossbench Peers on reducing the size of the Lords. I also understand that the Lord Speaker is chairing a small committee and the Campaign for an Effective Second Chamber has recently published its own proposals. Since this issue did not form part of the Terms of Reference of my review, I have not commented on them.

Questions have also been raised about the growth of SIs in recent years but as the table in appendix C shows, there has been no substantial increase in SIs laid before Parliament over the last 20 years. However, delegated powers need to be used appropriately. Publishing draft regulations during the parliamentary stages of Bills might also speed the passage of primary legislation.

[23] Page 10, paragraph 30, House of Lords Delegated Powers and Regulatory Reform Committee Guidance for Departments on the role and requirements of the Committee (2014) http://www.parliament.uk/documents/DPRR/2014-15/Guidance%20for%20Departments/Guidance-for-Departments.pdf

Conclusion and Recommendations

Through consultations with interested parties in the course of my review, including a large number of parliamentarians in both Houses and from across the political spectrum, it was clear that the overriding desire was for clarity, simplicity and certainty in whichever option I elected to recommend.

Therefore, I recommend option 3 which provides the certainty required to deal with the issues brought to the fore by the parliamentary events of 26 and 27 October 2015, while maintaining a simplicity of procedure in keeping with already established procedures for other forms of legislation. It would establish a clear role for the House of Lords to advise and require the House of Commons to vote again in exceptional circumstances. In doing so, it would give the House of Commons a decisive role in relation to secondary legislation.

I also recommend that the Government should carry out a review, in consultation with the House of Commons Procedure Committee, of when statutory instrument powers should be subject to Commons-only procedures, with a view to establishing principles that can be applied in future.

Furthermore, in order to mitigate against excessive use of the new process which I have proposed under option 3, I believe 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.

Acknowledgement

I have been advised by a team of experts with considerable knowledge and experience of parliamentary procedure, theory and practice. A former Clerk of the Parliaments, Sir Michael Pownall, a retired Clerk of Legislation in the House of Commons, Jacqy Sharpe and Sir Stephen Laws, First Parliamentary Counsel 2006-12. Their combined sense of what makes Parliament work best has been invaluable and this review would carry less authority without their insights and comment at every stage of the process. However, this report and the recommendations contained within it are very much my own.

I set a challenging timetable to deliver this review before Christmas. This would not have been achieved without the support of a knowledgeable secretariat provided by the Cabinet Office to coordinate meetings, collate responses from a wide parliamentary consultation and supply their lively minds on arcane matters of legislation. To the group of experts and officials in the Cabinet Office I extend my gratitude for all their help, encouragement and rigour.

Appendix A

Written Ministerial Statement - 4 November 2015

Strathclyde Review

The Parliamentary Secretary, Cabinet Office (John Penrose): The Government have commissioned Lord Strathclyde to lead a review into how to secure the decisive role of the elected House of Commons in the passage of legislation.

By long-standing convention the House of Lords does not seek to challenge the primacy of the elected House on spending and taxation. It also does not reject statutory instruments, save in exceptional circumstances. Until last month, only five statutory instruments had been rejected by the House of Lords since World War II, none of which related only to a matter of public spending and taxation.

The purpose of the review is to examine how to protect the ability of elected Governments to secure their business in Parliament in light of the operation of these conventions.

The review will consider in particular how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation.

Lord Strathclyde will be supported in his work by a small panel of experts:

> Jacqy Sharpe, former Clerk of Legislation in the House of Commons and Clerk to the Joint Committee on Conventions in 2006;
>
> Sir Stephen Laws, former First Parliamentary Counsel; and
>
> Sir Michael Pownall, former Clerk of the Parliaments.

Lord Strathclyde and the panel of experts will not be paid a fee for their work on the review. Lord Strathclyde will aim to submit his recommendations to the Prime Minister by the end of the year.

Appendix B

Five main forms of statutory instrument procedure

Instruments subject to super-affirmative resolution procedure

The super-affirmative procedure requires a Minister to have regard to representations, House of Commons and House of Lords resolutions, and Committee recommendations that are made within 60 days of laying, in order to decide whether to proceed with the order and (if so) whether to do so as presented or in an amended form.

Instruments subject to affirmative resolution procedure

These instruments cannot become law unless they are approved by both Houses. There are three types of affirmative resolution:

1) the instrument is laid in draft but cannot be made unless the draft is approved by both Houses (the Commons alone for some financial SIs);
2) the instrument is laid after making but cannot come into force unless and until it is approved; and
3) the instrument is laid after making and will come into effect immediately but cannot remain in force unless approved within a statutory period (usually 28 or 40 days).

Instruments subject to negative resolution procedure

Instruments subject to negative resolution procedure become law unless there is an objection from the House. There are two types:

1) the instrument is laid in draft and cannot be made if the draft is disapproved within 40 days (draft instruments subject to the negative resolution procedure are few and far between); and
2) the instrument is laid after making, subject to annulment if a motion to annul (known as a 'prayer') is passed within 40 days (usually by either House; for a few instruments only the Commons can pass an annulment motion).

Laid instruments

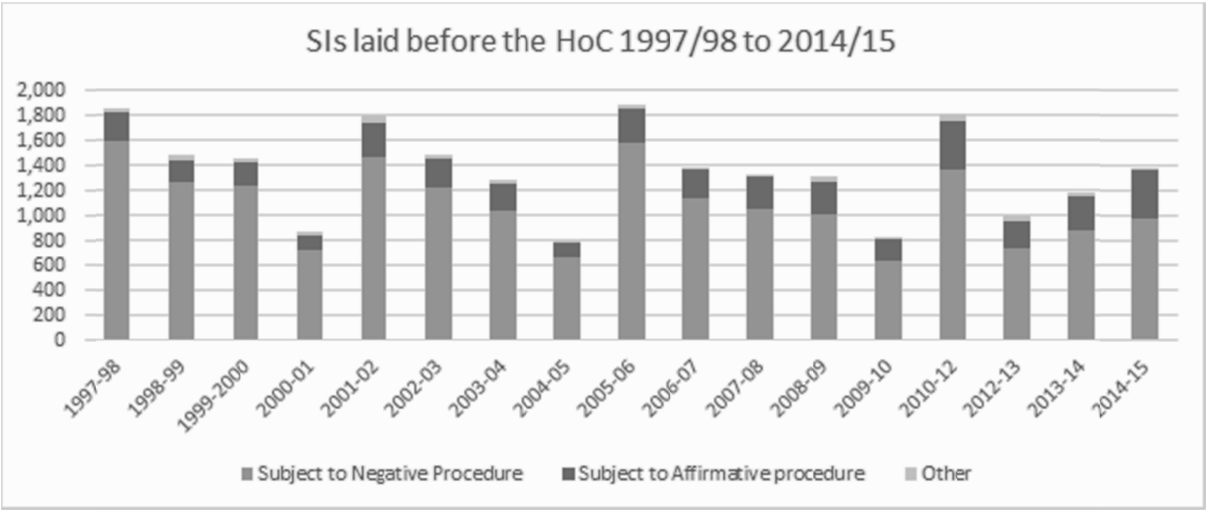
These instruments are required to be laid before Parliament after being made but no further parliamentary procedure applies.

Unlaid instruments

These instruments are not required to be laid (and are therefore not subject to parliamentary procedure other than scrutiny by the Joint Committee on Statutory Instruments) and simply become law on the date stated in them. Such instruments are, in general, not contentious. Commencement Orders generally fall into this category. The Joint Committee on Statutory Instruments examines instruments in this category only if they are of general, as distinct from local, application.

Appendix C

Total number of Statutory Instruments laid before the House of Commons, 1997/98 to 2014/15[24]



[24] House of Commons Library Paper, *Acts and Statutory Instruments: the volume of UK legislation 1950 to 2014*, by Richard Cracknell and Rob Clements
http://researchbriefings.files.parliament.uk/documents/SN02911/SN02911.pdf
House of Commons Sessional Returns 1997/8 to 2014/15
http://www.publications.parliament.uk/pa/cm/cmsesret.htm

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