



Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons and the related Select Committee Reports

Presented to Parliament
by the Leader of the House of Commons
by Command of Her Majesty

December 2016



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Foreword

On 27 October 2015, the then Prime Minister, Rt Hon David Cameron MP, asked Lord Strathclyde to lead a non-Government review *“to examine how to protect the ability of elected Governments to secure their business in Parliament. In particular, to consider the decisive role of the House of Commons in relation to (i) its primacy on financial matters; and (ii) secondary legislation”*.

Lord Strathclyde was commissioned to lead the review in the wake of the House of Lords withholding its approval to the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, despite the will of the House of Commons, the elected Chamber, having been clearly expressed on 15 September, and then again on 20 October, prior to the debate in the House of Lords.

The Government is grateful to Lord Strathclyde and his panel of experts for their work in producing a comprehensive and balanced report. The report has led to much debate across both Houses and to inquiries by four Select Committees. We said that we would wait for those inquiries to report and consider the views of parliamentarians before responding to Lord Strathclyde’s recommendations and we have done that.

In his report, Lord Strathclyde presented three options for ensuring the primacy of the House of Commons in relation to Statutory Instruments (SIs), clearly recommending legislation that would enable the Commons to overturn a decision by the House of Lords not to approve an SI. The Government agrees with Lord Strathclyde that on SIs, as with primary legislation, the will of the elected House of Commons should prevail. However, the Government does not intend to introduce legislation in this parliamentary session.

Whilst recognising the valuable role of the House of Lords in scrutinising SIs, the Government remains concerned that there is no mechanism for the elected chamber to overturn a decision by the unelected chamber on SIs. We do not believe that it is something that can remain unchanged if the House of Lords seeks to vote against SIs approved by the House of Commons when there is no mechanism for the will of the elected House to prevail. We must, therefore, keep the situation under review and remain prepared to act if the primacy of the Commons is further threatened.

Rt Hon David Lidington MP
Leader of the House of Commons
December 2016

Secondary legislation and the primacy of the House of Commons Government's Response

Summary

1. The Government is grateful to Lord Strathclyde and his panel for the report into secondary legislation and the primacy of the House of Commons. We welcome the findings of the report and agree that the House of Commons should have primacy in relation to secondary legislation as it does for primary legislation, including through the Parliament Acts 1911 and 1949. The primacy of the House of Commons on legislation is a long established principle of our democracy. For its part, the House of Lords plays a vital role in scrutinising and revising legislation, but it is the will of the elected chamber that should prevail.
2. As Lord Strathclyde concluded, the only firm way to guarantee this primacy would be to legislate. The Government has, however, decided not to take forward such legislation, because in our view it is not a priority for the session. However, the Government will introduce the legislation if it becomes necessary to intervene to maintain the primacy of the House of Commons, as the democratically elected chamber, on secondary legislation.

Lord Strathclyde's Report and Recommendations

3. Lord Strathclyde published his report on 17 December 2015 following the House of Lords' withholding agreement to the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 on 26 October 2015. The Lords had voted in favour of motions tabled by Baroness Meacher and Baroness Hollis which sought to hold up Government business by seeking pre-conditions to be met prior to consideration of the SI. Prior to debate in the Lords, the House of Commons had approved the Regulations on two separate occasions. As set out in Lord Strathclyde's report, 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 an SI of very considerable importance relating to a matter contained in the budget which was central to the Government's fiscal policy'. In his report, Lord Strathclyde set out three options. Of these three options, he recommended that the Government legislate to secure the primacy of the House of Commons in relation to SIs.
4. The options Lord Strathclyde set out in his report and the Government response to them are as follows:

Option 1: Remove the House of Lords from the SI procedure

5. ***Option 1: would remove the House of Lords from existing scrutiny procedures of SIs. This would mean that it would be the House of Commons alone which could decide whether to approve an affirmative instrument and have the power to annul a negative instrument.***
6. The Government agrees with Lord Strathclyde's assessment that there are significant disadvantages to this option. The House of Lords is highly effective in its scrutiny of SIs and the exercise of other delegated powers, particularly through the Delegated Powers and Regulatory Reform Committee (DPRRC), the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. In this way, the House of Lords plays a significant role in holding the Government to account. That role is distinct from the role played by the House of Commons and is an integral part of its function as a second chamber.
7. We do not, therefore, believe that removing the House of Lords from this process would be in keeping either with the role of the House of Lords or with the value it adds to our parliamentary democracy.

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

8. ***Option 2: would 'retain the present role of the House of Lords in relation to SIs, 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.'***
9. The Government agrees with Lord Strathclyde's analysis that the debates surrounding the Tax Credits votes exposed a lack of clarity around what the convention was and how it should be applied. The Lords Constitution Committee came to similar conclusions when it said that 'Conventions can only govern proceedings when there is a common understanding as to their meaning—and that is no longer the case, if it ever were.'
10. Given the many divergent views about how the House of Lords should use its powers, the Government is not confident that there is sufficient consensus in the House of Lords for it to be codified in a resolution which would be effective.
11. As previous attempts have shown (such as that by the Joint Committee on Conventions which looked in 2006 at codification), it is virtually impossible to arrive at a set of criteria that is precise enough to be interpreted by all in the same way. We, therefore, agree with Lord Strathclyde's conclusions that an adequate solution will not be found through the resolution route. Furthermore, the maintenance of such conventions is a matter for the Houses themselves.

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

12. ***Option 3: would create a new procedure in statute to allow the House of Commons to override a vote by the House of Lords to reject an SI. This would bring the procedure for secondary legislation more in line with primary legislation.***
13. In his review, Lord Strathclyde clearly recommended this option, which provides a mechanism for giving the House of Commons the ability to assert its primacy over secondary legislation. Under this proposal, if the House of Lords voted against an SI, the House of Commons could override that decision. We agree with Lord Strathclyde's conclusions that this would bring secondary legislation more in line with primary legislation where the Parliament Acts 1911 and 1949 provide a mechanism for asserting the primacy of the Commons by giving it the final say. We also agree with Lord Strathclyde that this option would bring clarity and certainty to the current arrangements. However, the Government does not intend to legislate to introduce this mechanism at this point.

Commons-only procedures

14. Lord Strathclyde also recommended *"that the Government should carry out a review, in consultation with the House of Commons Procedure Committee, of when SI powers should be subject to Commons-only procedures, with a view to establishing principles that can be applied in future"*.
15. The Government agrees with Lord Strathclyde that the will of the elected House of Commons should prevail on SIs, including those which concern financial matters. As Lord Strathclyde notes, there is a long-established convention that the House of Commons should have primacy in financial matters. The Government does not propose to undertake a review of SI powers at this time, but - as with Option 3 - will keep the situation under review and look again at the options if the primacy of the Commons is further threatened.

Select Committee Reports

16. The Government welcomes the consideration given to Lord Strathclyde's report by parliamentarians. The thorough and reflective reports by the Lords Constitution Committee, the DPRRC, the Secondary Legislation Select Committee and the Public Administration and Constitutional Affairs Committee (PACAC) have informed our response.
17. In responding to the Select Committee reports the Government joins PACAC in commending the House of Lords for its vital scrutiny of

secondary legislation. At the forefront of this scrutiny in the Lords is the DPRRC and the Secondary Legislation Scrutiny Committee, with the Joint Committee on Statutory Instruments adding a layer of technical scrutiny by members of both Houses. As the DPRRC recognises in its report, the Government either explicitly accepted, or there were debates in the House of Lords on, two-thirds of its recommendations in the 2015/16 session (up to 15 March).

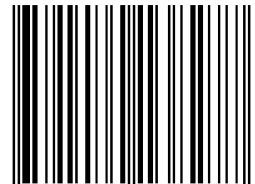
18. In the debate following Lord Strathclyde's report there has been discussion about the number of SIs and whether there has been an increase. The figures provided by the House of Commons Library and published in the Sessional Returns, cited by Lord Strathclyde, show that since 1997 there has been no increase in the number of SIs laid before the House of Commons. Furthermore, they show that numbers peaked in 2005/06 and 1997/98 under the previous Labour Government, and that the number of SIs laid in the last session (2015/16) was the lowest since at least 1997 (when figures became readily available).
19. It should also be remembered that the delegated powers under which secondary legislation is created have been approved by Parliament as part of the parent Act under which an SI is made. Moreover, most SIs of policy significance are required by the parent Act to be laid before Parliament for its approval if the SI is to take, or continue to have, legal effect. Nonetheless, this is not to suggest that SIs routinely contain significant policy detail. SIs are limited in scope by their parent Act, which is approved by Parliament. Parliament considers delegated powers on a case-by-case basis as it scrutinises Bills and judges what the appropriate scope of a power is. Ministers cannot, therefore, unilaterally move towards including significant policy within SIs.

Conclusion

20. The Government commissioned Lord Strathclyde to undertake his review because of concerns about the implications of the decision by the Lords not to approve the Tax Credits SI last year. When the Lords voted down the SI it had already been approved by the House of Commons. The process for approving SIs does not provide an opportunity for the House of Commons to overturn the decision by the House of Lords. The focus of Lord Strathclyde's review was, therefore, the primacy of the House of Commons in relation to secondary legislation.
21. The Government agrees with Lord Strathclyde's conclusion that the withholding of approval to the Tax Credits SI broke new ground. As well as the SI having twice been debated and voted on in the House of Commons, no substantive concerns had been raised by the scrutiny committees that considered the SI prior to the vote, and the vote divided along party lines.

22. In response, Lord Strathclyde has produced a balanced and comprehensive report which presents three clear options. The Government agrees with Lord Strathclyde's conclusions, and with his misgivings about proceeding with options 1 or 2. We also agree that the third option, recommended by Lord Strathclyde, would bring the procedures for approving secondary legislation more in line with those for primary legislation where the House of Commons is able to assert its primacy.
23. The Government has decided not to introduce primary legislation to implement Lord Strathclyde's recommendation in this parliamentary session. However, if the House of Lords puts itself in a position where it seeks to vote against SIs approved by the House of Commons, then Lord Strathclyde's recommendation provides a clear mechanism for the House of Commons to be able to assert its primacy over SIs.

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